

# **Attachment C**

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

# Clause 4.6 Variation Request - Height of Buildings

502-514 Elizabeth Street and 272-276 Cleveland Street, Surry Hills



**'Gura Bulga'**

Liz Belanjee Cameron

'Gura Bulga' – translates to Warm Green Country. Representing New South Wales.

By using the green and blue colours to represent NSW, this painting unites the contrasting landscapes. The use of green symbolises tranquillity and health. The colour cyan, a greenish-blue, sparks feelings of calmness and reminds us of the importance of nature, while various shades of blue hues denote emotions of new beginnings and growth. The use of emerald green in this image speaks of place as a fluid moving topography of rhythmical connection, echoed by densely layered patterning and symbolic shapes which project the hypnotic vibrations of the earth, waterways and skies.

Ethos Urban acknowledges the Traditional Custodians of Country throughout Australia and recognises their continuing connection to land, waters and culture.

We acknowledge the Gadigal people, of the Eora Nation, the Traditional Custodians of the land where this document was prepared, and all peoples and nations from lands affected.

We pay our respects to their Elders past, present and emerging.

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# Contents

1.0	Introduction.....	4
2.0	Development Standard to be Varied .....	5
2.1	Variation Sought.....	5
3.0	Justification for Contravention of the Development Standard .....	7
3.1	Role of the Consent Authority .....	7
3.2	Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.....	8
3.3	Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard .....	12
3.4	Clause 4.6(4)(i): The applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3) .....	16
3.5	Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard .....	16
3.6	Other Matters for Consideration.....	17
4.0	Conclusion.....	18

## Table of Figures

Figure 1	Excerpt from Sydney LEP 2012 Height of Buildings Map.....	5
Figure 2	3D Height Plane Diagram .....	6
Figure 3	Photomontage showing façade height and proportions.....	9
Figure 4	3D Massing of the Locality Illustrating Height Transition along Elizabeth Street.....	11

## Table of Tables

Table 1	Proposal’s consistency with Clause 5.6 objectives.....	13
Table 2	Consistency with objects of the EP&A Act.....	15

# 1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of AIDOP No.7. It is submitted to the City of Sydney (the Council) in support of a development application (DA) for a commercial development at 502-514 Elizabeth Street and 272-276 Cleveland Street, Surry Hills (the site).

The proposed development seeks consent for:

- Demolition of 272-276 Cleveland Street to provide the required road widening under *Sydney Local Environmental Plan 2012* (Sydney LEP 2012).
- Retention of the contributory building fabric fronting Elizabeth Street and demolition of the remaining building.
- Bulk earthworks and excavation to create two levels of basement to accommodate:
  - A two-car lift
  - 29 Car parking spaces
  - Three (3) motorcycle spaces
  - Services rooms
- New vehicle access from Perry Street.
- Landscaping and public domain improvements including footpath widening and the provision of landscaping along Cleveland Street.
- Construction of a four-story commercial building comprising:
  - Ground floor retail uses
  - End of trip facilities on the ground floor
  - Three (3) levels of commercial above ground floor
  - A rooftop garden terrace accessible to tenants and tenant visitors.
- Extension and augmentation of services and utilities to the development, as required.

Clause 4.6 of the Sydney LEP 2012 enables City of Sydney to grant consent for development even though the development contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from the development.

This clause 4.6 variation request relates to the Height of Buildings development standard under clause 4.3 of the Sydney LEP 2012 and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban dated 16 June 2022 including supporting documentation. This clause 4.6 variation request demonstrates that compliance with the maximum height development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the standard. It demonstrates that, notwithstanding the non-compliance with the maximum height standard, the proposed development:

