

Attachment C

<p>Clause 4.6 Variation Request Height of Buildings</p>
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CLAUSE 4.6 VARIATION REQUEST - HEIGHT OF BUILDINGS (CLAUSE 4.3)
DEVELOPMENT APPLICATION FOR A NEW COMMERCIAL BUILDING
12-18 STOKES AVENUE, ALEXANDRIA



Prepared by Planning Lab

Issued 02 May 2023

Site

12-18 Stokes Avenue, Alexandria - Lot 101 DP 1238296

Variation sought

Sydney Local Environmental Plan 2012 Clause 4.3 Height of Buildings

Extent of variation

Maximum height of buildings control = 22m

The maximum building height is 23.01m measured from ground level (existing) which is an exceedance of 1010mm as identified in Architectural DA903 by Smart Design Studio. This is a variation to the height control of 4.59%.

Summary of non-compliance

The proposed development is a new 5-storey commercial office building. The building's parapet is set at RL 32.42m which is a compliant height of 22m at the northern boundary. Due to a downwards slope in the land to the south, the height above ground level increases to 22.92m at the south-eastern boundary corner. The highest point of the building above ground level is the lift overruns which reach a maximum height of 23.01m above ground level. In addition, an array of solar panels is proposed which exceed the height limit.

The development has been proposed with a height of 5-storeys which is consistent with the maximum height in storeys under the Sydney DCP 2012. The proposal also complies with the maximum permissible FSR which is 1.5:1. The variation primarily arises from the development providing floor to floor heights of 4.5m on Ground Level and levels 1 and 2. Floor to floor height is 4.05m on level 3 and the floor to roof height on level 4 is 4.31m. These heights are greater than those required under the Sydney DCP 2012.

Aligned with the sustainable design of the building, the increased floor to floor height is beneficial to maximise natural light and airflow inside the building. The sustainable design techniques employed in the proposal, such as thermal mass and natural ventilation, are effectively complemented and enhanced by the tall ceilings in the office floors.

The minor variation to the maximum building height development standard that arises from the increased floor to ceiling heights provides a positive planning benefit in the form of improved environmental performance and increased occupant amenity. Meanwhile, the variation does not give rise to any significant negative environmental impacts. Accordingly, compliance with the height of buildings development standard is unreasonable and unnecessary in this instance as the objectives of the standard are achieved notwithstanding the non-compliance.

Introduction

This Clause 4.6 Variation Request has been prepared in accordance with Clause 4.6 (cl 4.6) of the *Sydney Local Environmental Plan 2012 (SLEP 2012)* to vary Clause 4.3 relating to the maximum height of buildings. It supports a Development Application (DA) submitted to the City of Sydney for 18 Stokes Avenue, Alexandria ('the site'). The DA proposes the demolition of an existing warehouse building and the construction of a 5-storey commercial office with a single basement level and with land to be dedicated to Council for public roadways.

The objectives of cl 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development. This request has been prepared having regard to the following:

- the Department of Planning and Environment's *Guidelines to Varying Development Standards* (August 2011);
- the objectives of Cl 4.3 of the SLEP 2012, being the development standard to which a variation is sought; and,
- relevant case law in the New South Wales Land and Environment Court and New South Wales Court of Appeal regarding Clause 4.6 variations including *Wehbe v. Pittwater Council* [2007] NSWLEC 827.

This variation request provides an assessment of the development standard and the extent of variation proposed to the standard. The variation is then assessed in accordance with the principles set out in the *Wehbe* judgement.

This Request demonstrates that the variation from the 22m height standard results in a better outcome for the development by permitting taller floor to floor heights than required by the DCP which will offer improved environmental performance and occupant amenity in comparison with a height compliant design. This Request will also demonstrate that the area of the building that exceeds the height limit does not significantly contribute to any adverse impacts with regard to view loss, overshadowing, privacy or domination of the public domain. The additional height has no substantial negative environmental impacts and the development meets the objectives of the standard despite the non-compliance.

