

# **Attachment D**

<p><b>Clause 4.6 Variation Request – Height of Buildings</b></p>
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**URBIS**

# **CLAUSE 4.6 VARIATION REQUEST - BUILDING HEIGHT**

86-90 Bay Street, Ultimo

Prepared for  
**DEXUS/HBB PROPERTY**  
22 May 2023

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# 1. INTRODUCTION

This Clause 4.6 Variation Request ('the Request') has been prepared by Urbis Pty Ltd (Urbis) on behalf of Dexus Funds Management Limited (Dexus) and HBB Property Pty Limited (HBB Property) as the investment advisors to 86 Bay Street Pty Ltd (ATF Bay Street Trust) (the Applicant) and in support of a Development Application (DA) for the proposed alterations and additions to the existing three storey with a lower ground commercial building located at 86-90 Bay Street, Ultimo (the site). The proposed development for the site is designed to create a sustainable and environmentally conscious A-grade office building. This will involve the repurposing of the existing structure, as well as the addition of a timber extension that complements the built form of the surrounding area whilst enhancing the streetscape of Bay Street. The proposed alteration has considered the necessary adjustments to comply with Building Code of Australia (BCA) specifications for a class 9B structure in the event that an educational establishment is acquired based on market demand to occupy the premise.

The Request seeks an exception from the *Height of Buildings* prescribed for the site under clause 4.3 of *Sydney Local Environmental Plan 2012 (SLEP)*. The variation request is made pursuant to clause 4.6 of the LEP.

This request demonstrates that compliance with the maximum height control prescribed for the site is unreasonable and unnecessary, demonstrating that there are sufficient environmental planning grounds to justify the requested variation and that the approval of the variation is in the public interest because it is consistent with the development standard and zone objectives.

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

This report should be read in conjunction with the Statement of Environmental Effects prepared by Urbis Pty Ltd and dated 22 May 2023.

The following sections of the report include:

- **Section 2:** Description of the site and its local and regional context, including key features relevant to the proposed variation.
- **Section 3:** Brief overview of the proposed development as outlined in further detail within the SEE and accompanying drawings.
- **Section 4:** Identification of the development standard which is proposed to be varied, including the extent of the contravention.
- **Section 5:** Outline of the relevant assessment framework for the variation in accordance with clause 4.6 of the LEP.
- **Section 6:** Detailed assessment and justification of the proposed variation in accordance with the relevant guidelines and relevant planning principles and judgements issued by the Land and Environment Court.
- **Section 7:** Summary and conclusion.

## 2. SITE CONTEXT

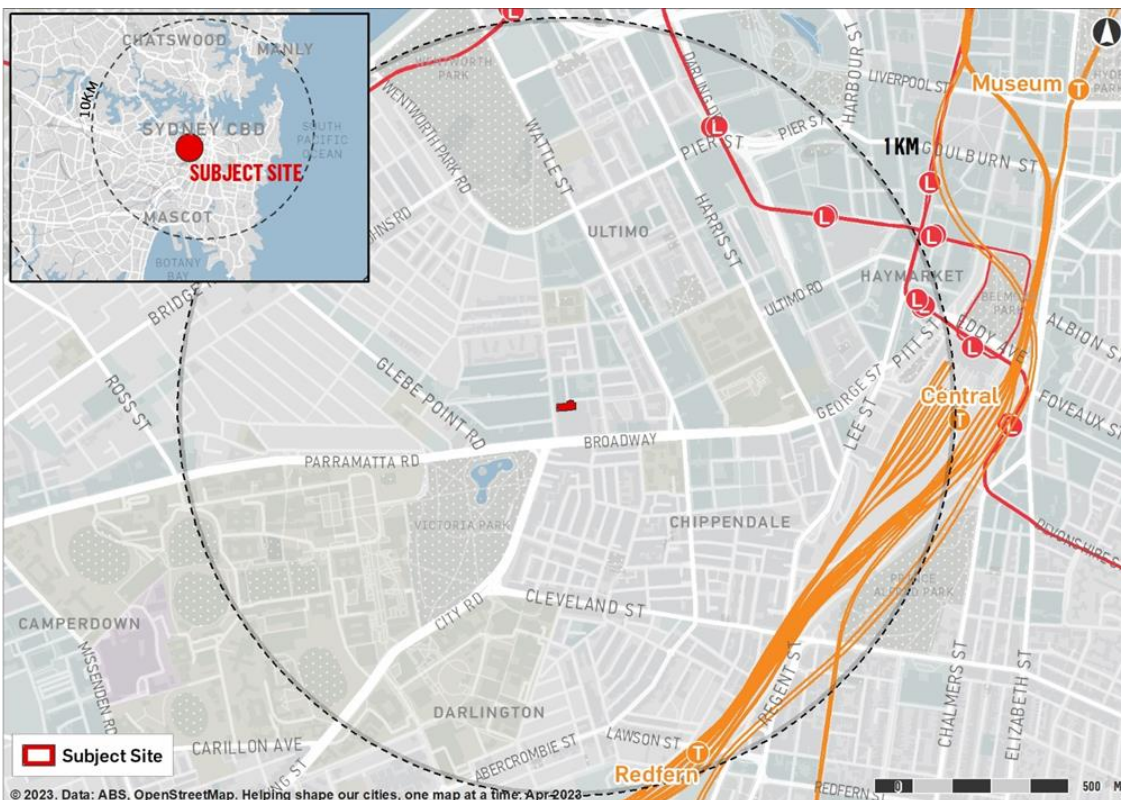
### 2.1. SITE DESCRIPTION

The site is identified as 86-90 Bay Street, Ultimo, legally described as SP 21479. The site assumes a rectangular configuration with an east-west alignment, comprising a total land area of 1,011 sqm (as surveyed). Notably, there exists a topographical differential of 2.75 metres between the front-facing Bay Street facade and the rear-facing St Barnabas Street. Moreover, the present ground floor slab is elevated above the Bay Street and footpath levels, featuring an 800mm incline towards the northern direction.