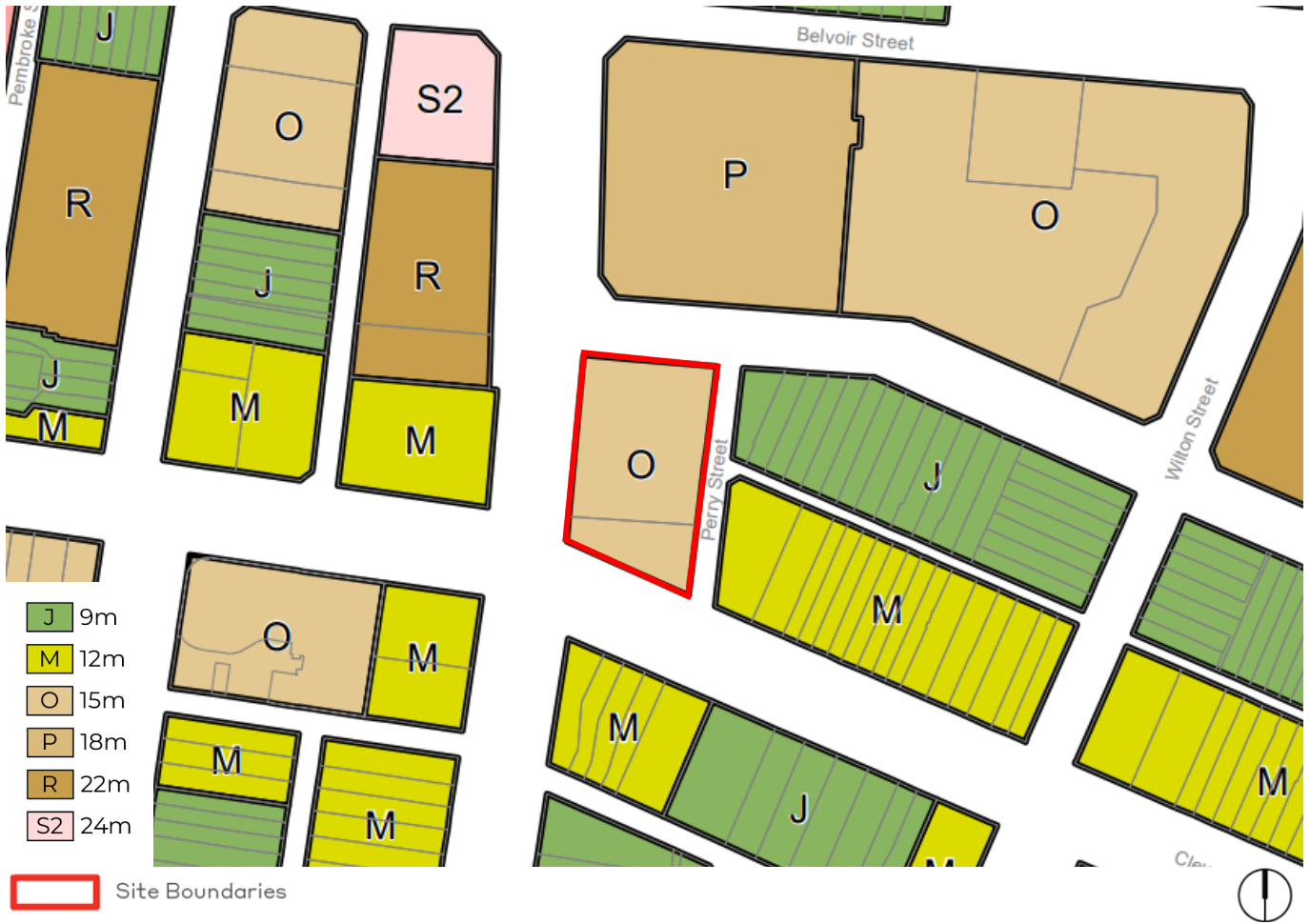
- Achieves the objectives of clause 4.3 of the Sydney LEP 2012 by:
  - Ensuring that the height of the development is in-keeping with the scale and character of neighbouring buildings and is of a form that will not result in any unreasonable environmental impacts.
  - Respecting the character, appearance and scale of the surrounding heritage conservation area (HCA) including the retained heritage fabric, and nearby heritage buildings.
- Will provide a landscaped roof terrace as a key workplace benefit, contributing to a naturally ventilated environment currently desired by the office market resulting from the COVID-19 pandemic.
- Will provide access to a renewable energy source and deliver optimum ESD outcomes by accommodating PV cells above the roof terrace structure where it will not impact upon the amenity of the building.
- Will provide access to fresh air and light to enhance the social sustainability benefits of the future workplace.
- Will have an appropriate impact, in terms of its scale, form and massing.
- Will promote the orderly and efficient use of land, in accordance with the objects of the Environmental Planning and Assessment Act 1979 (the Act).

In light of the above, the consent authority can be satisfied that there is sufficient justification for the variation to the development standard, as proposed in accordance with the flexibility allowed under clause 4.6 of the Sydney LEP 2012.