Proposal

The site is currently occupied by two warehouse style buildings (figure 1). The northernmost building ('Building 1') is a former warehouse that has recently been converted for use as an office and retail display space under D/2017/1443. The adaptive reuse of Building 1 included contemporising of the warehouse form and use of dark brick with decorative embellishments. Parking is located to the south between the buildings.

The southern-most building ('Building 2') is a single storey metal shed that is proposed to be demolished and replaced under this DA. It is built to the eastern and western boundaries and is serviced by a large hardstand forecourt area.

This DA seeks approval for the demolition of the existing southern warehouse building on site and the

construction of a five storey plus basement commercial office building. The proposed building would result in the site having a compliant FSR of 1.48:1. The proposal also includes the dedication of land to Council as identified and required under section 5.8 of the Sydney DCP 2012. The proposed building is detailed in the Architectural Plans prepared by Smart Design Studio and are discussed in greater detail in the Statement of Environmental Effects.

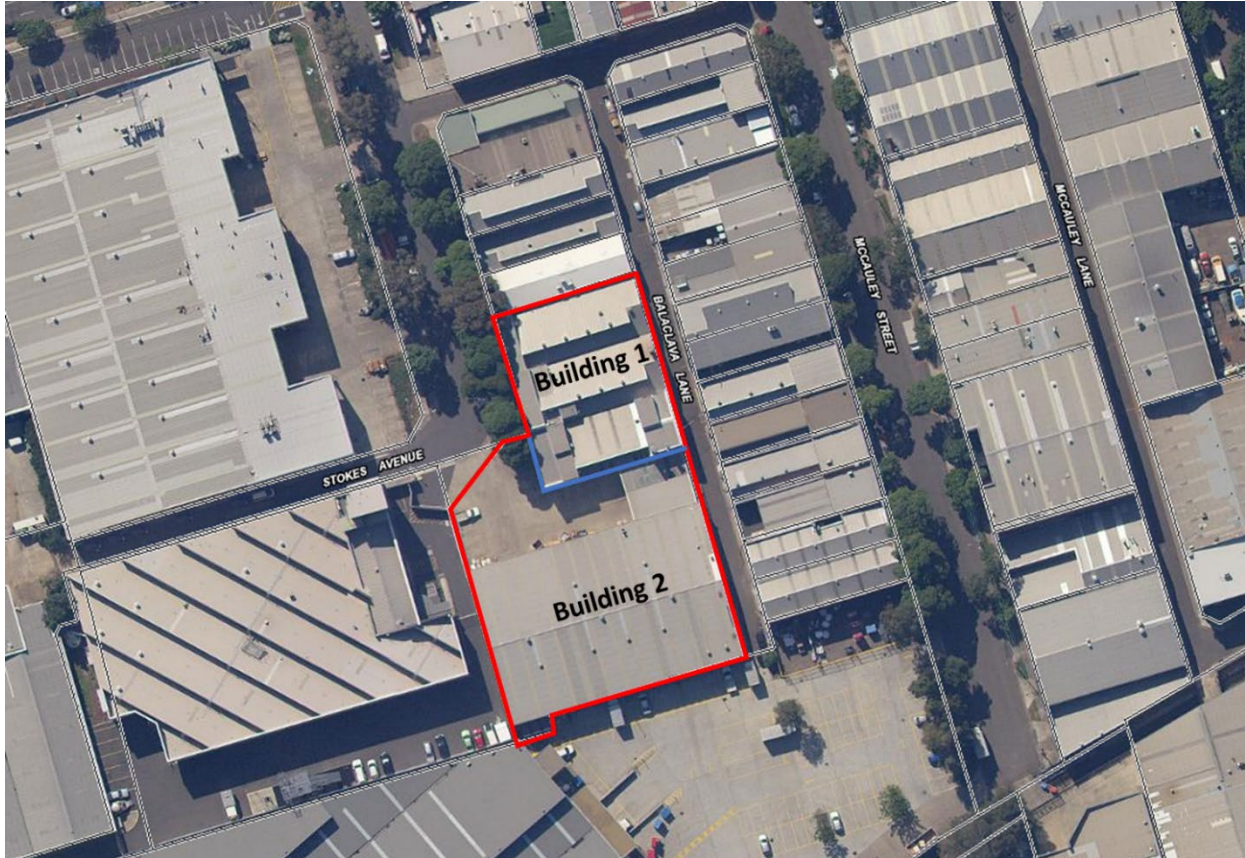


Figure 1 - Aerial image of the site

Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the SLEP 2012 provides that development consent may be granted for development even though the development would contravene a development standard imposed by the SLEP 2012, or any other environmental planning instrument, provided it is not expressly excluded from the operation of the clause.

