

# **Attachment C**

<p><b>Clause 4.6 Variation Request – Height of Buildings</b></p>
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Prepared for  
Art Gallery of NSW Trust

Date  
20 March 2024

## Appendix L - Clause 4.6 Written Request

# Upgrades to Brett Whiteley Studio

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### Revision history

Issue Reference	Issue Date	Issue Status
A	18 March 2024	First Draft to Client
B	20 March 2024	Final

# 1. Introduction

This Clause 4.6 Variation to Development Standards Request relates to proposed alterations and additions to Brett Whiteley Studio at 2-4 Raper Street, Surry Hills NSW 2010. The proposed development comprises:

- Minor excavation within existing building footprint for proposed lift core;
- Construction of a new lift core between Ground level and Level 1;
- External alterations comprising roof replacement and minor façade repairs;
- Construction of new Plant Level concealed within new roof form, with access via a ceiling hatch from new archive/library below;
- Minor internal demolition works;
- Minor reconfiguration of Ground Level and Level 1 spaces (art storage areas, gift shop and water closets) and addition of new accessible and ambulant amenities; and
- Accessibility upgrades to ensure compliance with the Disability Discrimination Act and the current access and mobility codes standards and legislation.

This written request seeks to vary the development standard for maximum Height of Buildings under Clause 4.3 of Sydney Local Environmental Plan (Sydney LEP 2012).

The proposed development:

- Is unreasonable and unnecessary in the circumstances of this particular case, as it is consistent with and achieves the objectives of the development standard in Clause 4.3 of THLEP 2019 (Wehbe Test 1); and
- Provides sufficient environmental planning grounds to justify the contravention of the development standard.

Accordingly, the proposed development can be approved as proposed, in accordance with Clause 4.6 of Sydney LEP 2012.

## 1.1 Authorship

This Clause 4.6 Variation Request has been prepared by Jasmine Bautista, Urban Planner. It has been reviewed by Jane Fielding, Associate Principal, Planning.

## 1.2 Pre-lodgement consultation

Pre-lodgement advice was requested from City of Sydney Council to discuss queries such as the Clause 4.6 Variation to the maximum building height control under Sydney LEP 2012.

Written advice was provided by Christopher Ashworth, Area Planning Coordinator, Planning Assessments, from City of Sydney Council, which states:

*No objection is raised in principle with the proposed height of the roof on the basis that the existing roof exceeds the maximum height plane, the public benefit arising from concealing the plant, the architectural merit of the proposal, and the apparent absence of overshadowing impacts. However, it is incumbent on the applicant to submit a request to vary the development standard in accordance with the provisions of Clause 4.6 'Exceptions to development standards' of the Sydney Local Environmental Plan 2012 (SLEP 2012). Support for the proposed variation to the height of buildings development standard will be contingent upon the Clause 4.6 variation request successfully demonstrating that compliance with the development standard would be unnecessary or unreasonable in the circumstances of the case.*

This Clause 4.6 Variation Request has been prepared in accordance with the above advice and the requirements of Clause 4.6 of Sydney LEP 2012.

## 2. Clause 4.6 exceptions to development standards

Clause 4.6 of Sydney LEP 2012 permits the consent authority to grant development consent for a development even though the development would contravene a development standard imposed by Sydney LEP 2012. The objectives in Clause 4.6 are as follows:

- 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 Clause goes on to provide the following:

- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*
  - (a) *compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
  - (b) *there are sufficient environmental planning grounds to justify the contravention of the development standard.*
- (4) *The consent authority must keep a record of its assessment carried out under subclause (3).*
- (5) *(Repealed)*
- (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—*
  - (a) *the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
  - (b) *the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*
- (7) *(Repealed)*
- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following—*
  - (a) *a development standard for complying development,*
  - (b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
  - (c) *clause 5.4,*

