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<p>Clause 4.6 Variation Request Height of Buildings</p>
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Clause 4.6 Variation Request (Height)

Commercial Building

19-21 Buckland Street, Chippendale (Lot 1 DP 789207)

Submitted to the City of Sydney
on behalf of George Hay Pty Ltd

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Project: 21-230

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1. EXECUTIVE SUMMARY

This request has been prepared in accordance with Clause 4.6 of the *Sydney Local Environmental Plan 2012* (SLEP 2012). The purpose of the request is to justify a contravention to the maximum Height of Buildings (Cl 4.3) development standard as part of a Development Application (DA) submitted to the City of Sydney Council (Council).

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

This request has been prepared having regard to the Department of Planning and Environment's *Guidelines to Varying Development Standards* (August 2011) and various recent decisions in the New South Wales (NSW) Land and Environmental Court (LEC) and the NSW Court of Appeals (Appeals Court).

Clause 4.6 requires that a consent authority be satisfied of the following three (3) matters before granting consent to a development that contravenes a development standard:

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

The proposed development involves the construction of a five (5) level commercial building. This request demonstrates that compliance with the SLEP 2012 height control is unreasonable and unnecessary in the circumstance of the case and that the objectives of the height control and MU1 (Mixed Use) zone are achieved notwithstanding the non-compliance.

The development is in the public interest as there are sufficient environmental planning grounds to justify the variation:

- The majority of the building is located below the maximum 15m building height with the contravention relating only to a small section of the upper level (0.87m to 1.32m), the roof and associated roof structures (up to a maximum 3.74m). The structures on the roof are proposed to be setback from the building edge to ensure they are not discernible from the public domain which assists in minimising the overall bulk and scale of the height variation.
- The proposed building creates an appropriate height transition between adjacent buildings including the nearby heritage items such as Pioneer House which is six storeys (with a large billboard above).
- If the proposal was for a four level building that strictly complied with the DCP floor to ceiling heights, this would result in a 15.3m high building (not factoring in lift overruns or services on the roof) which would be above the LEP maximum building height.
- The design includes the retention and restoration of the existing façade as suggested by Council in their Pre-Lodgement advice dated 10 January 2022 with a new two storey addition above. The two additional levels above will improve the feasibility of the proposal when considering the costs associated with retaining and restoring the existing façade.

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- As the façade is proposed to be retained, limited excavation is proposed with only a small part basement included in the proposal. Therefore, structures such as the AC and plant are required to be located on the roof above the maximum height limit.
- The proposed height contravention will not result in any unreasonable amenity impacts on surrounding sites.

This request also addresses the requirements for concurrence of the Secretary by Clause 4.6(4)(b). It is therefore considered appropriate in this circumstance to vary the development standard.

2. INTRODUCTION

This request has been prepared in accordance with Clause 4.6 of the SLEP 2012. The purpose of the request is to justify a contravention to the maximum Height of Buildings (Cl 4.3) development standard as part of a Development Application (DA) submitted to the City of Sydney Council (Council).

The DA is for a commercial building at 19-21 Buckland Street, Chippendale (legally described as Lot 1 in DP 789207). The site comprises a single, regular shaped allotment with a total area of 702.9sqm.

The SLEP 2012 identifies a Height of Buildings control of 15m for the site.



Figure 1: Site Location Plan

3. STANDARD TO BE VARIED

The standard to be contravened is the Height of Buildings (HOB) development standard which is set out in clause 4.3 of the SLEP 2012 as follows:

- (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.*

The site has a maximum height control of 15m as shown in Figure 2 below.