The site is located within 100m north of Broadway and is in the middle of a predominantly commercial and retail local hub within the Mount Street Ultimo Heritage Conservation Area. The site is located in the southern end of the Mountain Street Locality which contains adaptively reused older warehouse buildings and is surrounded within walking distance by major education precincts like UTS and TAFE to the east, the new mixed-use hub of Central Park to the southeast, Broadway shopping centre to the west and public parks to the north (Wentworth Park) and the southwest (Victoria Park).

The block where the site is located includes the Uni Lodge building, one of the old Grace Brothers department stores and the Readers Digest building both heritage listed and in Federation Queen Anne style. The rest of the buildings are simpler warehouse style most re-adapted to commercial or residential uses. The site currently contains a 3 storey commercial building with vehicle and service access off St Barnabas Street via a narrow lane of Smail Street.

Figure 1 Location Plan



Source: Urbis, 2023



Figure 2 Aerial Photograph



Source: Urbis, 2023

The site is within the Mountain Street Heritage Conservation Area which features a number of heritage items and contributory buildings. The area currently accommodates a mix of residential, retail and commercial land uses across the historic warehouse buildings and contemporary developments. It is noted that in the SDCP 2012 that the area will continue to provide a diverse mix of uses across adaptively reused early warehouse buildings. Consequently, a wide variety of built forms have been established across the HCA as to support the adaptive re-use of the buildings.

The building is identified as a detracting item within the HCA. It is not listed as a heritage item and does not have any specific statement of significance. The Bay Street corridor is comprised of a mixture of building scales as well as a blend of historic and contemporary stylings.

There is a mix of surrounding buildings varying from one storey to 8 storeys and varying from contemporary to early twentieth century in style. Of note, there are a number of contributory warehouse buildings that have undergone substantial modifications to the original face brickwork in support of adaptive re-use. This is evident at the warehouses at 60 Small Street, 25 Kelly Street and 22-36 Mountain Street which have all seen their facades and detailing altered with contemporary features. Of note, 14 Mountain Street includes a contemporary, multiple storey roof addition above warehouse form with minimal setbacks at the upper-level additions.

Figure 3 Site Pictures



Picture 1 View of the site looking northeast.

Source: Fitzpatrick + Partners, 2023



Picture 2 View of the site and the Uni Lodge building looking south east.

Source: Fitzpatrick + Partners, 2023



Picture 3 View of the site and Bay Street looking north.

Source: Fitzpatrick + Partners, 2023



Picture 4 View of St Barnabas Street located on the northern boundary of the site looking west.

Source: Fitzpatrick + Partners, 2023

The features immediately surrounding the site include:

- **North** The site is bound to the north by the Reader's Digest a 4-storey heritage retail and commercial building. Further to the north is a three-storey masonry building at the south end of the site and a 7-storey building approved under D/2013/1458 for retail and low-cost rental apartments at 68-74 Bay Street, Ultimo. The 7 storey tower interfaces with the subject site with a blank, northern façade that is built up to boundary. The existing tower exceeds the height limit (built to a height of 23.1m) and is built to a nil setback to the north (towards the subject site) with minimal articulation to the building form.
- **South** Directly adjoining the site to the south is the Uni Lodge building, a 5-storey heritage listed used as student accommodation currently undergoing renovation works
- **West** Directly opposite the site to Bay Street is Broadway Shopping Centre. The structure to the north west is the 1990s Broadway carpark which is a large scale, modern building with a neutral toned,



unarticulated pre-cast panelled form. The existing building is four storeys tall and well in excess of the 15-18m maximum building height applicable to the site.

- **East** Across Kettle Lane/St Barnabas Street to the northeast is an eight-storey commercial office building. The commercial building is far in excess of the 22m height limit and establishes a high-density context at the immediate locality. Heritage listed sewer pump station is located further east.

The site is located directly opposite the main retail area of Ultimo and is well served by public transportation including bus connections along Paramatta Road to the west, Glebe to the northwest and east towards Central and the Sydney CBD. The site is located 900m from Central Station providing excellent train, light rail, and further bus connections across Sydney.

Figure 4 Surrounding Development Section



Source: Fitzpatrick + Partners, 2023

### 3. PROPOSED DEVELOPMENT

This clause 4.6 Variation Request has been prepared to accompany a DA for a six-storey commercial building with one retail tenancy located on the ground plane and additional end of trip facilities located at the lower ground level. Whilst a commercial land use is sought, the proposal has considered the suitability of both a commercial and educational land use within the building, thereby allowing a future utilisation of the property for educational purposes.

A detailed description of the proposed development is provided in the Statement of Environmental Effects prepared by Urbis Pty Ltd and dated 22 May 2023. The proposal is also detailed within the architectural drawings that form part of the DA prepared by Fitzpatrick and Partners.

A summary of the key features of the proposed development is provided below:

- Demolition of the external façade and roof, maintaining the main structural building elements of the building, demolition of existing services, lifts, and fire stairs.
- Construction of a new six storey and lower ground building, inclusive of;
  - A basement carpark, ground floor retail and office spaces,
  - CLT Mass Timber structure above the existing structure,
  - A new internal courtyard light well
  - New services, lifts and fire stairs
  - New amenities including end of trip facilities.