- (caa) clause 5.5,*
- (ca) clause 4.3 (Height of buildings), but only in relation to land shown as being in Area 1 or Area 2 on the Height of Buildings Map,*
- (cab) clause 4.5A (Balconies on certain residential flat buildings),*
- (cb) clause 5.3A (Development below ground level in Zone RE1),*
- (cc) clause 6.10 (Heritage floor space),*
- (cd) clause 6.11 (Utilisation of certain additional floor space requires allocation of heritage floor space),*
- (cda) clause 6.11A (Temporary alternative heritage arrangements in relation to allocation of heritage floor space),*
- (cdb) clause 6.16 (Erection of tall buildings in Central Sydney),*
- (ce) clause 6.17 (Sun access planes),*
- (cf) clause 6.18 (Overshadowing of certain public places), unless the additional overshadowing is caused by playground equipment, a shade structure, an awning, a sculpture or artwork, a community notice or a public information sign,*
- (cg) clause 6.19 (View planes), except in relation to the Martin Place View of western sky view protection plane,*
- (cga) clause 6.26 (AMP Circular Quay precinct),*
- (cgb) clause 6.29 (58–60 Martin Place, Sydney),*
- (cgc) clause 6.33 (230–238 Sussex Street, Sydney),*
- (cgd) clause 6.35 (45 Murray Street, Pyrmont), but only if the development is an alteration or addition to an existing building,*
- (cge) clause 6.36 (12–20 Rosebery Avenue, 22–40 Rosebery Avenue and 108 Dalmeny Avenue, Rosebery),*
- (cgf) clause 6.37 (296–298 Botany Road and 284 Wyndham Street, Alexandria),*
- (cgg) clause 6.41 (7–15 Randle Street, Surry Hills),*
- (cgh) clause 6.42 (102–106 Dunning Avenue, Rosebery),*
- (cgi) clause 6.40 (2–32 Junction Street, Forest Lodge),*
- (cgj) clause 6.43 (Danks Street South Precinct),*
- (cgk) clause 6.52 (1–11 Oxford Street, Paddington),*
- (cgl) clause 6.55—4–22 Wentworth Avenue, Surry Hills,*
- (cgm) clause 6.56—24–40 Wentworth Avenue, Surry Hills,*
- (cgn) clause 6.58—187–189 Thomas Street, Haymarket,*
- (ch) Division 1 of Part 7 (Car parking ancillary to other development),*
- (ci) clause 6.19A (Views of Sydney Harbour),*
- (cj) clause 6.21E(2) and (5) (Tower cluster areas),*
- (ck) clause 6.60C—2 Chifley Square, Sydney,*
- (cl) clause 6.60D—Oxford Street Cultural and Creative Precinct,*
- (cm) clause 6.60E—Flinders Street and Oxford Street,*

*(cn) clause 6.60G—15–23 Hunter Street and 103–107 Pitt Street, Sydney,*

*(co) clause 6.60H—Hunter Street Metro Station,*

*(cp) clause 6.60I—85–93 Commonwealth Street, Surry Hills.*

This document constitutes the written request required by Clause 4.6(3) of Sydney LEP 2012 in relation to the proposed development's breach of the height of buildings development standard.



# 3. The development standard to be varied

As noted earlier, this Clause 4.6 Variation has been prepared as a written request seeking to vary Clause 4.3 Height of Buildings under Sydney LEP 2012.

Clause 4.3 states the following:

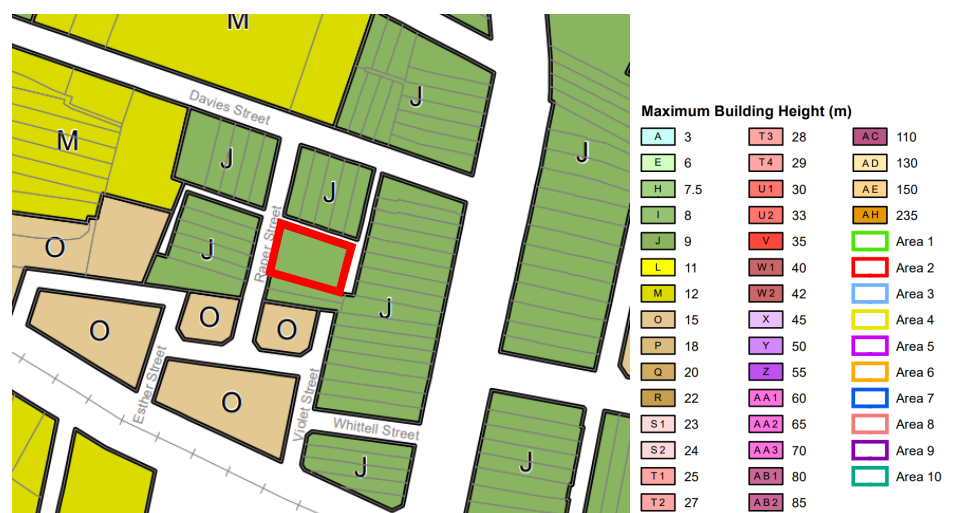
(1) *The objectives of this clause are as follows—*