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

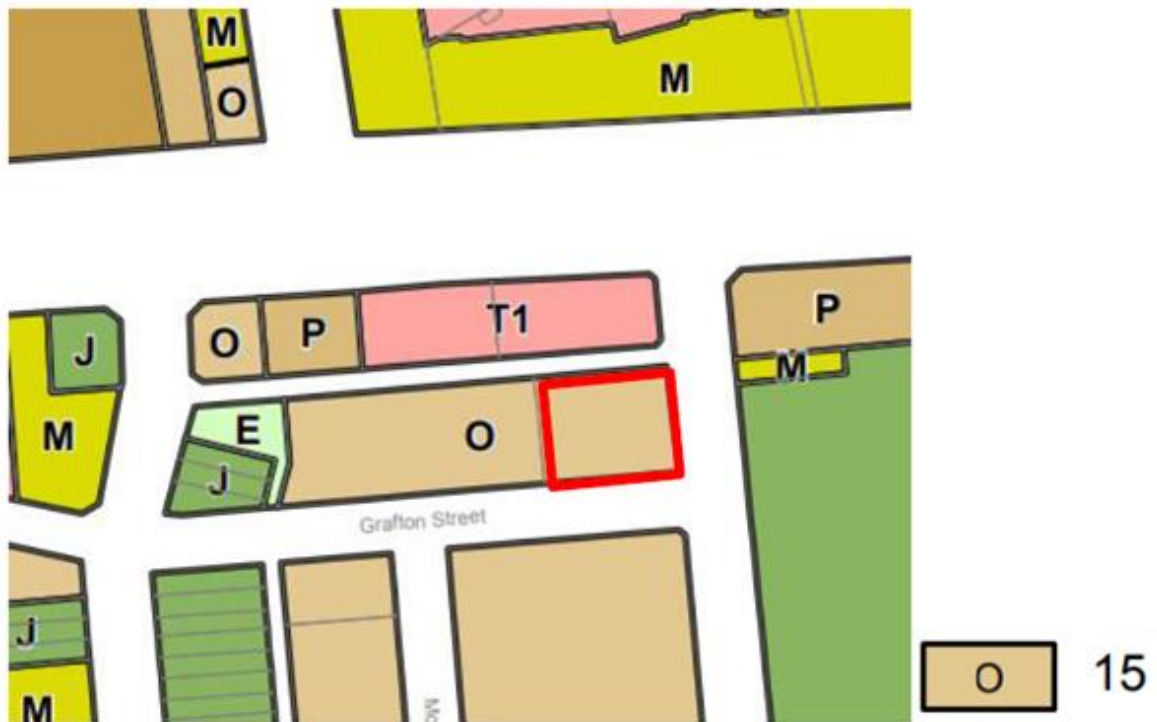


Figure 2: SLEP Height Map

4. EXTENT OF VARIATION

Pursuant to Clause 4.3 of the SLEP 2012, the site has a maximum height limit of 15m. The proposed development has a maximum building height of 18.74m (RL 26.700) to the top of the stair structure. This equates to a maximum 3.74m (maximum 24.9%) contravention from the height of building development standard.

The majority of the bulk and scale of the development is located under the 15m maximum building height. In addition to the stair structure, the other parts of the building located above the height standard include:

- 0.87m - 1.32m of the upper level (5.8% to 8.8% variation).
- The AC plant area which is located 2.895m to 3.125m above the height limit (19.3% to 20.8% variation).
- The lift overrun which is located 2.33m above the height limit (15.5% variation).

A 114sqm PV array zone is also proposed on the roof to the south of the AC plant.

Refer to the extract of the height plane diagram in Figure 3.