Clause 4.6(3) prevents development consent from being granted under Clause 4.6 unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

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

This Clause 4.6 Variation Request has been prepared to satisfy Clause 4.6(3).

What is the Environmental Planning Instrument (EPI) that applies to the land?

The Environmental Planning Instrument (EPI) to which this variation relates is the SLEP 2012.

What is the zoning of the land?

The site is zoned E3 – Productivity Support, pursuant to the SLEP 2012 (**Figure 2**). The proposed commercial offices and food and drink use is permissible with consent in the zone.



Figure 2 - Land Zoning Map (Source: Land Zoning Map - Sheet LZN_010_005 SLEP 2012)

What is the development standard being varied?

Clause 4.3(2) of the SLEP 2012 provides that the maximum height for a building on any land is not to exceed the height shown for the land on the Height of Buildings Map. The site is within area 'R' and 'O' on the Height of Buildings Map. The portion of the site within area 'O' is the land identified for dedication while the proposed building is wholly on the land identified in area 'R'. Accordingly, a maximum height of 22m applies to the building as shown in **Figure 3**.

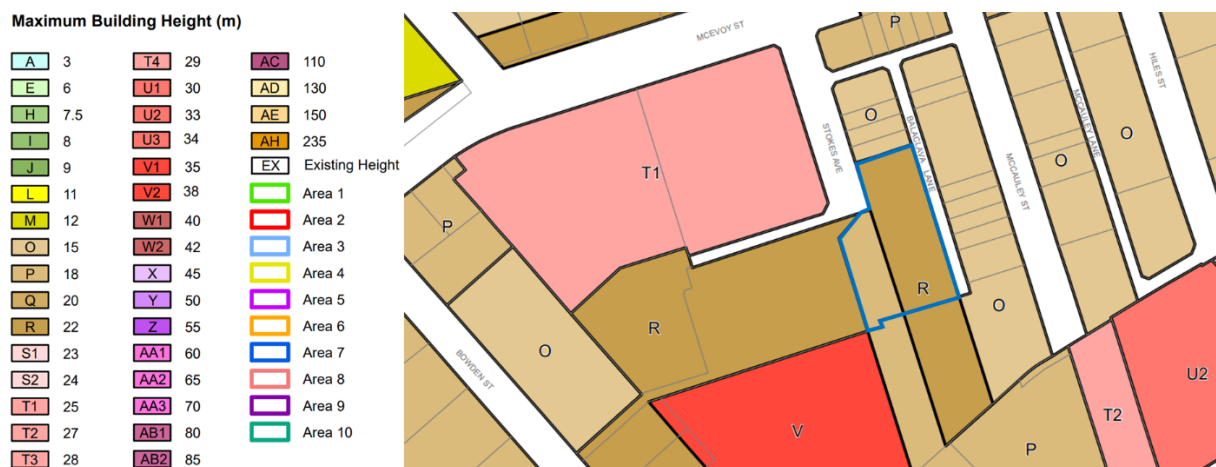


Figure 3 - Height of Buildings Map (Source: Sheet HOB_010 - SLEP 2012)

Is the development standard excluded from the operation of Clause 4.6 of the EPI?

Cl 4.6(2) states that development consent may be granted for development even though the development would contravene a development standard. However, this does not apply to a development standard that is expressly excluded under cl 4.6(8). The maximum height development standard is not identified under subclause 4.6(8) and is therefore not specifically excluded from the operation of cl 4.6 of SLEP 2012.

The Site and its Context

This application relates to 12-18 Stokes Avenue, Alexandria ('the site'), legally known as Lot 101 DP 1238296. The site is the result of the recent amalgamation of four properties and has a total area of 3,600m². The site has a slight slope with a cross fall of approximately 800mm from north to south.