- (a) *to ensure the height of development is appropriate to the condition of the site and its context,*
- (b) *to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,*
- (c) *to promote the sharing of views outside Central Sydney,*
- (d) *to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,*
- (e) *in respect of Green Square—*
  - (i) *to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and*
  - (ii) *to ensure the built form contributes to the physical definition of the street network and public spaces.*

(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](#).*

(2A) *Despite any other provision of this Plan, the maximum height of a building on land shown as Area 1 or Area 2 on the Height of Buildings Map is the height of the building on the land as at the commencement of this Plan.*

The Sydney LEP 2012 Height of Buildings map identifies that the subject development site has a maximum height of 9m (refer to **Figure 1** below).



**Figure 1 Maximum Height of Buildings Map**

Site outlined in red.

Source: Sydney LEP 2012 Height of Buildings Map - Sheet HOB\_016

# 4. Extent of variation to the development standard

This Clause 4.6 Variation Request seeks to vary the 9m maximum building height control applying to the site, by proposing a maximum height of 10.4m. The exceedance of this variation against the maximum building height control is 1.4m or 15.6%.

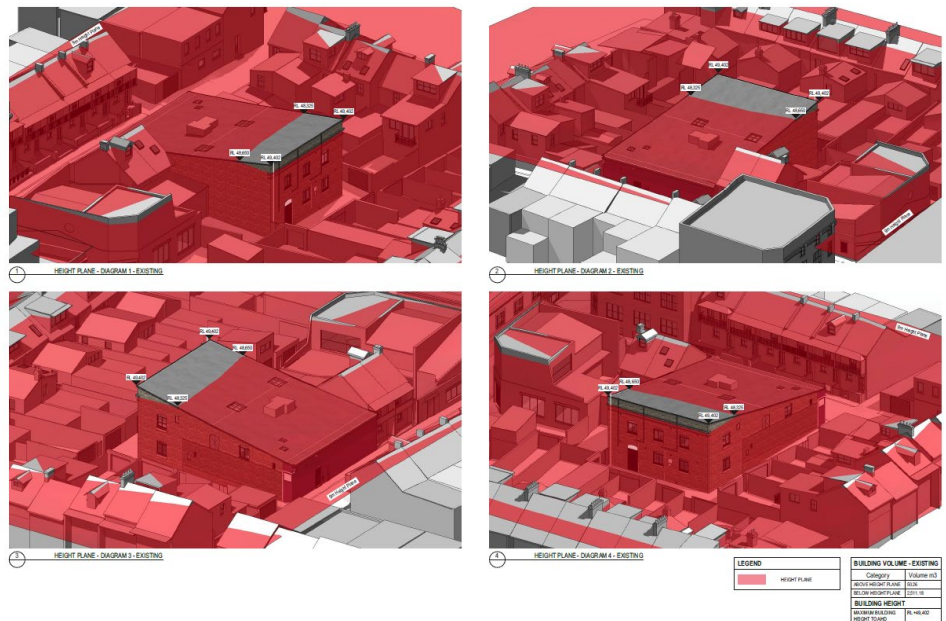
It is important to acknowledge that the Brett Whiteley Studio building already exceeds the development standard, with the current building height being 10.4m (15.6% exceedance). The maximum height of the new roof form therefore aligns with the maximum height of the existing roof form.