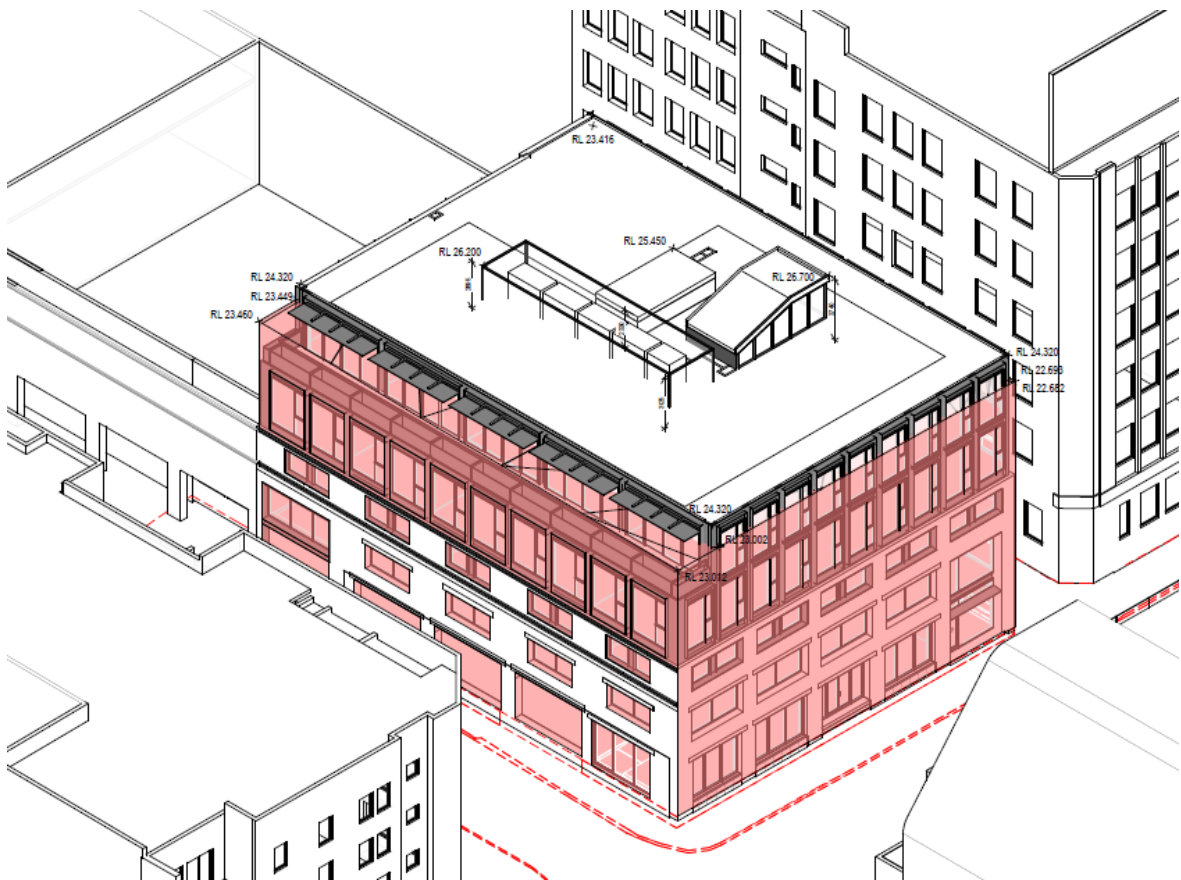


Figure 3: Height Plane Diagram (Source: AJC)

5. UNREASONABLE OR UNNECESSARY

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case, as required by clause 4.6(3)(a) of the SLEP 2012.

The Court held that there are at least five (5) different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. See *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*).

The five (5) ways of establishing that compliance is unreasonable or unnecessary are:

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

It is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a). Nonetheless, we have considered each of the ways as follows.

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

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

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Table 1: Consistency with Objectives of clause 4.3 of the SLEP 2012

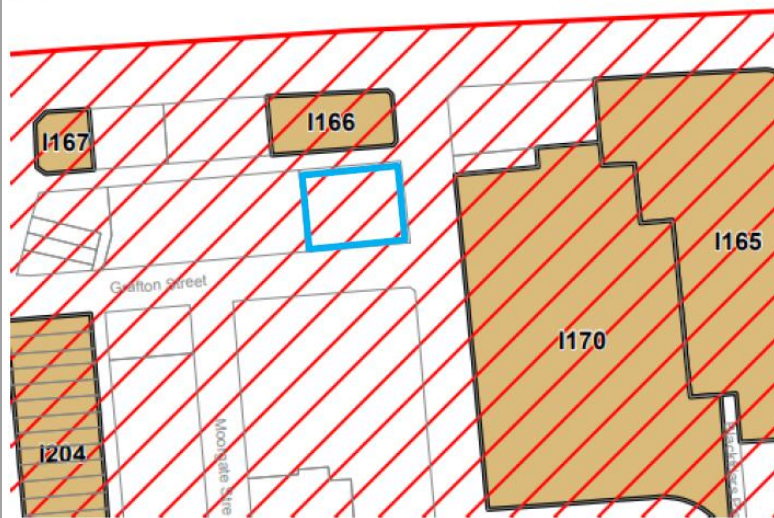
OBJECTIVE	DISCUSSION
<p>4.3 Height of Buildings</p>	
<p>(1) The objectives of this clause are as follows—</p>	
<p>(a) to ensure the height of development is appropriate to the condition of the site and its context</p>	<p>The majority of the building is located below the maximum 15m building height with the contraventions relating only to a small section of the upper level (0.87m to 1.32m), the roof and associated roof structures (up to a maximum 3.74m). As discussed in further detail below, the site is located within the Chippendale Heritage Conservation Area. The proposal includes the retention and restoration of the existing façade and internal structures with a new two storey addition above. The two additional levels above will improve the feasibility of the proposal when considering the costs associated with retaining and restoring the existing façade. Further, as the façade and internal structure is proposed to be retained, limited excavation is proposed or possible with only a small part basement included in the proposal. Therefore, structures such as the AC and plant generally have been required to be located on the roof above the maximum height limit.</p> <p>The height of the development in relation to the surrounding context is discussed in response to objective (b) below.</p>

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(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 located in the Chippendale Heritage Conservation Area and adjacent to two local heritage items including:

- Former Bank, retail and warehouse building “Pioneer House” including interiors at 128 Broadway; and
- Former Blackfriars Public School and Headmaster Residence including interiors, fence, grounds and archaeology at 4–12 Buckland Street.