The site is located within a business and industrial area of on the northern side of Alexandria. The area is located approximately 3.5km south of the centre of the Sydney CBD and approximately 500m north-west of Green Square Railway Station. The surrounding land uses are primarily light industrial.

The site is currently occupied by two warehouse style buildings (figure 1). The northernmost building ('Building 1') is a former warehouse that has recently been converted for use as an office and retail display space under D/2017/1443. The adaptive reuse of Building 1 included contemporising of the warehouse form and use of dark brick with decorative embellishments. Parking is located to the south between the buildings.

The southern-most building ('Building 2') is a single storey metal shed that is proposed to be demolished and replaced under this DA. It is built to the eastern and western boundaries and is serviced by a large hardstand forecourt area.

Extent of Variation to the Development Standard

The extent of the variation is depicted in Drawing DA903 of the Architectural Plans and extracted below as Figure 4.

The building's maximum height is 23.01m which is a variation of 1.01m or 4.6%. This height is reached at the top of the lift overrun. Solar panels on the roof also exceed the maximum height limit.

The north-western corner of the building is within the maximum height limit at RL 32.42. Due to a downwards slope in the land to the south and the east, the height above ground level increases to 22.92m at the south-eastern boundary corner.

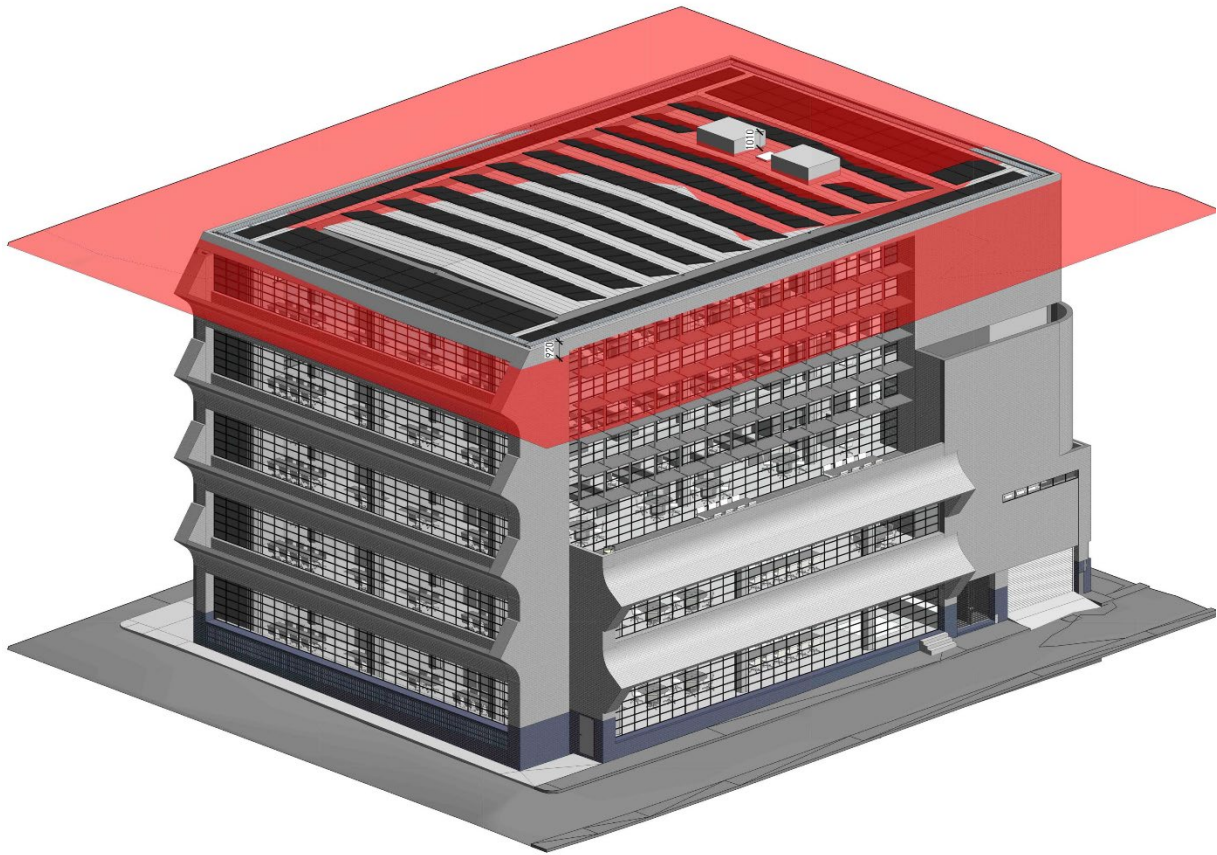


Figure 4 - Extrapolated height plane showing variation to the 22m control.

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

Tests

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

In *Wehbe v Pittwater Council* [2007] 156 LGERA 446 [42] – [51] (“*Wehbe*”) and repeated in *Initial Action* [17]-[21] the Chief Judge identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established.

Although *Wehbe* concerned a SEPP 1 objection, it remains relevant to requests under clause 4.6 as confirmed by Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, notwithstanding that if