The design of the new roof is curved, resulting in only part of the Brett Whiteley Studio exceeding the Height of Buildings development standard – the eastern portion of the site towards Davies and Austin Lane. The new roof form has been deliberately designed to conceal a new Plant Level, with access via a ceiling hatch from new archive/library below. Refer to **Figure 4 to Figure 9**.

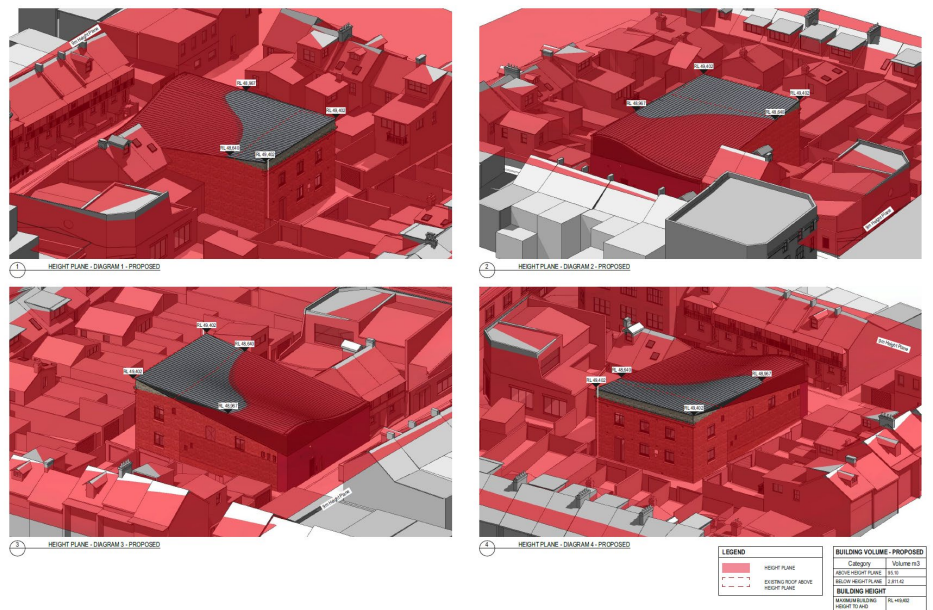
A numerical summary of the extent of variation is provided at **Table 1** below.

**Table 1 Numerical overview**

Item	Existing	Proposed
Building height (m)	10.4m	10.4m
Building height (RL)	49,402 RL	49,402 RL
Building volume above the 9m height plane	50.26m <sup>3</sup>	95.10m <sup>3</sup>
Building volume below the 9m height plane	2,511.18m <sup>3</sup>	2,811.42m <sup>3</sup>



**Figure 2 Axonometric drawings showing the existing building in relation to the 9m maximum building height control under Sydney LEP 2012**  
Source: TZG Architects



**Figure 3 Axonometric drawings showing the proposed development in relation to the 9m maximum building height control under Sydney LEP 2012**  
Source: TZG Architects

#### 4.1 Rationale for height exceedance

The proposed height exceedance allows for a new plant level and acoustic mechanical plenum, that will minimise acoustic impacts on neighbouring properties from the proposed 24-hour climate control air conditioning system.

There is desire for a quieter air conditioning unit to limit acoustic impact on surrounding residential amenity. Newer air conditioning units typically have quieter operation. In addition, acoustic attenuation is provided to the new roof, through proposed acoustic louvres, to isolate and reduce noise from the air conditioning plant.

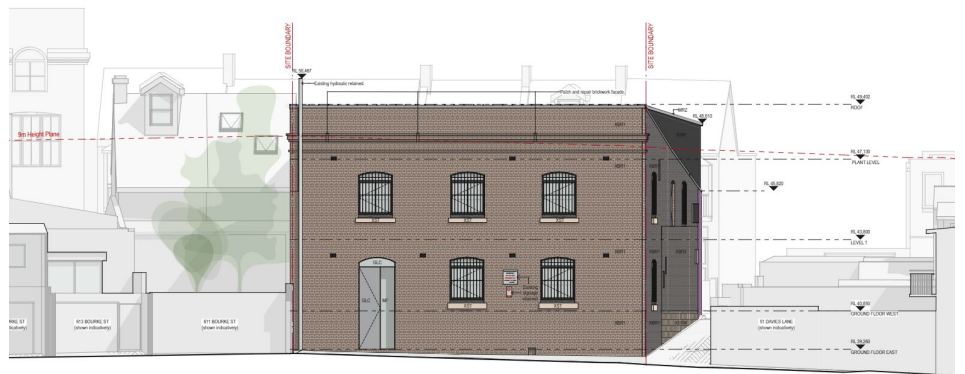
The air conditioning plant is also necessary to preserving Brett Whiteley's art collection and therefore, it is critical that it operates 24 hours a day.