The site itself is not nominated as a local heritage item and is identified as neutral to the heritage conservation area. The height of the building, notwithstanding the proposed variation, provides an appropriate transition in height between adjacent sites as discussed below.

The east elevation below illustrates the step down in heights along Buckland Street from north to south.

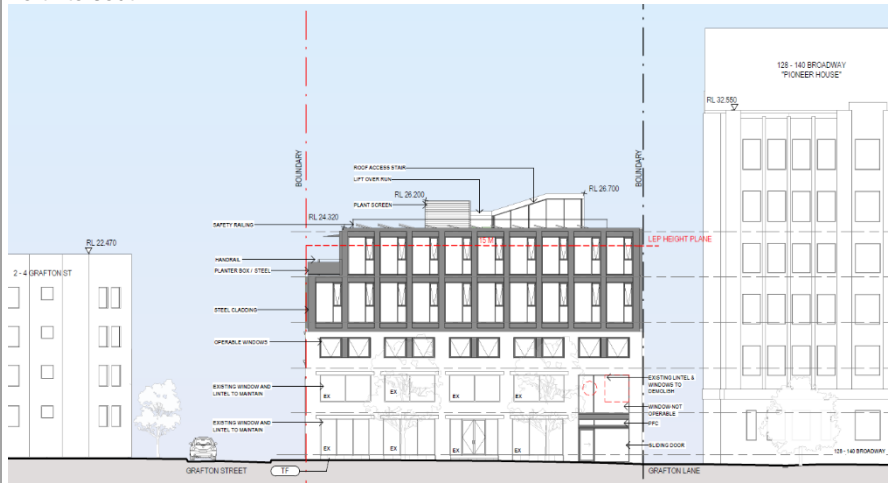
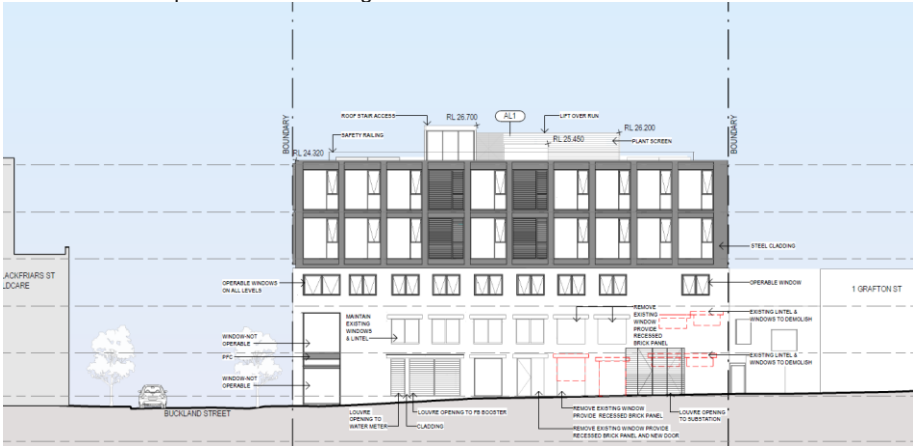

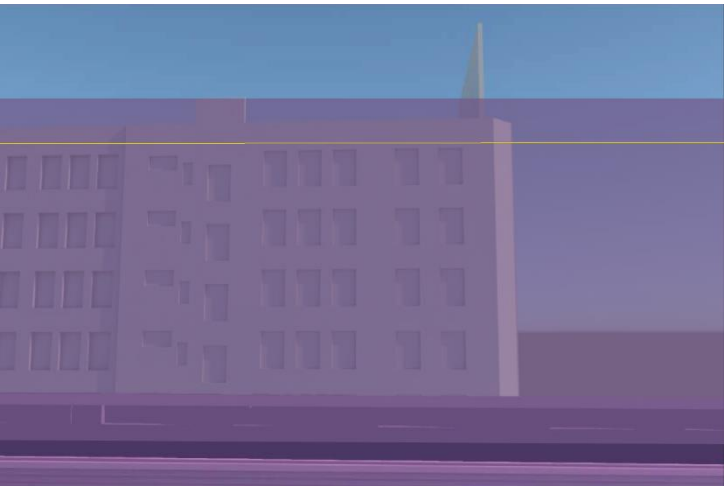



Figure 4: East Elevation (Source: AJC)