the first and most commonly applied way is used, it must also be considered in 4.6(4)(a)(ii).

The 5 ways in *Wehbe* are that:

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

The five ways are not exhaustive and it may be sufficient to establish only one. This Request relies on the first way established under *Wehbe*. The remaining 4 are not relevant to the circumstances of the DA.

Compliance is unreasonable and unnecessary

Compliance with the Height of Buildings development standard is unreasonable and unnecessary in the circumstances of this application because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. The proposal's compliance with the objectives of the height standard is discussed below.

Clause 4.3 Objective (a)

to ensure the height of development is appropriate to the condition of the site and its context,

The subject site is located within North Alexandria. The desired future character of the area was recently considered in the "Enterprise Area Review" planning proposal by the City of Sydney which resulted in amendments to LEP controls and the creation of new specific area controls under Sections 5.2 and 5.8 of the Sydney DCP 2012. Broadly, it articulated a vision of increased height and density with the land uses to transition away from purely industrial uses towards including commercial and entertainment uses.

Broadly, the height of the subject proposal is consistent with the height in storeys control applied to the site (Figure 5). A 5-storey building with the specified street wall heights to Stokes Avenue and Balaclava Lane has been proposed. The additional building height arises from greater floor to floor heights in the building. The resulting variance to the height control is most pronounced on the roof at the lift overrun and solar panels. These elements are within the roof plane and not visible from the public domain. The building's roof exceeds the maximum height but is typically setback behind a street wall, minimising the impact. Further, the extent of this variation is minor, being less than 1m.