There would indeed be a negative public benefit from upholding the height limit as it means that the upgrade would not be able to proceed or proceed in a severely compromised form. As aforementioned, the current built form of Brett Whiteley Studio already exceeds the maximum height control. Hence, it would involve significant unnecessary changes including demolition, to the existing gallery to comply with the applicable maximum building height control.

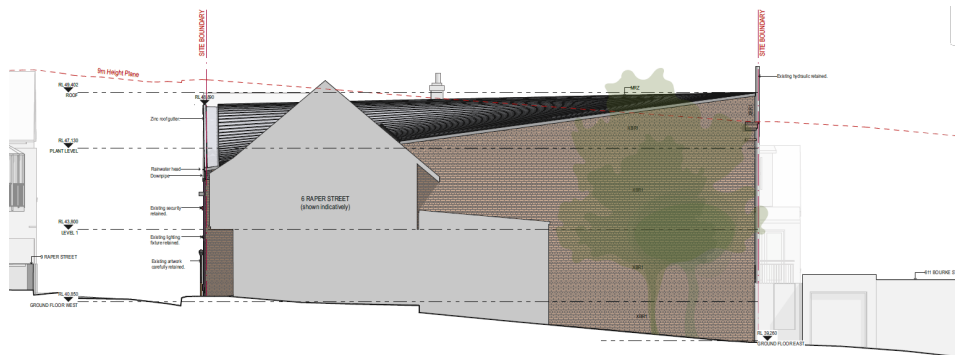
Consideration has been given to how the height exceedance is acceptable further below in **Section 5**.



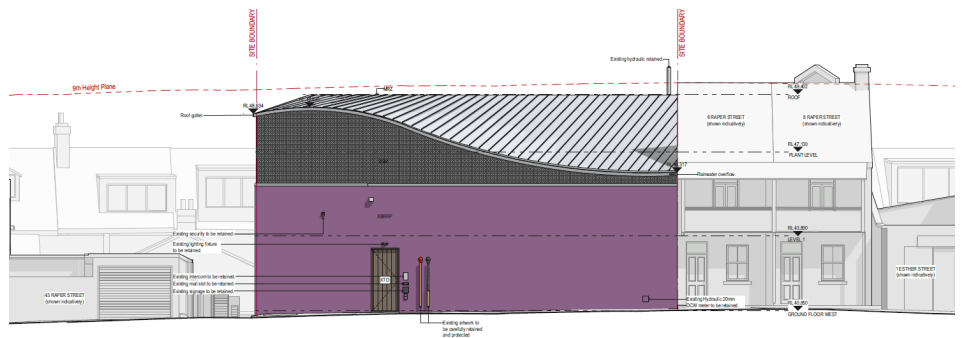
**Figure 4 Proposed north elevation**  
Source: TZG Architects