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OBJECTIVE	DISCUSSION
	<p>Pioneer House to the north of the site is six storeys with a large billboard located on top of the building. The proposed building is five levels with the roof structures setback from the building edge. Then to the south of the site is the four storey RFB at 2-4 Grafton Street. The proposal results in a consistent step down in storeys from north to south.</p> <p>When looking at the transition in height from east to west, opposite Buckland Street to the east is a UTS site with approval for the UTS Blackfriars Industry Hub. The Hub building is approved as five storeys facing Buckland Street. This is consistent with the number of storeys proposed on the site which then steps down to three storeys at 1 Grafton Street to the west adjoining the proposed building. As shown on the North Elevation below, the proposal seeks to maintain a consistent wall height with the existing 1 Grafton Street building and utilises different colours and materials on the two-storey addition to differentiate between the two parts of the building.</p>  <p><i>Figure 5: North Elevation (Source: AJC)</i></p> <p>As demonstrated above, the proposed building creates an appropriate height transition between adjacent buildings including the nearby heritage items. The elements of the building that exceed the height standard relate to a minor part of the upper floor which is part of the fifth storey as well as roof structures which are setback from the building edge. The roof structures including the plant, lift overrun and stair structure will not be discernible from the public domain and as such do not impact on the transition in height between buildings.</p>
<p>(c) to promote the sharing of views outside Central Sydney</p>	<p>Consideration has been given to views from the upper level of 2-4 Grafton Street (RFB) looking north towards Pioneer House. It is noted that the remaining adjacent buildings are used for tertiary education purposes. These upper level units currently have views across the subject site to Pioneer House which is a listed as a local heritage item. The three views from the level 4 balconies are discussed as follows.</p>

OBJECTIVE	DISCUSSION
	<p data-bbox="568 551 639 577">View 1</p> <div data-bbox="571 613 1473 974"> </div> <p data-bbox="568 987 1233 1014"><i>Figure 6: View 1 location (left) current CGI view (right) (Source: Urbis)</i></p> <p data-bbox="568 1048 1433 1144">The Computer-Generated Image (CGI) shows a view that is available from a standing location from the balcony of a centrally located dwelling on the 4th storey of 2-4 Grafton Street with 'Pioneer House' visible to the north of the site.</p> <div data-bbox="571 1176 1362 1702"> </div> <p data-bbox="568 1715 1497 1776"><i>Figure 7: Approximate CGI of proposed view 1, 15m height limit shown by yellow line. This image is an estimation of the impact of the proposed built form.</i></p> <p data-bbox="568 1809 1509 2007">It is estimated that the proposed built form will block views of 'Pioneer House', with only an oblique view of the advertising billboard on the roof remaining visible. The view that would be affected is not of high scenic quality or value in <i>Tenacity</i> terms as assessed by Urbis, for example views lost do not include scenic or highly valued features such as land water interface, water or a combination of such features to form a 'whole view'. It is further noted that existing views to the northwest and west as well as towards the treed heritage precinct</p>

OBJECTIVE	DISCUSSION
	<p>to the north-east will be unaffected by the proposed additional built form. The additional height sought within the clause 4.6 variation application does not generate any significant additional view loss from what is permissible within the LEP height control and would block only a minor additional horizontal section of the 'Pioneer House' parapet.</p> <p>View 2</p>  <p><i>Figure 8: View 2 location (left) current CGI view (right) (Source: Urbis)</i></p> <p>The CGI shows a view that is available from a central standing location from the balcony of the western dwelling on the 4th storey of 2-4 Grafton Street with 'Pioneer House' visible to the north of the site.</p>  <p><i>Figure 9: Approximate CGI of proposed view 2, 15m height limit shown by yellow line. This image is an estimation of the impact of the proposed built form.</i></p> <p>It is estimated that the proposed building will block views of 'Pioneer House', with an oblique</p>

OBJECTIVE	DISCUSSION
	<p>view of the advertising billboard on the roof remaining visible. The view that is affected is not of high scenic quality or value in Tenacity terms, for example views lost do not include scenic and highly valued features such as land water interface, water or combination of features to form a 'whole view'. It is noted that existing oblique views to the northwest and west over 1 Grafton Street to Broadway and beyond will be unaffected by the proposed additional built form. The additional height sought within the clause 4.6 variation application does not generate any significant additional view loss from what is permissible within the LEP height control and would block only a minor horizontal section of the 'Pioneer House' parapet.</p> <p>View 3</p>  <p><i>Figure 10: View 3 location (left) current CGI view (right) (Source: Urbis)</i></p> <p>The Computer-Generated Image (CGI) shows a view that is available from a central standing location from the balcony of the eastern dwelling on the 4th storey of 2-4 Grafton Street with 'Pioneer House' visible to the north of the site.</p>