## 2.0 Development Standard to be Varied

### 2.1 Variation Sought

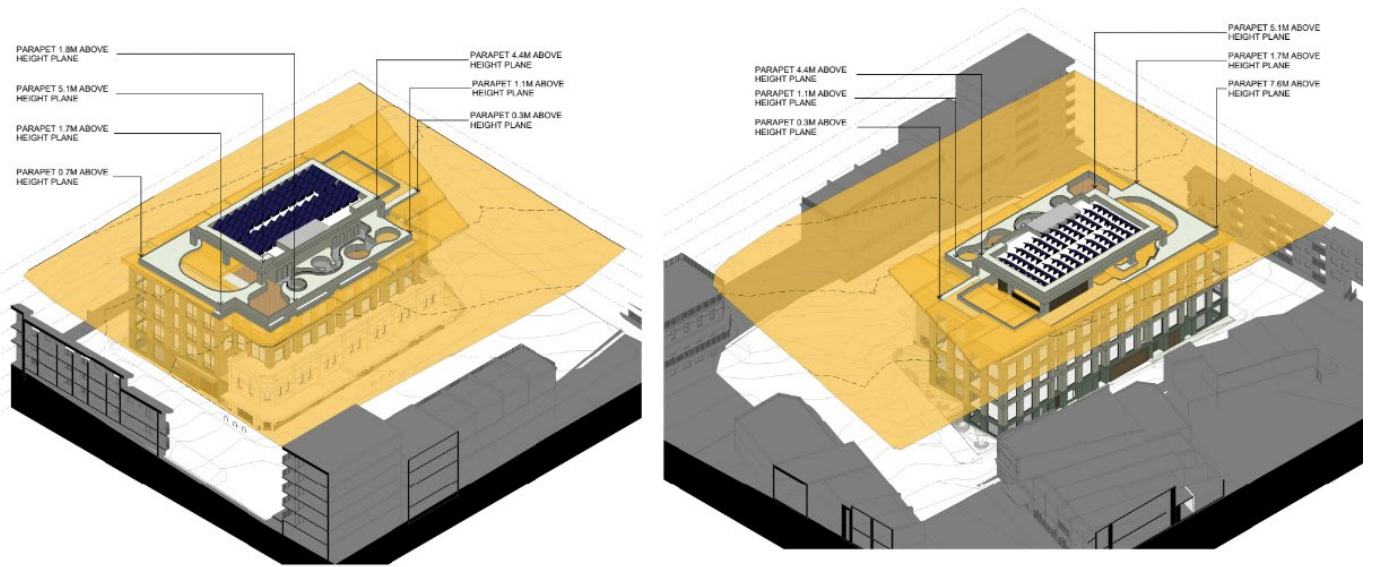
This clause 4.6 variation request seeks to justify contravention of the building height development standard set out in clause 4.3 of the Sydney LEP 2012. Clause 4.3 provides that the maximum height, shown on the Height of Buildings Map for the site is 15m. An excerpt from the Sydney LEP 2012 map sheet is shown at **Figure 1**.



**Figure 1** Excerpt from Sydney LEP 2012 Height of Buildings Map

Source: City of Sydney via NSW Legislation

The proposed development comprises a commercial office building with a maximum height of 16.8m to the top of the parapet and 20.1m to the top of the proposed roof feature. This will result in a variation to the height development standard by 5.1 metres (or by 34%). This variation is generally localised to the centre of the building where a roof structure has been provided on the proposed roof terrace. Some areas of additional height also relate to planters provided on the perimeter of the roof terrace and areas of the parapet. The areas of variation increase with the slope of the site towards the north eastern corner. This is illustrated in the 3D height plane diagram provided at **Figure 2**. Architectural drawings providing further detail of the variation sought are provided at **Appendix A** of the SEE.



**Figure 2** 3D Height Plane Diagram

Source: SJB

## 3.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Sydney LEP 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.*

Further, clause 4.6(4)(a) of the Sydney LEP provides that:

*(4) Development consent must not be granted for development that contravenes a development standard unless:*

- (a) the consent authority is satisfied that:
  - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
  - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and**
- (b) the concurrence of the Secretary has been obtained.*

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; and
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.
3. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (Initial Action).
4. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (Al Maha).
5. *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511.
6. *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386.
7. *Moskovich v Waverley Council* [2016] NSWLEC 1015.
8. *Baron Corporation Pty Ltd v The Council of the City of Sydney* [2018] NSWLEC 1552 (Baron Corporation).

The relevant matters contained in clause 4.6 of the Sydney LEP, with respect to the maximum height development standard, are each addressed below, including with regard to these decisions.

### 3.1 Role of the Consent Authority

The role of the consent authority in considering this written request for a clause 4.6 variation has been recently explained by the NSW Court of Appeal in *Initial Action* and in *Al Maha* to require that the consent authority needs to be satisfied in relation to two matters:

- That the applicant's request has adequately addressed the matters in clause 4.6(4)(a)(i).
- That the proposed development will be in the public interest because of its consistence with the objectives of the development standard and the zone objectives.

The consent authority is required to form these two opinions first before it considers the merits of the DA, and it can only consider the merits of the DA if it forms the required satisfaction in relation to the matters. In particular, the consent authority needs to be satisfied that there are proper planning grounds to grant consent and that the contravention of the standard is justified.

This report provides the basis for the consent authority to reach the required level of satisfaction.



This clause 4.6 variation request is proposed in context of clause 4.3 of the Sydney LEP 2012. Relevant matters contained in clause 4.6 of the Sydney LEP 2012, with respect to the height development standard, are each addressed below. The objectives and criteria in clause 5.6 of the Sydney LEP 2012 have also been identified for the purposes of justifying the additional height subject to the variation.

### 3.2 Clause 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 the Sydney LEP 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**).

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances because the objectives of the height development standard are achieved notwithstanding the non-compliance with the standard (**First Method**).

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

The objectives of the development standard contained in clause 4.3 of the SLEP are:

- (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.

#### 3.2.2 The objectives of the standard are achieved notwithstanding the non-compliance

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

The proposed variation results in an appropriate height for the site and its context, as described below.

The site has frontages to streets on all boundaries and therefore does not adjoin any other buildings. Accordingly, the site has a unique opportunity to present a built form that responds to its context and constraints. The proposal has been designed in accordance with the four (4) storey limit as provided by the *Sydney Development Control Plan 2012*.