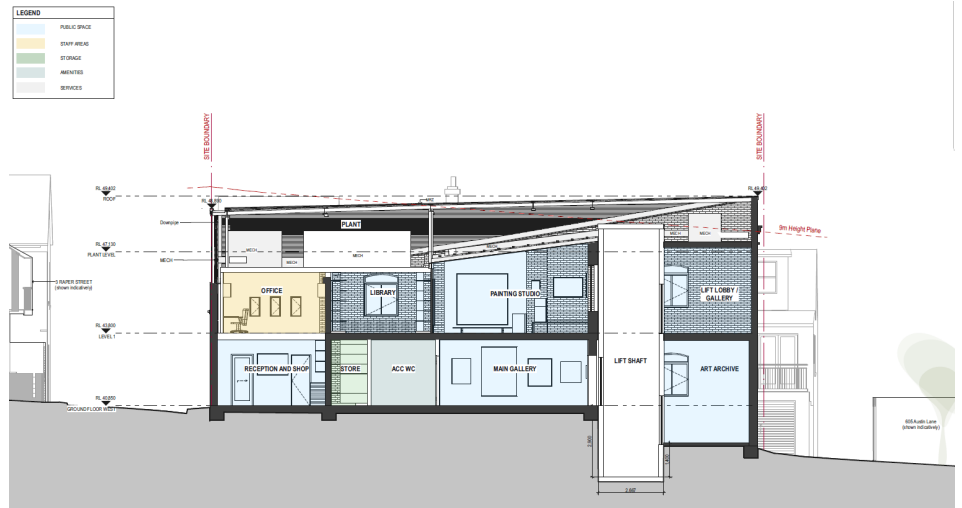
**Figure 5 Proposed east elevation**  
Source: TZG Architects



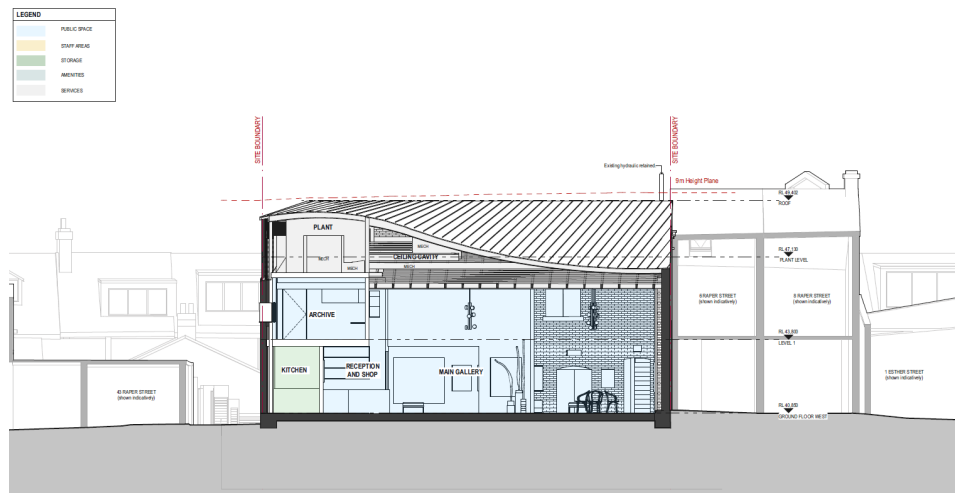
**Figure 6 Proposed south elevation**  
Source: TZG Architects



**Figure 7 Proposed west elevation**  
Source: TZG Architects



**Figure 8 Proposed section 01 looking north**  
Source: TZG Architects



**Figure 9 Proposed section 02 looking east**  
Source: TZG Architects



# 5. Assessment of variation

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

Clause 4.6(3)(a) of the LEP 2012 requires the applicant to provide justification that strict compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

### Wehbe Method

In *Wehbe* (at 43-48), Preston CJ established five potential ways for determining whether a development standard could be considered to be unreasonable or unnecessary and that approval of the objection may be consistent with the aims of the policy. These include the following methods:

1. *“The objectives of the standard are achieved notwithstanding non-compliance with the standard;”*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
4. *The development standard has been virtually abandoned or destroyed by the Council’s own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.*
5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.”*

Relevant to the proposed development, the first method is considered to be most appropriate in establishing that compliance with the development standard is unreasonable or unnecessary.

### Wehbe Test 1 – Objectives of the Height of Buildings standard

An assessment against the objectives of the Height of Buildings development standard is provided below:

1) *The objectives of this clause are as follows:*

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

The design has considered the condition of the site and its context to ensure that the development can exist in harmony with its surroundings.

There is a proposed height increase in built form at the northern and western portion of the roof towards Raper Street and Davies Lane, however, due to the topography of the site, this portion of the roof largely complies with the maximum height limit of 9m.