OBJECTIVE	DISCUSSION
	 <p><i>Figure 11: Approximate CGI of proposed view 3, 15m height limit shown by yellow line. This image is an estimation of the impact of the proposed built form.</i></p> <p>It is estimated that the proposed built form would block views of 'Pioneer House', with an oblique view of the advertising billboard on the roof remaining visible. The view that is affected is not high scenic quality or value in Tenacity terms, for example views lost do not include scenic and highly valued features such as land water interface, water or combination of features to form a 'whole view'. Oblique views to the north-west and west over 1 Grafton Street to Broadway and beyond will be unaffected by the proposed additional built form. The additional height sought within the clause 4.6 variation application does not generate any significant additional view loss from what is permissible within the LEP height control and blocks only a minor horizontal section of the 'Pioneer House' parapet.</p> <p>For each of the views above it is concluded that the proposed height contravention will not generate any significant additional view loss from what is permissible.</p>
<p>(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,</p>	<p>The site is not located near the Green Square Town Centre however it is located approximate 500m west of the southern end of Central Sydney. The site is generally separated from Central Sydney by the Central Park development which is higher scale than the immediately surrounding area. The site is then located further west in an area characterised by buildings ranging from two storeys up to six with the increased storeys closer to Broadway. As such the proposal, notwithstanding the proposed height contravention, ensures an appropriate height transition with the adjoining area.</p>
<p>(e) in respect of Green Square— (i) to ensure the amenity of the public</p>	<p>Not applicable, the site is not located in Green Square.</p>

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OBJECTIVE	DISCUSSION
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.	

As demonstrated in the Table above, the objectives of the Height development standard are achieved notwithstanding the variation. In accordance with the Wehbe, compliance with the development standard is therefore demonstrated to be unreasonable or unnecessary, and the requirements of clause 4.6(3)(a) have been met on this way alone.

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

The underlying objective or purpose is relevant to the development. This reason is not relied upon.

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

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

- 5.4. The objective would not be defeated or thwarted if compliance was required. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary

The SLEP 2012 Height of Buildings standard has not been abandoned by Council, so this reason is not relied upon.

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

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

6. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

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

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

As discussed in Section 4 of this report, the elements of the development that contravene the height of buildings development standard are limited to part of the upper level and roof structures including lift overrun, AC plant and stair structure/access to roof for maintenance purposes.

The environmental planning ground to justify the variation to the height standard are as follows:

- The majority of the building is located below the maximum 15m building height with the contravention variations relating only to a small section of the upper level (0.87m - 1.32m), the roof and associated roof structures (up to a maximum 3.74m). The structures on the roof are proposed to be setback from the building edge as follows to ensure they are not discernible from the public domain which assist in minimising the overall bulk and scale of the height variation:
 - Stair structure setback 4.1m from northern building edge and 8.9m eastern edge.
 - Lift overrun setback 6.6m from northern building edge and 12.1m from western edge.
 - AC plant setback 7.1m from western edge, 9m from eastern edge and 8.4m from southern edge.