The site is located in Surry Hills, immediately south of the Sydney CBD. The site is also bounded by Central Station to the west and in close proximity to local centres such as Haymarket, Darlinghurst, Redfern and Sydney CBD which comprise some of the highest densities in Sydney. Importantly, directly west from the site at 543-551 and 539-541 Elizabeth Street, the prescribed maximum building height is 22m and 24m respectively. Further, to the north of the site, the buildings are allowed from 18-24m along Elizabeth Street. As the roof feature will be set back from the site's boundaries and not readily visible from the public domain, the perceived height of the building from most vantage points will be to the top of the parapet of the new addition (i.e. to the top of Level 3). This is in keeping with the development to the north along Elizabeth street and acts as a transition to the lower scale buildings to the south.

The overall built form and height of the building has taken contextual cues from adjacent buildings which corner the Elizabeth and Cleveland Street intersection. Along Elizabeth Street, the area of additional height has been set back from the building line of the restored contributory fabric, as to meaningfully reduce the perceived bulk of the building. The new addition behind the fabric has been designed to reflect the height and proportions of the contributory fabric, as to provide symmetry to the Elizabeth Street façade, as shown at **Figure 3** below. This is compatible in proportions and articulation to various buildings on the opposite sides of Elizabeth and Cleveland Streets with the lower two levels providing more fine grain architectural detail and upper one/two levels presenting a recessed level or differing façade articulation. As demonstrated in **Figure 3** below, the roof level above the height limit will not be readily perceptible from the street.



Proposed building



Existing building opposite the site at 557- 565 Elizabeth Street



Existing building opposite the site at 273 Cleveland Street and 567- 571 Elizabeth Street

**Figure 3** Photomontage showing façade height and proportions

Should the proposal seek to fully comply with the prescribed building height limit, to provide compliant floor to ceiling heights, the top office level of the building as well as the rooftop would have to be removed. This would result in a built form that is not compatible or consistent with proportions of those adjacent corner buildings. The additional height has facilitated the inclusion of the top commercial level which provides the compatible built form to those adjacent corner buildings as provided at **Figure 3**.

It is noted that the site slopes from the south eastern corner at the intersection of Cleveland and Perry Streets, to the north western corner at the intersection of Elizabeth and Goodlet Streets. This is reflected in the 3D height plane diagram provided at **Figure 2** above, which shows that the area comprising the greatest height variation is the north western corner.

On 12 April 2022, Pre-DA consultation was undertaken with Council to discuss a proposed commercial office concept for the site. The concept scheme took the sloping site into account, and presented an eroded corner on the intersection of Elizabeth and Goodlet Street. On 13 April 2022, Council provided written feedback to the concept scheme, which specifically provided the following regarding the built form.

*The stepped massing of the building to the centre may be better considered as an address to one of the main street frontages.*

Further clarification was sought from Council Staff via email regarding the above feedback. Correspondence via email from Council Staff on 19 May 2022 provided the following:

*The intent of the comment is that the built form massing should not be increased at the centre of the site and should not form a 'pyramidal' shape. The massing should relate to the street hierarchy and defining the street edges.*

The proposed design scheme was amended accordingly, and the eroded corner on the north western section of the site was infilled, as to move away from the 'pyramidal' shape, and provide a more consistent built form across the site. As noted, this area of the building which has now been infilled as a result of the pre-DA feedback now provides one of the more significant areas of height variation due to the slope of the site but as highlighted in Council's feedback provides a better built form response on the site.

Accordingly, for the reasons stated above it has been considered that the proposal is appropriate to the condition of the site and its context.

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

The proposed development is located in the Goodlet Street HCA which is mapped as being of local significance under the Sydney LEP 2012. The existing building on site is also identified as a contributing building in the Sydney DCP 2012. The site is also located in the immediate vicinity of heritage items at 557- 565 Elizabeth Street (Item I1538), the Surrey Club Hotel at 273 Cleveland Street (Item I1297), and 567- 571 Elizabeth Street (Item I1311), which are all shown at **Figure 3** above. It is noted that these items are on the opposite sides of Elizabeth and Cleveland Streets and to the site, and therefore provide sufficient separation between the two.

The existing development currently sits lower than these heritage buildings, which present as tall three storey buildings equivalent to four storey buildings due to the height of each level. The areas which comprise the largest variation are localised to the centre of the building, and are not readily perceivable from the public domain. Accordingly, the proposals visible built form aligns with those heritage items, as demonstrated above.

The site also sits on the western boundary of the Goodlet Street HCA and presents a different urban context to the remaining buildings within the HCA. The site is also an island site, in that it has four street frontages with no adjoining buildings. Additionally, as a corner building on a prominent intersection between classified roads, the site holds a different role and function to the other buildings within the Goodlet Street HCA. It is considered that the urban context of the site is more compatible with those buildings on the opposite side of Elizabeth Street.