The proposal is described in further detail within the following sections of this report.

Table 1 Numeric Overview of Proposal

Descriptor	Proposed
Land Use Activities	Commercial and Retail Premises
Site Area	1,011 sqm
Height of Building	26 m maximum height RL+34.44
Gross Floor Area	Total - 4,785 sqm (Including 2,685 sqm existing GFA, and 262 sqm of retail GFA)
Floor Space Ratio	Total - 4.73:1 (Including 0.08 for EOT, and 2.65:1 existing FSR)
Total Storeys	6 storeys with a lower ground level
Car Parking Spaces	9 parking spaces (inclusive of 1 accessible space) and 1 service vehicle bay  1 loading bay  2 motorcycle spaces  48 Bicycle spaces including 13 for visitors <ul style="list-style-type: none"> <li>▪ EOT facilities</li> </ul>

Figure 5 Façade Modelling of Proposed Development



Source: Fitzpatrick+ Partners, 2023

Figure 6 Architectural Section



Source: Fitzpatrick + Partners, 2023

## 4. EXTENT OF CONTRAVENTION

This section of the report identifies the development standard, which is proposed to be varied, including the extent of the contravention. A detailed justification for the proposed variation is provided in **Section 6** of the report.

### 4.1. DEVELOPMENT STANDARD SEEKING VARIATION – MAXIMUM BUILDING HEIGHT

The site is restricted by a maximum height provision under clause 4.3 of the *Sydney Local Environmental Plan 2012*. The relevant height of buildings map, extracted from SLEP, in **Figure 7** stipulates a maximum building height of 22m for 86 Bay Street, Ultimo.

Figure 7 Maximum HOB – SLEP 2012



Source: Urbis, 2023

The proposed maximum building height of the site is 26m (RL+ 34.44) which aligns with the height of the Uni Lodge parapet. This maximum height exceedance is located to the rear north eastern corner of the site. Bay Street is sloped to the south north direction with buildings showing a stepped roof parapet that follows the street slope. The site currently has a three storey building facing Bay Street that doesn't follow the natural roof/parapet stepping of the adjoining properties creating a detracting gap in the street scape.

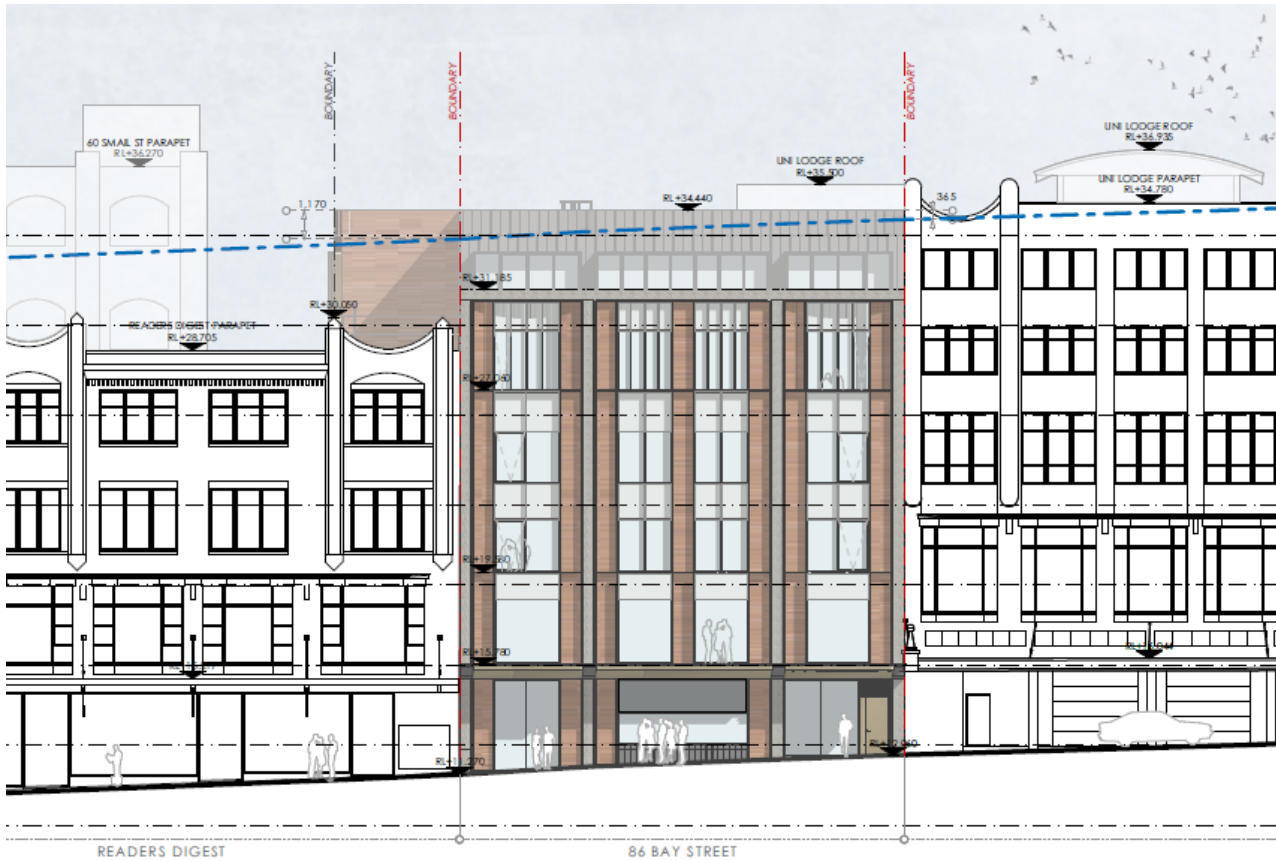
The Architectural Plans and Design Report show the specific parts of the building which project above the 22m height plane. An extract of the Bay Street elevation is provided in Figure 7, below. The 22m building height control has been measured in accordance with the SLEP 2012 definition.