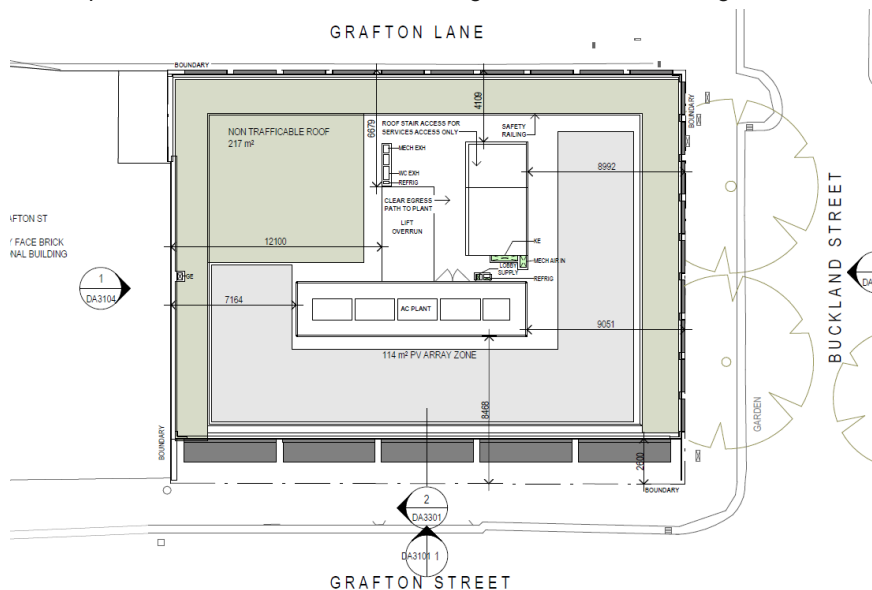
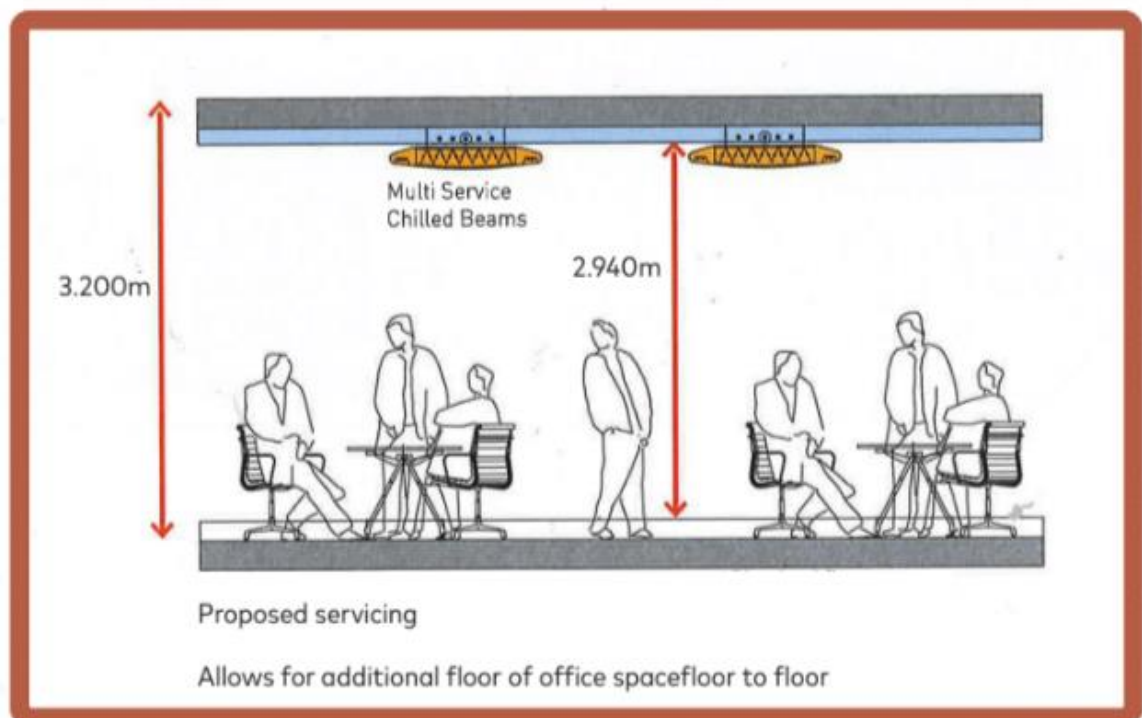


Figure 12: Roof Plan (Source: AJC)

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- In this regard, the roof structures have been located as centrally as possible on the roof while also ensuring the layout of the lower levels is appropriate in relation to the lift and stair connections. It is also noted that the roof is non trafficable with the only access directly from the stairs to the AC plant for maintenance purposes. This minimises the opportunity for any privacy impacts associated with the height variation. As the façade is proposed to be retained, limited excavation is proposed with only a small part basement included in the proposal. Therefore, structures such as the AC plant are required to be located on the roof above the maximum height limit.
- The proposal provides reduced floor to floor heights compared to what is prescribed under the DCP for commercial buildings (being 4.5m at the ground level and 3.6m for all commercial levels above). Specifically, the proposed floor to floor heights are 2.95m at the ground floor (existing), 3.15m at Level 1 (existing) and 3.2m for the three levels above. This has occurred as a result of retaining the façade and internal structures (with three levels proposed behind the existing façade) and ensuring the proposed levels above are proportional to the rest of the building. The following figure demonstrates how the 3.2m floor to floor height can be designed to allow for a 2.94m floor to ceiling height and provide a high level of amenity for future users. The floor-to-floor heights have been designed with space efficient services to minimise the overall height of the building. This allows the internal space to maintain the feeling of a traditional warehouse with exposed services.