For these reasons, the proposed height has been designed to reflect the sites unique context, and to be compatible with the scale of development on the opposite site of Elizabeth Street. As noted above the perceived height of the building from most vantage points will be to the top of the parapet of Level 3. This is in keeping with the development to the north along Elizabeth Street and acts as a transition to the lower scale buildings to the south. This is supported

by a Heritage Impact Statement (HIS) prepared by Weir Phillips Heritage and Planning (Weir Phillips) which is provided at **Appendix I** of the SEE. The HIS confirms that the building when viewed from Cleveland Street provides an appropriate transition in scale as the roof structure which presents the greatest areas of variation, is small and well set back. Weir Phillips Heritage and Planning also confirms that given the setback of the roof structure and the top commercial level, and due to the topography of the site, it is not easily perceived from Elizabeth Street and presents a compatible form and scale to the surrounding locality.

**Objective (c): to promote the sharing of views outside Central Sydney**

The site is located outside of Central Sydney as defined in the Sydney LEP 2012. Due to the site's location and the height and scale of surrounding buildings, the proposal does not impact views to the Sydney CBD.

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

The site is positioned along the Elizabeth Street corridor which presents taller buildings and higher densities towards Central Station that decrease in height from 10-12 storeys to 4 storeys when travelling south, as illustrated at **Figure 4** below. From the public domain, the proposal will be perceived as a four storey building which is compatible in scale to the adjacent buildings on Elizabeth Street. This provides an appropriate transition building in its context, especially from the seven storey building at 554-551 Elizabeth Street to the lower scale residential buildings on the southern side of Cleveland Street.



View from the south west



View from the south east

**Figure 4 3D Massing of the Locality Illustrating Height Transition along Elizabeth Street**

Source: Google Maps/Ethos Urban

**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 site is not located within Green Square. Therefore, the objective does not apply to the proposed development.

### **3.2.3 Conclusion on clause 4.(3)(a)**

In summary, compliance with the building height development standard is considered unreasonable and unnecessary since:

- The variation results in a height that is appropriate for the site and its context, which will better transition heights in the locality and respond to the site's location as a corner building.
- An appropriate transition to surrounding heritage items is achieved, notwithstanding the variation.
- Views from key public vantage points and surrounding buildings will not be negatively impacted.
- The proposal remains lower in height than many of the surrounding buildings and therefore does not impact height transitions between Central Sydney and Green Square.

## **3.3 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard**

Clause 4.6(3)(b) of the Sydney LEP 2012 requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* at [24]).

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site at [60]. There are sufficient environmental planning grounds to justify contravention of the height of buildings development standard in this specific instance, as described under the relevant headings below.

### **3.3.1 Provision of Accessible Landscaped Roof Terrace**

Much of the additional height comprises the roof feature, lift overrun and stairs which provide access to the rooftop garden terrace. The landscaped rooftop terrace has been designed as a key element of the commercial space, which will be used by tenants and their visitors and will be a major attractor for knowledge based companies seeking to locate within the Innovation Corridor.

As described to in Section 3.14 of the SEE, COVID-19 has been an unprecedented global health crisis and economic event that is still evolving. Commercial office requirements have evolved, particularly in the short term as many of the workforce 'work from home', with traditional commercial offices operating at reduced capacity and a need for the office of the future to be designed as adaptive and accommodating of a hybrid work approach. The proposed development demonstrates a commitment to the Surry Hills area, and will be an influential draw for workers. An amenity of the nature proposed at the rooftop is considered essential to leasing the building of this nature in a post COVID-19 environment and will assist with the strategic objective of delivering knowledge based jobs within the City Fringe and Innovation Corridor aligned with Council's Local Strategic Planning Statement and the Eastern Harbour City District Plan.

The additional proposed height will support the use of the roof as a high amenity terrace. The roof structure will provide undercover areas to the terrace, to ensure it's use can be maximised throughout the year. Additionally, the roof terrace provides a range of high-quality amenity spaces including collaboration, gathering, meeting and wellness areas to be used by tenants.

The built form above the height limit will also support significant landscaping proposed on the roof terrace. Planters that will sit above the height limit will be located around the building's perimeter, which will cascade over the rooftop, to be visible from the public domain as to soften the built form and reflect the strong parapets of the adjacent heritage listed buildings. The height of the planters are required to appropriately support the growth of the chosen landscaping.

These planters have been designed as an important element to the roof terrace, as to contribute to an enhanced experience with direct access and sightlines to nature and landscaping.

The proposed roof also provides space for the integrated installation of PV solar panels which further contributes to the environmentally sustainable outcomes for the building. The location of the PV solar panels on the roof terrace structure ensures they are not readily visible from the office floor areas of the common roof garden which improves the overall aesthetic and outlook of the building.

Accordingly, the additional height is required to facilitate the use of the terrace as an accessible and high amenity space, which is necessary for office spaces in the post-COVID 19 workplace environment.

### 3.3.2 Topography

The site has a fall of approximately 3m from the south eastern corner to the north western corner of the site. This topography results in the parapet of the building being under the height limit on part of Cleveland Street and above it on Elizabeth Street near Goodlet Street. As discussed in Section 2 above, the proposal has been designed to respond to the surrounding context and in particular to reflect the proportions of the heritage buildings on the adjacent corners. Accordingly, the areas of the parapet above the height limit are a consequence of the topography of the site and the need to respond to the surrounding built form character.