**building height (or height of building)** means –

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

Figure 8 Height Plane Architectural Section



Source: Fitzpatrick + Partners, 2023

## 4.2. PROPOSED VARIATION TO CLAUSE 4.3 OF THE SLEP 2012

The following building elements are proposed to be located above the 22m building height plane:

- Roof top floor (This includes portions of the level 5 office space, north facing terrace and rooftop plant rooms).
- Roof Level (Southwestern corner).
- Roof Level (North-western corner).
- Roof Level (Northern Boundary).
- Roof Level (Rear).

Table 2 below provides a summary of the height exceedances across the building. Figure 8 depicts the areas of non compliance diagrammatically across the site. The 'blue' colouring depicts the 22m height plane and further demonstrates the UniLodge building to the south and development to the east also project beyond the 22m height limit.

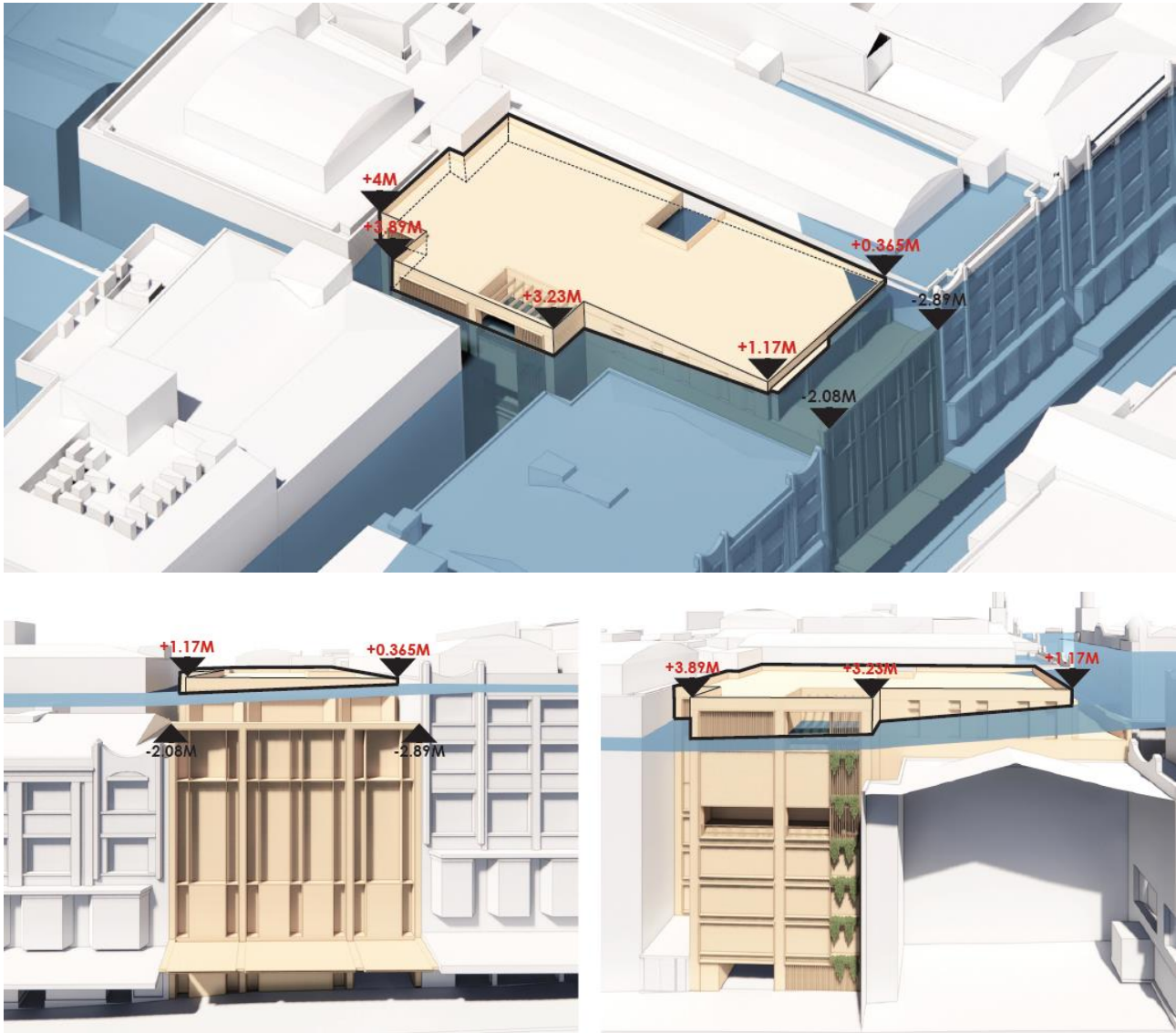
Table 2 Maximum Building Height

Building Element	Maximum Height	Departure from the standard
Roof Level (Southwestern Corner)	22.365m	+ 0.365m (1.7% increase)
Roof Level (North-western Corner)	23.17m	+ 1.17m (5.3% increase)



Building Element	Maximum Height	Departure from the standard
Roof Level (Northern Boundary)	25.89m	+ 3.89m (17.7% increase)
Roof Level (Rear)	26m	+ 4m (18.2% increase)

Figure 9 Proposed Height Exceedance Mapping



Source: Fitzpatrick + Partners, 2023



## 5. RELEVANT ASSESSMENT FRAMEWORK

Clause 4.6 of *Sydney Local Environmental Plan 2013 (SLEP)* includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 of the SLEP are:

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

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a DA that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, clause 4.6(3) requires that the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development by demonstrating:

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

Clause 4.6(4)(a) requires the consent authority to be satisfied that the applicant's written request adequately addresses each of the matters listed in clause 4.6(3). The consent authority should also be satisfied that that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which it is proposed to be carried out.