- The DCP specifies a maximum four storeys for the subject site. The proposal is for five levels resulting in a variation with the DCP, however as described in Table 1, the proposed building creates an appropriate height transition between adjacent buildings including the nearby heritage items. The elements of the building that exceed the height standard relate to a minor part of the upper floor which is part of the fifth level as well as roof structures which are setback from the building edge. The roof structures including the plant, lift overrun and stair structure will not be discernible from the public domain and as such do not impact on the transition in height between buildings.

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- It is noted that if the proposal was for a four storey building that strictly complied with the DCP floor to ceiling heights, this would result in a 15.3m high building (not factoring in lift overruns or services on the roof) above the LEP maximum building height.
- The design includes the retention and restoration of the existing façade as suggested by Council in their Pre-Lodgement advice dated 10 January 2022 with a new two storey addition above. The two additional levels above will improve the feasibility of the proposal when considering the costs associated with retaining and restoring the existing façade.

7. PUBLIC INTEREST

The proposed development will be in the public interest because it is consistent with the objectives of the development standard and the objectives of the MU1 (Mixed Use) zone. This is required by clause 4.6(4)(a)(ii) of the SLEP 2012.

An assessment against the objective of the MU1 Mixed Use zone is provided in the Table below.

Table 2: MU1 (Mixed Use) Zone Objectives

OBJECTIVE	DISCUSSION
<ul style="list-style-type: none"> To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities. 	<p>The proposal seeks to provide commercial premises on the site that will deliver opportunity for employment to the locality. This land use will be added to an area containing an existing diverse mix of land uses including residential, other commercial uses, retail and tertiary education. The proposal will positively promote the zone objectives by delivering employment generating commercial spaces to the area.</p>
<ul style="list-style-type: none"> 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. 	<p>The proposed design will provide active street frontages through commercial tenancies occupying the building's ground floor. These tenancies will be activated at street level by a series of generous window and door openings that extend along the primary frontage (Buckland Street) and wrap the commercial spaces along portions of both the north and south elevation.</p>
<ul style="list-style-type: none"> To minimise conflict between land uses within this zone and land uses within adjoining zones. 	<p>The proposal seeks to provide commercial tenancies within an MU1 Mixed Use zone. This use is compatible with the surrounding mix of land uses including residential, other commercial uses, retail and tertiary education. Within 25m of the site is an SP2 Classified Road and within 60m is an area zoned R1 General Residential. The proposed commercial use for this site provides an appropriate land use transition from the intensity of an infrastructure zone to an area of predominantly residential uses.</p>
<ul style="list-style-type: none"> To encourage business, retail, community and other non-residential land uses on the ground floor of buildings. 	<p>The proposal will provide commercial premises on the ground floor of the building, creating an active and occupied land use adjacent to the street.</p>
<ul style="list-style-type: none"> To ensure land uses support the viability of nearby centres. 	<p>The proposed commercial uses on the site will support the viability of nearby centres by providing increased employment opportunities.</p>

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<ul style="list-style-type: none">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 proposal will result in an office development on the site which is located in close proximity to multiple bus services from Broadway. The site is also a 13 minute walk from Central train station and is therefore highly accessible by public and active forms of transport. The proposal includes 28 bicycle parking spaces and EOTF to further encourage walking and cycling.
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As demonstrated in Table 2, the proposal is consistent with the objectives of the zone and in Section 6 it was demonstrated that the proposal is consistent with the objectives of the development standard. According to clause 4.6(a)(ii), therefore, the proposal is in the public interest.

8. STATE OR REGIONAL ENVIRONMENTAL PLANNING

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

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

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

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

9. CONCLUSION

This submission requests a variation, under clause 4.6 of the SLEP 2012, to the Height of Buildings development standard and demonstrates that:

- The two additional floors are satisfactory in terms of scale, bulk, streetscape and overall building massing as confirmed by Council's Urban Designer on 13 December 2022 and as outlined by Council's advice provided on 23 June 2023.
- Compliance with the development standard would be 'unreasonable and unnecessary' in the circumstances of this development.
- The development achieves the objectives of the development standard and is consistent with the objectives of the MU1 (Mixed Use) zone.
- There are sufficient environmental planning grounds to justify the contravention.
- There is no public interest achieved in maintaining compliance with the development standard.

The consent authority can be satisfied of the above and is therefore in the public interest. The concurrence of the Secretary can be assumed in accordance with Planning Circular PS 18-003. On this basis, it is therefore appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of the case.