The proposed new roof will exceed the maximum building height at the north-eastern portion of the site towards Austin Lane and Davies Lane, at 10.4m (exceedance of 1.4m). The proposed maximum height has been designed to match the current maximum building height of the Brett Whiteley Studio building.

The built form of the new plant level and building form will align with the height of adjoining terraces.

The façade will be treated to match the existing warehouse building until it reaches plant level. Refer to **Figure 10**.



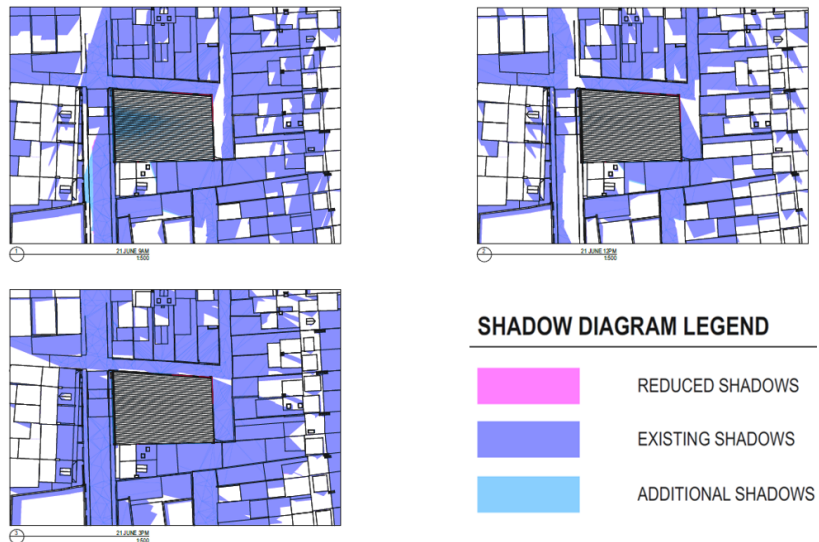
**Figure 10 Same materials being used to match the existing warehouse building**  
Source: TZG Architects

The plant level and roof will be of more contemporary appearance to be complementary to the original warehouse building and also to reflect the subject of the building:

- The façade of the plant level will be mesh stretched taut, with acoustic louvres behind, and the roof will be zinc. The mesh will allow for air conditioning intake and exhaust within, while the louvres will acoustically and visually screen plant operation behind;
- The form of the roof is a curve, reminiscent of Brett Whiteley’s art. The curved roof form will hide the air conditioning plant, lift overrun and other plant.

There will be conservation repairs made to the exterior of the warehouse building. These, together with other proposed alterations and additions, have been supported by the heritage consultant (Tonkin Zulaikha Greer in their Statement of Heritage Impact), and found by the consultant to enhance the character of the conservation area.

The design has also been carefully designed to reduce overshadowing to neighbouring properties. Solar access diagrams have been prepared by TZG Architects at **Appendix A** and shown in **Figure 11**. These diagrams demonstrate that the proposed development will not result in any significant changes to shadow impacts to surrounding properties, as additional overshadowing at 9am and 12pm during the winter solstice is limited to the public domain and the roof of the neighbouring property at 6 Raper Street.



**Figure 11 Shadow diagrams**  
Source: TZG Architects

The proposed roof form has considered neighbouring views, with no impacts anticipated given the change is relatively minor. Therefore, despite a slight height exceedance, the proposed height limit is compatible with its surrounds given there is no change to the current maximum height of the building

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

The proposed new roof is curved in shape towards Raper Street. It rises up to the north to accommodate the acoustically attenuated plant room and slopes down to the south to meet the height of roofs of the adjacent terrace houses, to ensure an appropriate height transition is achieved within the heritage conservation area.

Refer to the proposed elevations and sections at **Figure 4** to **Figure 9** above.

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

There are no significant views relevant to the site as referenced under Sydney LEP 2012 or Sydney DCP 2012.

Notwithstanding, consideration has been given to how the proposed development may affect views of neighbouring properties, by aligning the proposed maximum height to the current maximum building height.