Clause 4.6(4)(b) requires the concurrence of the Secretary to have been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary consider:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (d) *the public benefit of maintaining the development standard, and*
- (e) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

The concurrence of the Secretary can be assumed to have been granted for the purpose of this variation request in accordance with the Department of Planning Circular PS 18–003 'Variations to development standards', dated 21 February 2018. This circular is a notice under section 64(1) of the Environmental Planning and Assessment Regulation 2000 and provides for assumed concurrence. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The Secretary can be assumed to have given concurrence if the matter is determined by an independent hearing and assessment panel or a Sydney district or regional planning panel in accordance with the Planning Circular.

This Clause 4.6 request demonstrates that compliance with the building height prescribed for the site in the SLEP 2012 is unreasonable and unnecessary, that there are sufficient environmental planning grounds to justify the requested variation and that the approval of the variation is in the public interest because it is consistent with the development standard and zone objectives.

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

## 6. ASSESSMENT OF CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standards relating to the height of buildings development standard in accordance with Clause 4.3 of the SLEP 2012.

Detailed consideration has been given to the following matters within this assessment:

- Varying development standards: A Guide, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court.

The following sections of the report provides detailed responses to the key questions required to be addressed within the above documents and clause 4.6 of the SLEP.

### 6.1. IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED? – CLAUSE 4.6(2)

The maximum building height prescribed by clause 4.3 of the SLEP 2012 is a development standard capable of being varied under clause 4.6(2) of the SLEP 2012

The proposed variation is not excluded from the operation of clause 4.6(2) as it does not comprise any of the matters listed within clause 4.6(6) or clause 4.6(8) of SLEP 2012.

### 6.2. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE? – CLAUSE 4.6(3)(A)

Historically, the most common way to establish a development standard as being unreasonable or unnecessary was by satisfying the first method set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method requires the objectives of the standard are achieved despite the non-compliance with the standard.

This was recently re-affirmed by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [16]-[17]. Similarly, in *Randwick City Council v Mical Holdings Pty Ltd* [2016] NSWLEC 7 at [34] the Chief Judge held that “*establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary*”.

This Request addresses the first method outlined in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The Request also addresses the third method, that the underlying objective or purpose of the development standard would be undermined, defeated or thwarted if compliance was required with the consequence that compliance is unreasonable (*Initial Action* at [19] and *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]). Again, this method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The Request also seeks to demonstrate the ‘unreasonable and unnecessary’ requirement is met because the burden placed on the community by not permitting the variation would be disproportionate to the non-existent or inconsequential adverse impacts arising from the proposed non-complying development. This disproportion provides sufficient grounds to establish unreasonableness (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

- ***The objectives of the standard are achieved notwithstanding non-compliance with the standard*** (the first method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43])

The specific objectives of the maximum building height development standard as specified in clause 4.3 of SLEP 2012 are detailed in **Table 3** below. An assessment of the consistency of the proposed development with each of the objectives is also provided.

Table 3 Assessment of Consistency with Clause 4.3 Objectives

Objectives	Assessment
<p><i>(a) to ensure the height of development is appropriate to the condition of the site and its context,</i></p>	<p>The proposed massing of the building with the recessed top floor fits within the built form of the surroundings and contributes positively to the streetscape of Bay Street by creating a stepped parapet line that is in keeping with the predominant parapet lines of the adjoining properties.</p> <p>To minimise the non compliance at the street edge and to ensure the UniLodge northern corner is appreciated, the massing of the top floor has been reduced by setting it back 6m from the street boundary and by aligning its roof parapet with the roof parapet of the adjoining Uni Lodge building at RL34.44.</p> <p>The massing doesn't create extra overshadowing on adjoining properties or the public domain and the overall the bulk and massing when viewed in context is appropriate for the area.</p>
<p><i>(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,</i></p>	<p>The proposed scheme addresses the issues of an increased building scale by creating a five-storey volume that steps in between the Uni Lodge and Readers Digest filing in the existing gap, creating a massing that vastly improves the streetscape of Bay Street. The new parapet of level 4 sits comfortably 2.5m on average below the height plane and is aligned with the window sill height of the Uni Lodge's top floor window.</p> <p>As mentioned, to minimise its impact the massing of the top floor has been reduced on its extent by setting it back 6m from the street boundary and by aligning its roof parapet with the roof parapet of the adjoining Uni Lodge building at RL34.44. As such the greatest non compliance is not perceptible from Bay Street and is located at the rear of the site.</p>
<p><i>(c) to promote the sharing of views outside Central Sydney,</i></p>	<p>Due to the heights of the surrounding buildings, the site topography and site location the site currently does not benefit from any district views or views of significance. The site provides an aspect onto Bay Street, Broadway Shopping Centre to the west and along Kettle Lane to the north.</p> <p>The building height will additionally not create any visual impacts to the surrounding developments including UniLodge to the south as the roof parapet is in line with the developments roof line. The adjoining developments do not contain windows that face the development.</p>
<p><i>(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,</i></p>	<p>As previously mentioned, the proposed massing with its recessed top floor fits within the built form of the surroundings and contributes positively to the street scape of Bay Street by creating a stepped parapet line that is in keeping with the parapet lines of the adjoining properties.</p>

Objectives	Assessment
	The height exceedance will not create a building that changes the height transition of the Bay Street streetscape nor adversely impact the established height of the Mountain Street Heritage Conservation Area. The proposed height is wholly consistent with the surrounding context.
<p><i>(e) in respect of Green Square—</i></p> <p><i>(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and</i></p> <p><i>(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.</i></p>	The site is not located within Green Square.