### 3.3.3 Mismatch between height and FSR

During the process investigating the planning proposal on the site (see Section 1 of the SEE) Council acknowledged that there is a mismatch between the current height limit and the FSR, which was likely to result in an FSR compliant development exceeding the height limit. This site specific mismatch in the controls necessitate at minimum the lift overrun of the top level exceeding the height limit. In response to this the SJB design provides a recessive integrated rooftop design that delivers a key amenity to the building and the public domain in the form of the landscape rooftop (see 3.3.1).

### 3.3.4 Environmental Impacts

The proposed development, despite the contravention of the height of buildings development standard, does not cause significant additional environmental impact which would render it incompatible with its surrounding land uses and ensures the proposal is appropriate for the context of the site. In particular, the areas of non-compliance will not result in significant additional overshadowing impacts to the surrounding public realm or existing residential receivers surrounding the site.

In regards to privacy for surrounding residential receivers, as an island site, the building benefits from separation from all adjacent development. Landscaping will be located on the perimeter of the roof terrace, limiting the trafficable areas to the middle of the roof, ensuring overlooking to residential receivers is minimised. Accordingly, the areas of additional height will not cause any significant additional impacts to the existing residential receivers surrounding the site in terms of overlooking and privacy. In regards to view impacts, there are no known views obtained over the existing site. Accordingly, the additional height will not disrupt views from surrounding properties.

### 3.3.5 Roof Feature

As discussed above, whilst the roof terrace structure may not be formally considered a minor architectural roof feature, the provisions of clause 5.6 provide relevant tests to assess the impacts of the additional proposed height. Clause 5.6 of Sydney LEP 2012 provides that architectural roof features can exceed the height limit for the site, provided certain objectives and criteria are met.

The proposal's consistency against the objectives as listed under clause 5.6 of the Sydney LEP 2012 are listed in **Table 1** below. While the provisions do not technically apply, they provide relevant tests to assess the impact of the additional proposed height in the context of an integrated rooftop structure.

**Table 1** Proposal's consistency with Clause 5.6 objectives

Objective	Comment
Objective (a): to allow minor architectural roof features to exceed height limits	The height exceedance is of 4.9m and will be contained in the centre of the building. The additional height will not be readily perceivable from the public domain.

Objective	Comment
Objective (b): to ensure that any architectural roof feature does not cause an adverse visual impact or adversely affect the amenity of neighbouring premises	The proposed development, despite the contravention of the height of buildings development standard, does not cause significant additional environmental impact which would render it incompatible with its surrounding land uses and ensures the proposal is appropriate for the context of the site. Further, the roof feature in itself is designed in the centre of the building, minimising the visual impact.
Objective (c): to ensure that architectural roof features are considered in the design of a building and form an integral part of a building's design	The roof feature will be an important part of the building form, function and overall design. The feature presents a unique opportunity for workers to have an amenity which allows for fresh air and a chance for socialisation. Workplaces have evolved in response to COVID, with a greater emphasis on quality and amenity to ensure they remain attractive. The proposed development adopts the strategy of a garden rooftop to elevate occupant amenity and user comfort.

Clause 5.6 of Sydney LEP 2012 provides that architectural roof features can exceed the height limit for the site, provided certain objectives and criteria are met:

- (3) Development consent must not be granted to any such development unless the consent authority is satisfied that—*
- (a) the architectural roof feature—*
    - (i) comprises a decorative element on the uppermost portion of a building, and*
    - (ii) is not an advertising structure, and*
    - (iii) does not include floor space area and is not reasonably capable of modification to include floor space area, and*
    - (iv) will cause minimal overshadowing, and*
  - (b) any building identification signage or equipment for servicing the building (such as plant, lift motor rooms, fire stairs and the like) contained in or supported by the roof feature is fully integrated into the design of the roof feature.*

The criterion is assessed below.

**(i) comprises a decorative element on the uppermost portion of a building**

The roof feature has been designed as a key element of the roof garden. Planted edges of the building will provide a protected rooftop garden experience for building occupants, creating a decorative element which provides additional amenity in a densely urban environment.

**(ii) is not an advertising structure**

The proposed roof feature is not an advertising structure and is not proposed to be used as such at any time in the future.

**(iii) does not include floor space area and is not reasonably capable of modification to include floor space area**

The proposed roof feature does not include any floor space, with all floor space located below the maximum height limit.

**(iv) will cause minimal overshadowing, and**

The proposed architectural roof feature will not result in any significant overshadowing, particularly given it is a small component of the overall built form. Further, massing of the rooftop towards has been purposefully designed in the centre of the building to minimise any visual and overshadowing impacts and cause minimal overshadowing.

**(b) any building identification signage or equipment for servicing the building (such as plant, lift motor rooms, fire stairs and the like) contained in or supported by the roof feature is fully integrated into the design of the roof feature.**

The roof feature discretely screens equipment for servicing the building such as the elevator machine rooms, of which will not be perceivable from ground floor and not obvious to receivers of neighbouring buildings. Plant is carefully integrated into the architecture of the building as shown in the elevation drawings provided in the Architectural Drawings package at **Appendix A** of the SEE.