The impact on view sharing of surrounding properties from the proposed development, specifically attributed to the height exceedance over the 9m height limit, is demonstrated by comparing the existing and proposed built form in the height plane diagrams at **Appendix A**. These show windows of the surrounding buildings and are replicated above at Figure 2 and Figure 3. In summary, there will be only minor impact overall to existing view sharing.

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

The proposed development is not located within Central Sydney and Green Square Town Centre.

*(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.*

Not relevant.

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

In the case *Four2Five vs Ashfield Council* [2015] NSW LEC 90, Pain J held that a Clause 4.6 must also demonstrate that there are environmental planning grounds to justify contravening the development standard, in addition to meeting the objectives of the standard.

Moreover, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the Court stated that the phrase ‘environmental planning grounds’ is not defined but would refer grounds that relate to the subject matter, scope and purpose of the Environmental Planning and Assessment Act 1979 (EP&A Act), including the objects in Section 1.3 of the Act.

With the achievement of the objectives of Clause 4.3, it is considered that there are sufficient environmental planning grounds to justify contravening the development standard because it meets the objectives of the development standard, the objectives of the zone, the objects of Section 1.3 of the EP&A Act, and the variation does not result in any adverse impacts as detailed below.

The design has considered the condition of the site and its context to ensure that the development can exist in harmony with its surroundings. Refer to response to “Height of Buildings” development standard above.

Consistency is achieved with objectives of the SP2 Infrastructure zone, as that part of the development resulting in the proposed height exceedance is maintaining and supporting the purpose of the approved community facility infrastructure (a museum).



The amenity of adjoining development is expected to be maintained considering it results in the following acceptable impacts:

- Negligible overshadowing to surrounding properties;
- Reduces noise impact from plant by concealing new plant and lift overrun in new roof form;
- Only minor additional view sharing impacts to windows of surrounding buildings;
- Visually improves views of roof by concealing plant and lift overrun with addition of attractive curved roof form;
- Architectural merit of the proposed addition; and
- Is compatible with the building and the conservation area.

There would indeed be a negative public benefit from upholding the height limit as it means that the upgrade would not be able to proceed or proceed in a severely compromised form. As aforementioned, the current built form of Brett Whiteley Studio already exceeds the maximum height control. Hence, it would involve significant unnecessary changes including demolition, to the existing gallery to comply with the applicable maximum building height control.

The proposed development will provide for a future development which is responsive to site and context and maintains a high level of amenity within the site and to surrounds. It represents the orderly and economic use of land and good design and amenity of the built environment, as identified by Section 1.3 of the Environmental Planning and Assessment (EP&A) Act 1979.

Overall, it results in better environmental planning outcomes for the surrounding context and also the subject premises, being a public museum/art gallery that is for the purpose of furthering the social, cultural and intellectual development of the community.

# 6. Conclusion

This written request is made pursuant to Clause 4.6 of the Sydney LEP 2012 to vary the permitted maximum building height development standard contained within Clause 4.3 of Sydney LEP 2012.

The proposed variation is attributed to part of proposed new plant level and new roof form. A variation is sought for a non-compliance with the 9m height control applying to the site, by proposing a maximum height of 10.4m. The percentage of this variation against the height control is 1.4m or 15.6%. There is no change to the current maximum building height on site, as the proposed maximum building height matches the existing maximum building height.

The written request demonstrates:

- the proposed development is consistent with and achieves the objectives of the Height of Buildings development standard under Clause 4.3(a) of the Sydney LEP 2012 (Wehbe Test 1);
- The proposed development is consistent with the objectives of the SP2 Infrastructure zone;
- there are sufficient environmental planning grounds to justify the contravention of the Height of Buildings development standard under Clause 4.3(b) of the Sydney LEP 2012;
- the proposal is consistent with Section 1.3 of the EP&A Act 1979.

The proposed variation to the Building Height development standard for proposed height exceedance will be in the public interest because it is consistent with the objectives of the development standard, and the objectives for development of the zone.

The assessment above demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case and that the justification for the height exceedance is well founded. In addition, the proposed development will provide a better planning outcome for the site and surrounds, with no significant adverse environmental impacts.