The objectives of the development standard are achieved, notwithstanding the non-compliance with the standard in the circumstances described in this variation report.

- **The underlying object or purpose would be undermined, if compliance was required with the consequence that compliance is unreasonable** (the third method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43] as applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24])

Whilst the object or purpose of clause 4.3 of SLEP 2012 as shown in **Table 3** would not be undermined if compliance was required, the proposed development, subject to the proposed exceedance remains fully capable meeting the objectives of clause 4.3.

- **The burden placed on the community (by requiring strict compliance with the FSR standard) would be disproportionate to the (non-existent or inconsequential) adverse consequences attributable to the proposed non-compliant development** (cf *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

Full compliance with clause 4.3 would require the removal of the Level 5 office space and terraces which would result in the loss of additional commercial space within the City of Sydney. Compliance would also result in the continued provision of a building that doesn't follow the natural roof/parapet steeping of the adjoining properties and potentially still retaining the detracting gap in the streetscape. The proposed exceedance will have nil impact on the local community as the protrusions do not result in any additional shadow impacts on the public domain or residential properties and are not visible from the public domain along Bay Street given the meaningful upper level setback.

### **6.3. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD? – CLAUSE 4.6(3)(B)**

The Land & Environment Court judgment in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, assists in considering the sufficient environmental planning grounds. Preston J observed:

*“...in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and*

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

There is an absence of environmental harm arising from the contravention and positive planning benefits arising from the proposed development as outlined in detail above. These include:

### **Visual Impact**

A very small portion of the site exceeds the height limit (ranging from 0.34m to 4m), whilst a significant portion of the site sits well below the height limit. The highest point of the building has been positioned appropriately to align with the highest natural point of the site, which is at the rear of the site. From an urban design and heritage perspective, the building height on Bay Street has been purposely designed to take cues from the heritage items to the north and south. The building setback allows for an upper level terrace that provides increased amenity to the building's occupants.

Furthermore, there are no material impacts arising from the elements projecting above the building height plane. These elements comprise the office space, north facing terrace, lift core and rooftop plant rooms. No material overshadowing or other amenity impact to surrounding properties will arise from these elements and has been demonstrated in the architect's shadow diagrams and the acoustic assessment.

These exceedances assist in creating a high quality and complete design for the building that leads to a more cohesive streetscape height plane that is in line with the adjoining heritage listed developments to the north and south of the site and following the streets natural topography.

Figure 9 provides a diagrammatic representation of the height non-compliance and illustrates how insignificant the height non-compliance is when viewed from Bay Street and how the rear exceedance is seen along a narrow aperture along Kettle Lane.

### **Loss of Privacy**

The non-compliant elements of the building are limited to the upper portion of the rooftop level and have been designed to maintain the privacy of adjacent buildings, as well as the relationship between the two adjoining buildings. If strict compliance with the maximum building height were to be enforced, the privacy impact on neighbouring properties would remain unchanged as the proposal complies with relevant separation criteria. The height breach does not increase the extent of overlooking; thus the non-compliant elements have no greater impact on privacy than the compliant elements.

### **Solar Access**

The building elements exceeding the height limit do not cause any notable additional overshadowing to neighbouring properties or the public domain when evaluated against the relevant planning regulations. The non-compliant height is set back from the surrounding streetscape and will not result in reduced solar access to neighbouring developments. The elements of the building that exceed the height limit would have minimal additional effects on overshadowing of neighbouring properties between 9am and 3pm at midwinter, as evidenced by the shadow diagrams.