**Consistency with Objects of the EP&A Act**

In *Initial Action*, the court stated that the phrase “*environmental planning grounds*” is not defined but would refer grounds that relate to the subject matter, scope and purpose of the EP&A Act, including the objects in section 1.3 of the

Act. While this does not necessarily require that the proposed development should be consistent with the objects of the Act, nevertheless, as set out in **Table 2** we consider the proposal is broadly consistent with each object, notwithstanding the proposed variation of the height development standard.

**Table 2** Consistency with objects of the EP&A Act

Object	Comment
(a) to promote 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	<p>The proposed height variation will promote the social and economic welfare of future tenants by enabling a higher performing building with enhanced amenity.</p> <p>The proposed development will provide a key workplace benefit, contributing to a naturally ventilated environment currently desired by the office market resulting from the COVID-19 pandemic. Further, the provision of fresh air and light from the roof feature will enhance the social sustainability benefits of the workplace.</p>
(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment	<p>The proposed variation allows for building services to be located above the mapped maximum height limit. It will facilitate the usability of the rooftop terrace by future tenants and visitors, providing a highly sustainable development outcome. Further, the building height variation will have no negative impact on environmental and social considerations and will support the economic health of Sydney.</p>
(c) to promote the orderly and economic use and development of land	<p>The site is strategically located, in close proximity to existing heavy rail, bus and light rail to service future commuters. Strict compliance with the maximum building height control would be a lost opportunity to enable services and improve usability of the rooftop which will cater to future tenants and workers, adding to the diversity of Surry Hills.</p> <p>The proposal with a variation to the maximum building height control is a balanced and orderly design outcome that responds to the unique characteristics of the site and does not represent the over intensification of land as it does not comprise habitable commercial office floor space.</p>
(d) to promote the delivery and maintenance of affordable housing	<p>The proposal relates to non-residential uses, and therefore this object is not relevant.</p>
(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats	<p>The proposal will not have any impact on threatened species or ecological communities.</p>
(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)	<p>The proposal will not impact built or cultural heritage. This is further detailed at <b>Section 5.3</b> and <b>5.4</b> of the SEE, and the combined Aboriginal Objectives Due Diligence and Non-Aboriginal Archaeology Assessment and HIS provided at <b>Appendix J</b> and <b>I</b>, respectively.</p>
(g) to promote good design and amenity of the built environment	<p>The proposal will promote good design and amenity of the built environment by exhibiting a high quality and sculptured design which adds to the architectural diversity of Surry Hills.</p>
(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants	<p>The proposal will comply with the relevant provisions of the BCA and will promote the health and safety of occupants.</p>
(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State	<p>This object is not relevant to this proposal, however, the proposal has adhered to the required planning processes for the site and scale of development, and implements the strategic planning priorities for employment growth in Surry Hills and more broadly City of Sydney.</p>
(j) to provide increased opportunity for community participation in environmental planning and assessment	<p>The proposed development will be publicly exhibited in accordance with the requirements of Council's Community Participation Plan.</p>



### 3.3.6 Conclusion of clause 4.6(3)(b)

There are sufficient environmental planning grounds to justify contravening from the development standard as:

- The additional height supports the use of the roof as a terrace landscaped garden, which will provide high quality spaces and amenity to the commercial office building and is an essential aspect of being able to lease a building of this nature.
- The additional height will not result in adverse environmental impacts including overpacking, privacy and views.
- The roof feature responds to the criteria for architectural roof features contained in clause 5.6 of the Sydney LEP 2012, comprising a decorative top of building element which does not comprise floor space, screens plant, and is free of signage.

### 3.4 Clause 4.6(4)(i): The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3)

This written request adequately and comprehensively addresses the matters required to be demonstrated by subclause (3).

### 3.5 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

In *Initial Action* at [27], it was held that it is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. The proposal is in the public interest because it is consistent with the objectives of the development standard and the objectives of the zone.

#### Consistency Caselaw

Consistency has been defined throughout caselaw including the following Land and Environment Court cases:

- *Addenbrooke v Woollahra Municipal Council* [2008] NSWLEC 190.
- *Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21.
- *Raassis v Randwick City Council* [2019] NSWLEC 1040.
- *Abrams v Council of City of Sydney* [2018] NSWLEC 1648.
- *Kingsland Developments v Parramatta Council* [2018] NSWLEC 1241.
- *Dem Gillespies v Warringah Council* (2002) 124 LGERA 147.

In these cases, consistency is considered to be different to that of 'achievement'. The term 'consistent' has been considered in judgements of the Court in relation to zone objectives and has been interpreted to mean "compatible" or "capable of existing together in harmony" (*Dem Gillespies v Warringah Council* (2002) 124 LGERA 147; *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190) or "not being antipathetic" (*Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21). Whichever interpretation is adopted, the test of "consistency" is less onerous than that of "achievement".

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

The proposed development is consistent with the objectives of the height development standard, for the reasons discussed in **Section 3.2.2** of this report.

#### 3.5.2 Consistency with objectives of the zone

The proposed development has been assessed against the objectives for the MU1 – Mixed Use Zone as outlined below. The departure from the height of building development standards do not result in any inconsistencies with the objective of the zone.