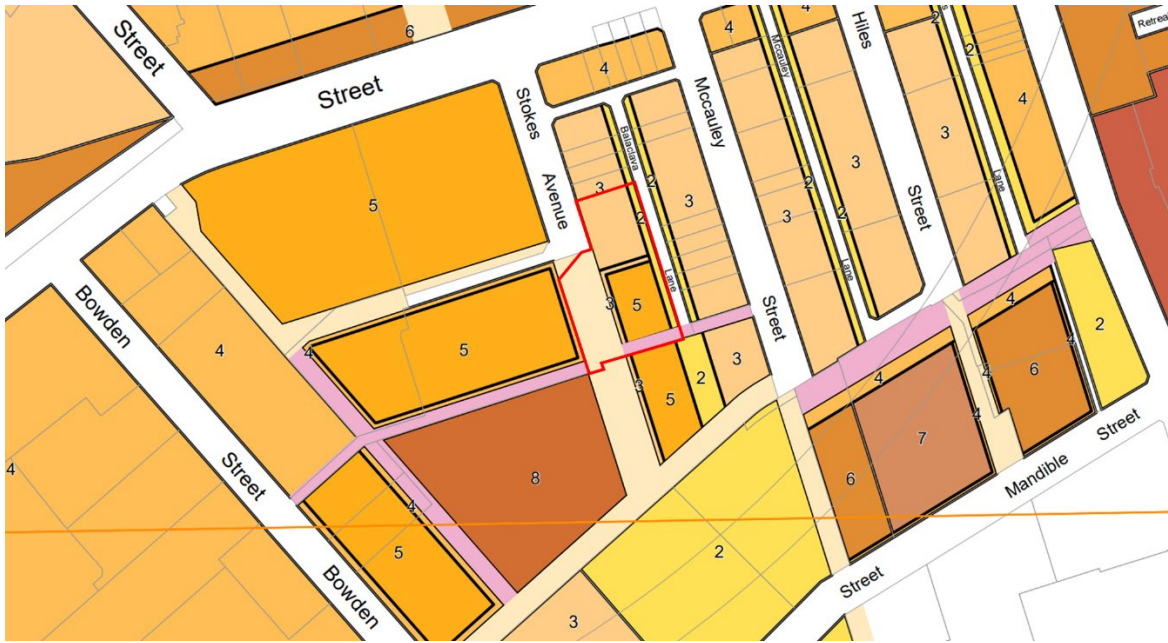


Figure 4 - Building height in storeys control (Source: Sheet HOB_010 - SLEP 2012)

The height of the building reflects the desired future character of the area which includes larger developments of 6-8 storeys to the south-east and south-west. The proposed building is part of a larger site which includes a reduction in height to 3 storeys on the northern portion of the site. The proposed development is consistent with the height of development that is envisioned in the area.

Clause 4.3 Objective (b)

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

The subject site is not heritage listed, however, part of the building (12-16 Stokes Avenue) is encompassed within the boundaries of the North Alexandria Industrial Heritage Conservation Area (C74). Notwithstanding, the subject warehouse building at 18 Stokes Avenue is outside of the HCA boundaries. Additionally, the subject site is located in a distant proximity to the following heritage items:

- 'Warehouse including interior', 32–42 McCauley Street, item no. I21
- 'Former industrial building including interior', 111–117 McEvoy Street, item no. I22

The Heritage Impact Statement by City Plan considers the proposed development’s relation to the heritage conservation area and nearby heritage items stating on pages 16-17:

The proposed development will occupy lesser space than the existing warehouse building and will be situated at the southeastern portion of the allotment, leaving a large portion of previously occupied land at the southwest part of the lot and along the south boundary for future development of a new road and future lane respectively. The proposed development will not affect the topography or views to and from the nearby heritage items due to their

isolation by existing buildings between Balaclava Lane and McCauley Street. While it is larger in scale and bulk in comparison to the adjoining building at 12-16 Stokes Avenue, the new building will have an acceptable impact on known heritage values of the North Alexandria Industrial HCA as it complements the architectural style of the recently converted and modified Smart Design Studio building. The landscaping along Stokes Avenue, directly in front of the proposed development will be enhanced through pathway and landscaping upgrades improving the streetscape character of Stokes Avenue and leaving space for future infrastructural development.

The proposed design of a new 5-storey building, being larger in scale, is sympathetic to the type, siting, form, materials and details of the surrounding character of the North Alexandria Industrial HCA, which has warehouses with high floor to ceiling heights than normal buildings making two to three-storey buildings appear at least another level higher. As noted above, the new Stokes Avenue façade will complement the design of the Smart Design Studio office building located to the north of the proposed development featuring similar peeling-folding language and curved decorative elements. The proposed design combines two buildings in an ensemble which does not dominate over the existing buildings at Stokes Avenue and Balaclava Lane rather adding gradual increase in height and enhancing established streetscape and industrial nature of the area.

The proposed development is not designed as copy or replica of other buildings in the area, instead, it has been designed to complement the character of the North Alexandria Industrial HCA through its materiality, form and style, referencing the warehouse character of the surrounding buildings in a contemporary but compatible manner.

As described above, the proposal is sympathetic to the HCA and is consistent with the desired future character of the area.

Clause 4.3 Objective (c)

to promote the sharing of views outside Central Sydney,

The site is located within an industrial area where development is typically between 1-2 storeys. The proposed development does not block any views.

Clause 4.3 Objective (d)

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

The extent of the variation to the height control is minor, being a maximum of 4.59% at lift overruns located within the centre of the roof plane. The adjoining building on the subject site has a height substantially below the height limit and provides a transition downwards to the north.

The development maintains an appropriate height transition away from Green Square.