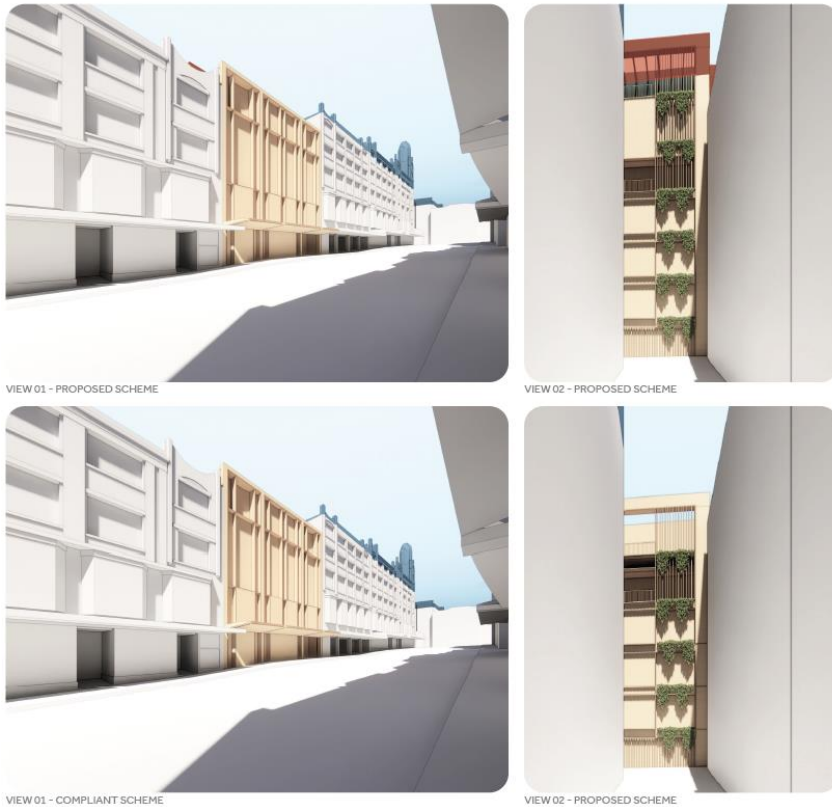
### **View Loss**

The proposed development's non-compliance with the height limit will not result in any significant loss of views or outlook compared to a compliant building. Importantly, neighbouring properties or the public domain do not currently enjoy any significant views across the subject site due to nature of the streetscape. Despite the additional height of the proposed buildings, the development remains consistent with this objective.

### **Design Excellence and Urban Design**

The height exceedances when viewed from Bay Street are minor in nature in comparison to a compliant scheme as demonstrated in **Figure 10** below. It is to be noted that the majority of the exceedance can be viewed from the rear service lane Kettle Lane which only provides vehicle access to the surrounding commercial and warehouse properties however is a secondary frontage and provides a termination point, looking south along St Kettle Lane

Figure 10 Height Plane Analysis



Source: Fitzpatrick + Partners, 2023

### Precedent Study

The prescribed maximum height limit of the site should be considered in the context of other development that has similarly demonstrated merit for variance against the development standard. Approvals have been granted for variations in building height standards for sites within the Mountain Street Heritage Conservation Area, whether for new development or additions. The following table provides a summary of the approved variations and existing non-compliant structures in the vicinity.

Table 4 Examples of Approved Heights within the Mountain Street Heritage Conservation Area

Site	LEP Maximum Height (metres)	Variation to Height	Approved Height (metres)
44 Mountain Street, Ultimo (D/2020/1288)	18m	+22.89%	22.12m
35-39 Mountain Street (D/2013/2004)	18m	+24.83%	22.47m
41 & 43-49 Mountain Street (D/2005/1562)	18m and 22m	+53.8% and +25.09%	27.7m
11 Smail Street (D/2009/2200)	22m	+21.84%	24.93m

In the course of evaluating the aforementioned applications, it was recognised that the surrounding buildings exhibit a notably higher density than the height and Floor Space Ratio (FSR) limits stipulated in the area. As a result, consideration was given that exceeding the maximum building height of 22m may be warranted based on a contextual assessment of the vicinity.

Moreover, the evaluations also took into account that such exceedances would not establish an unfavourable precedent and were generally appropriate in light of the former commercial/industrial

warehouse typology prevalent in the area. It is evident based on this development history, acknowledgement that the prescribed height development standards are incongruous with the existing context of the Mountain Street heritage conservation area.

Based on the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed maximum height of buildings non-compliance.

## 6.4. HAS THE WRITTEN REQUEST ADEQUATELY ADDRESSED THE MATTERS IN SUB-CLAUSE (3)? – CLAUSE 4.6(4)(A)(I)

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

Each of the sub-clause (3) matters are comprehensively addressed in this written request, including detailed consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. The written request also provides sufficient environmental planning grounds, including matters specific to the proposal and the site, to justify the proposed variation to the development standard.

## 6.5. IS THE PROPOSED DEVELOPMENT IN THE PUBLIC INTEREST? – CLAUSE 4.6(4)(B)(II)

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

The consistency of the development with the objectives of the development standard is demonstrated in **Table 3** above. The proposal is also consistent with the land use objectives that apply to the site under SLEP 2012. The site is located within the MU1 Mixed Use zone. The proposed development is consistent with the relevant land use zone objectives as outlined in **Table 5** below.

Table 5 Assessment of Compliance with Land Use Zone Objectives

Objective	Assessment
<i>To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.</i>	<p>The proposed development comprises of commercial, and retail uses that is compatible to the adjoining commercial and retail surrounding mixed use precinct. This land use responds to the needs of the current and future population of Sydney and is in close proximity to the Broadway Shopping centre and public transport corridors.</p> <p>The proposal is consistent with this objective.</p>
<i>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.</i>	<p>The proposed development presents an enhanced and dynamically activated street frontage, effectively complementing the diverse character of the local context. Through meticulous architectural design, particular attention has been given to the integration of the building's façade with the existing streetscape, resulting in a harmonious blend that respects the surrounding heritage fabric.</p> <p>Notably, the strategic placement of the retail tenancy at the forefront of the building plays a pivotal role in fostering pedestrian engagement and strengthening the connection to the streetscape. Overall, the proposal aligns seamlessly with the objective of encouraging non-residential land uses of retail and commercial tenancies on the ground floor, thereby creating a vibrant and functional urban environment.</p>