**To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.**

The proposal will provide a diversity of uses on site, being retail uses on the ground floor with commercial office uses above. Both retail and commercial uses will generate employment opportunities at the site.

**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.**

The proposal will provide retail uses on the ground floor of the building, with active frontages to Elizabeth and Cleveland Street. The proposal has retained the Elizabeth Street façade and continued the Level 1 façade detailing onto the ground floor elevation to provide an improved fine grain retail presence along the street, with five (5) separate tenancies. This will provide opportunity for more diverse tenants to support an active and vibrant pedestrian environment.

**To minimise conflict between land uses within this zone and land uses within adjoining zones.**

The proposal provides a mix of ground floor retail uses and commercial office uses above. These land uses are compatible to the Surry Hills area and other properties along Cleveland Street (zoned SP2 Classified Road) which generally comprises ground floor retail uses and residential or commercial above. Therefore, the proposal will not result in conflicts between land uses.

**To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.**

The proposal will provide retail uses on the ground floor to provide active street frontages, particularly to Elizabeth and Cleveland Streets.

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

The proposal will replace a tired and aging building with a new development which will rejuvenate the site. The ground floor will provide retail tenancies to all main facades, as to create an activated public domain. The office space has also been designed with high quality amenities, including the roof terrace which will contribute to the development's viability as a commercial building. Overall, the proposal will provide for a competitive and attractive commercial development which will, in turn, work to provide a vibrant urban environment.

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

As detailed above, the site is located in walking distance to a number of existing and future public transport options, which will help maximise the use of public transport patronage to and from the site. The proposal provides ground floor retail spaces, as to provide active frontages to Elizabeth and Cleveland Street. The proposal provides office spaces with generous end-of-trip facilities including bicycle parking.

### **3.6 Other Matters for Consideration**

Under clause 4.6(5), in deciding whether to grant concurrence, the Director-General must consider the following matters:

- (5) In deciding whether to grant concurrence, the Planning Secretary must consider—*
  - (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
  - (b) the public benefit of maintaining the development standard, and*
  - (c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*

These matters are addressed in detail below.

### **3.6.1 Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning**

The variation of the development standard does not raise any matter of significance for State or regional planning. As relevant to State and regional planning, the proposal is consistent with the Greater Sydney Regional Plan – A Metropolis of Three Cities and the Eastern City District Plan in that it:

- Supports and contributes to growing a stronger and more competitive space for commercial office floor space in the City of Sydney.
- Provides access to jobs within a location which is well serviced by primary transport modes such as train, buses and light rail.
- Provides workers with access to a covered green rooftop which can be utilised throughout the working week.

Furthermore, the variation of height of buildings development standard does not result in any significant adverse impact on the surrounding area, surrounding residences and enables a high quality design that is operational by the tenants within the building.

### **3.6.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard**

As outlined in **Section 3.3** above, there are sufficient environmental planning grounds to warrant contravention of the development standard and it is considered to be in the public interest for the variation to be supported in this case. As the rooftop feature is provided for the use of tenants in response to the evolution of workplaces post-COVID, it is considered appropriate and a positive strategy to provide access to the garden rooftop. The proposed roof feature is provided in full compliance with clause 5.6 of the Sydney LEP 2012 and will ultimately provide an interesting and high quality addition to the Surry Hills locality whilst improving the amenity and useability of the building for future tenants. As such, the proposed variation is in the public interest and necessary, and there is no foreseeable public benefit in maintaining the development standard.

### **3.6.3 Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Director-General before granting concurrence**

There are no other matters required to be taken into consideration.

## **4.0 Conclusion**

The assessment above demonstrates that compliance with the height development standard contained in clause 4.3 of the Sydney LEP is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. The variation allows for the orderly and economic use of the land in an appropriate manner, and an improved outcome in planning terms.

This clause 4.6 variation demonstrates that, notwithstanding the non-compliance with the height development standard, the proposed development:

- Achieves the objectives of clause 4.3 of the Sydney LEP 2012 by:
  - Ensuring that the height of the development is in-keeping with the scale and character of neighbouring buildings and is of a form that will not result in any negative environmental impacts.
  - Respecting the character, appearance and scale of nearby heritage buildings.
- Achieves the objectives of clause 5.6 of the Sydney LEP 2012 by:
  - Ensuring the roof feature will not cause any adverse visual impacts nor adversely affect the amenity of neighbouring premises. Additionally, the proposed development will not impact on any significant view lines and vistas from the public domain.
  - Ensuring the roof feature is a considered component in the overall proposed building design.
- Will provide a key workplace benefit, contributing to a naturally ventilated environment currently desired by the office market resulting from the COVID-19 pandemic.

- Has access to fresh air and light will enhance the social sustainability benefits of the workplace.
- Will have an appropriate impact, in terms of its scale, form and massing.
- Will promote the orderly and efficient use of land, in accordance with the objects of the Environmental Planning and Assessment Act 1979 (the Act).
- Is in the public interest in light of the numerous positive social, ecological, design and economic impacts it will deliver for the Site.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the Sydney LEP.