Clause 4.3 Objective (e)

(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.

i) The site has a split height limit of 18m and 22m. The proposed building is located wholly on the area of the site designated as having the taller 22m height limit.

ii) The proposal will provide strong definition to the newly created streets and lanes surrounding the building. Awnings are to be built to the site's boundary with a small setback below allowing pedestrian circulation. All frontages will be activated by large windows and entrances on the Ground Floor. Street wall heights and setbacks above the street wall are provided in compliance with the applicable controls. The development's minor exceedance of the building height control does not negatively affect its ability to appropriately define the street network.

Compliance with the objectives of Clause 4.3

Compliance with the maximum height development standard is unreasonable or unnecessary in the circumstances of this case because the objective of the standard is achieved notwithstanding the non-compliance.

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

- The proposal is consistent with the objectives of the 'Height of Building Standard' as detailed above; and
- The proposed variation to the Height of Buildings control does not give rise to any significant or unacceptable negative environmental impacts on the amenity of the locality.

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

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

In this particular circumstance, there are sufficient environmental planning grounds to warrant the proposed variation to the height of buildings standard.

Section 4.2.1.2 of the Sydney DCP 2012 requires the following minimum floor to floor heights:

(1) Buildings with a commercial or retail use are to have a minimum floor to floor height of:

(a) 4.5m on the first basement floor to enable conversion to retail uses for all development in Central Sydney;

(b) 4.5m on the ground floor; and

(c) 3.6m on the first commercial floor and any commercial floor above

The proposed design has the following floor to floor heights and variance from the DCP minimums:

Level	DCP minimum (m)	Proposed (m)	Variance (m)
Ground	4.5	4.5	0
L1	3.6	4.5	0.9
L2	3.6	4.5	0.9
L3	3.6	4.05	0.45
L4	3.6	4.31	0.71
Total			2.96

The proposed height variation of the development is 1.01m. This height is more than accounted for in the additional floor to floor heights being proposed.

The additional floor to floor heights reinforces the sustainable design techniques of the proposed building by maximising natural light and airflow movement. The development has the goal to be highly efficient and self-sustaining in terms of energy creation and usage.

The subject site is located within an industrial area that is envisioned by Council to have a future commercial character. The proposed additional building height accordingly has no impact on residential privacy. Further, the development has minimal overshadowing impacts with additional overshadowing falling primarily on the roofs of industrial buildings and future streets. Accordingly, the proposed additional height has no significant negative environmental impacts on surrounding development.

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

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

These matters are comprehensively addressed above in this written request with reference to the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the

circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

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

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

Objective of the Development Standard

The consistency of the proposed development with the specific objectives of the height of buildings development standard is addressed above.

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the E3 – Productivity Support zone. The objectives of the zone are:

- *To provide a range of facilities and services, light industries, warehouses and offices.*
- *To provide opportunities for new and emerging light industries.*
- *To encourage employment opportunities.*
- *To enable other land uses that provide facilities and services to meet the day to day needs of workers, to sell goods of a large size, weight or quantity or to sell goods manufactured on-site.*
- *To promote uses with active street frontages.*

The subject proposal is consistent with the objectives for the E3 – Productivity Support zone:

- *The proposal provides a high quality office development.*
- *The proposed building will encourage employment opportunities.*
- *The proposal promotes uses with active street frontages.*
- *The proposal includes a ground floor café which is intended to meet the day to day needs of workers in the area.*

Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

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

The proposal demonstrates a high-quality, contemporary and sensitive design response in accordance with the objectives of Council's LEP and DCP controls. The architectural composition is highly considerate of the North Alexandria industrial past and the building's form ensures appropriate height transitions between new development and heritage items and buildings in heritage conservation area or special character area. Broadly, it articulated a vision of increased height and density with the land uses to transition away from purely industrial uses towards including commercial and entertainment uses. The office floors have been designed with robust materials and a simple layout that can be reused and readapted for various purposes that are permitted within the zone. Furthermore, the proposal involves ambitious sustainable design techniques to have a highly efficient office building that is self-sustaining in terms of energy creation and usage.

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

Conclusion

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