<b>Objective</b>	<b>Assessment</b>
<i>To minimise conflict between land uses within this zone and land uses within adjoining zones.</i>	<p>The proposed development has been carefully designed to ensure a harmonious coexistence to the existing local character and minimise conflicts between land uses within the designated zone and neighbouring zones. Careful consideration to the building design, setback requirements, and the appropriate allocation of spaces for different activities.</p> <p>By adhering to zoning regulations and conducting a thorough analysis of the neighbouring land uses, the proposed development will help maintain a cohesive and balanced environment, fostering a harmonious relationship with the surrounding area. The design approach ensures that the development will contribute to a well-planned and cohesive urban fabric while promoting a sense of continuity and compatibility between land uses.</p>
<i>To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.</i>	<p>The proposed development is in strong alignment with the objective of promoting retail and commercial tenancy on the ground floor of the building. The overall design of the development has been thoughtfully crafted to activate the ground floor, resulting in a vibrant and engaging streetscape. By incorporating commercial spaces and retail tenancies at street level, the development not only contributes to the economic vitality of the area but also enhances the functionality and appeal of the public realm. The prioritisation of non-residential uses on the ground floor creates a sense of accessibility and convenience, attracting pedestrians and fostering social interaction. This approach resonates with the objective of creating a diverse and dynamic urban environment that supports a range of activities, stimulates economic growth, and enhances the overall character and liveability of the surrounding community.</p>
<i>To ensure land uses support the viability of nearby centres.</i>	<p>The proposed additional retail and commercial floor space will support the viability of the city centre location including nearby Broadway Shopping Centre and Central Park through increased commercial floor space and revitalisation of the existing commercial building, thereby enhancing the character of the conservation area and viability of the site.</p>
<i>To integrate suitable business, office, residential, retail and other land uses in accessible locations that maximise public transport patronage and encourage walking and cycling.</i>	<p>The site is within close walking distance to high frequency transport services, and cycle links connecting with local employment opportunities and the wider Metropolitan Area.</p> <p>The proposal will provide additional office and retail space within a highly accessible inner-city location. The proposal seeks to reduce the existing car parking provision to provide 9 car spaces, 1 service bay, and 2 motorcycle spaces while providing 48 bike parking spaces and end of trip facilities to promote active transportation modes of travel. The proposal is consistent with this objective.</p>



## **6.6. HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED? – CLAUSE 4.6(4)(B) AND CLAUSE 4.6(5)**

The Secretary can be assumed to have concurred to the variation under Department of Planning Circular PS 18–003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2000*.

The Secretary can be assumed to have given concurrence as the matter will be determined by an independent hearing and assessment panel or a Sydney district or regional planning panel in accordance with the Planning Circular.

The matters for consideration under clause 4.6(5) are considered below.

- **Clause 4.6(5)(a) – does contravention of the development standard raise any matter of significance for State or regional environmental planning?**

The proposed non-compliance with the maximum building height development standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals, especially given the existing examples of non compliance in the immediate precinct.

- **Clause 4.6(5)(b) - is there a public benefit of maintaining the planning control standard?**

The proposed development achieves the objectives of the maximum building height development standard and the land use zone objectives despite the technical non-compliance.

It has been demonstrated that the proposed variation arises due to the provision of level 5 floor and partial roof spaces as well as the lift core and plant rooms.

Compliance would result in the continued provision of a building that doesn’t comfortably integrate with the built form context, nor follow the natural roof/parapet stepping of the adjoining properties creating a detracting gap in the streetscape. The proposed exceedance will have nil impact on the local community as the protrusions do not result in any additional shadow impact and are not visible from the public domain along Bay Street.

There is no material impact or benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintaining the standard.

- **Clause 4.6(5)(c) – are there any other matters required to be taken into consideration by the Secretary before granting concurrence?**

Concurrence can be assumed, however, there are no known additional matters that need to be considered within the assessment of the clause 4.6 variation request prior to granting concurrence, should it be required.

## 7. CONCLUSION

For the reasons set out in this written request, strict compliance with the maximum building height development standard contained within clause 4.3 of SLEP 2012 is unreasonable and unnecessary in the circumstances of the case. Further, there are sufficient environmental planning grounds to justify the proposed variation and it is in the public interest to do so.

It is reasonable and appropriate to vary the maximum building height development standard contained within clause 4.3 of SLEP 2012 to the extent proposed for the reasons detailed within this submission and as summarised below:

- The proposed development remains consistent with the objectives of clause 4.3 of SLEP 2012, the SDCP 2012 controls and the objectives of the MU1 Mixed Use Zone.
- The height exceedances do not result in any additional shadow or amenity impacts, nor do they result in obstructing views to other private domain areas or residential units. The exceeding elements of the development are not visible from the public domain along Bay Street; the primary frontage and important heritage streetscape.
- A compliant building envelope would restrict the development from providing a fifth floor of commercial office space and amenity to the occupants through a terrace spaces. A deletion of the non compliant building elements would also result in a form that is not drawing reference to height datums and reference elements of the adjoining heritage items to the north and south. The resulting building would see the continued provision of a building that doesn't follow the natural roof/parapet stepping of the adjoining properties and retain a detracting gap in the streetscape.
- Various height standard exceedances have been approved as part of additions to former historical warehouse buildings or as part of new development immediately surrounding the site. It has been frequently concluded within these assessment reports for the non-compliant proposals that the prescribed maximum building height of 22m could be exceeded based on a merit assessment of the surrounding context and where a commensurate well thought out development was proposed that retained the key characteristics of the existing former warehouse buildings.

For the reasons outlined above, the clause 4.6 request is well-founded. The development standard is unnecessary and unreasonable in the circumstances, and there are sufficient environmental planning grounds that warrant contravention of the standard. In the circumstances of this case, flexibility in the application of the Height of Building development standard contained within clause 4.3 of SLEP 2012 should be applied.

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