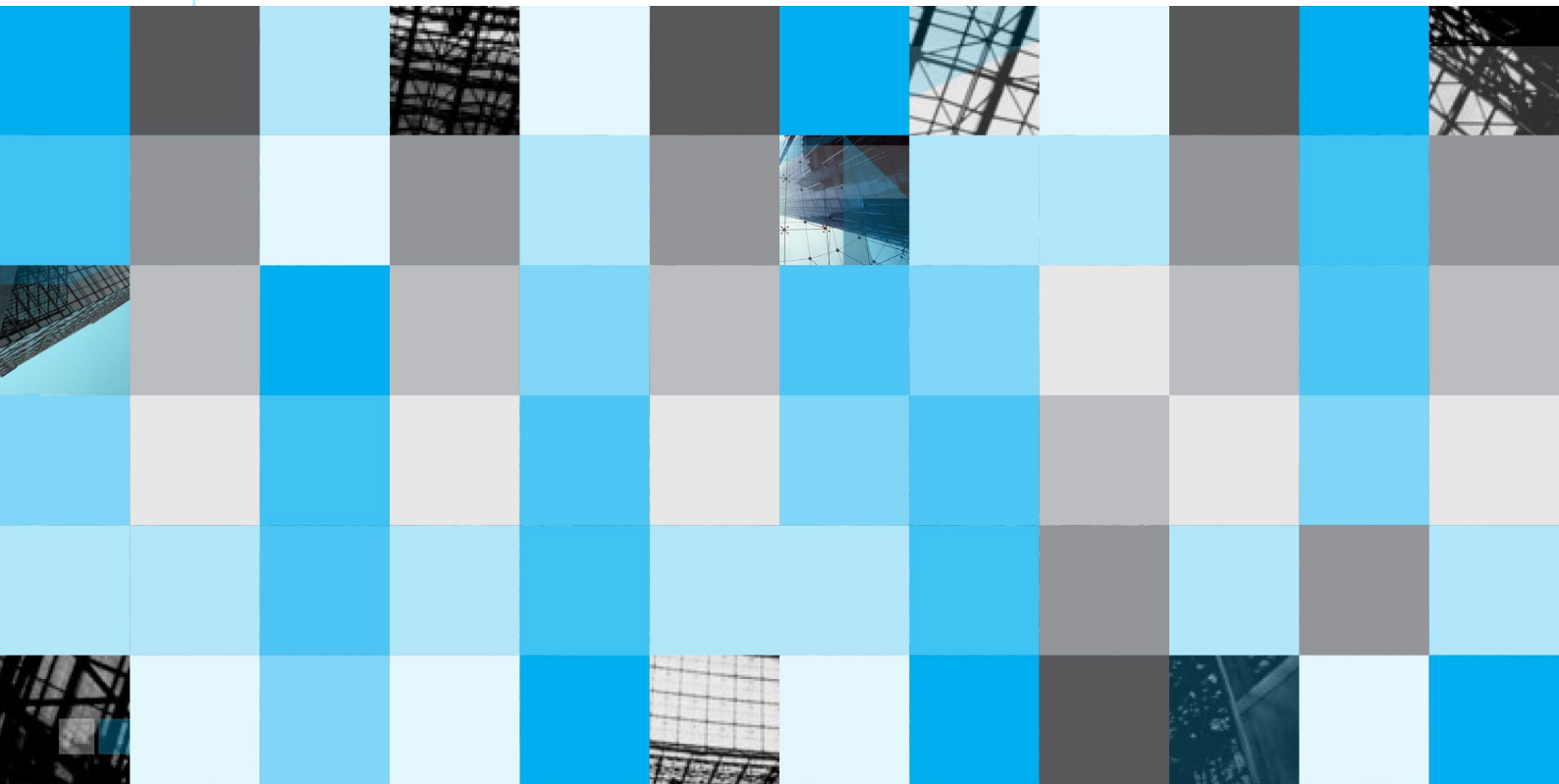


Attachment C

<p>Clause 4.6 Variation Request – Height of Buildings</p>
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375 – 387 Cleveland Street, Redfern

Clause 4.6 – Building Height Development Standard

Clause 4.6 – Building Height Development Standard

375 – 387 CLEVELAND STREET, REDFERN

June 2024

Prepared under instructions from
[Stasia Property](#)

by

[Aaron Sutherland](#)
B Town Planning UNSW

aaron@sutherlandplanning.com.au
Tel: 0410 452 371
PO BOX 812 BOWRAL NSW 2576

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1.0 CLAUSE 4.6 REQUEST – BUILDING HEIGHT

1.1 Introduction

This request for an exception to a development standard is submitted in respect of the height of buildings development standard contained within Clause 4.3 of the Sydney Local Environmental Plan 2012 (SLEP). The request relates to a Development Application for the demolition of existing structures and the erection of a 3 storey commercial building above a single basement level at 375-387 Cleveland Street, Redfern.

The proposed new building will provide 3 new retail tenancies at ground floor which will activate the street edges, a single retail floorplate on the first floor which is intended to be occupied for a small supermarket, and a single office tenancy on the second floor with outdoor terrace area.

1.2 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the Sydney Local Environmental Plan 2012 provides that development consent may be granted for development even though the development would contravene a development standard imposed by the Sydney Local Environmental Plan 2012, or any other environmental planning instrument.

However, clause 4.6(3) states that development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

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

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

1.3 Development Standard to be varied

Clause 4.3 states:

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

Building height (or height of building) is defined as the vertical distance between ground level (existing) at any point 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.

The maximum height shown for the land on the Map for the site to which the proposed building relates is 12 metres, as shown in Figure 1.

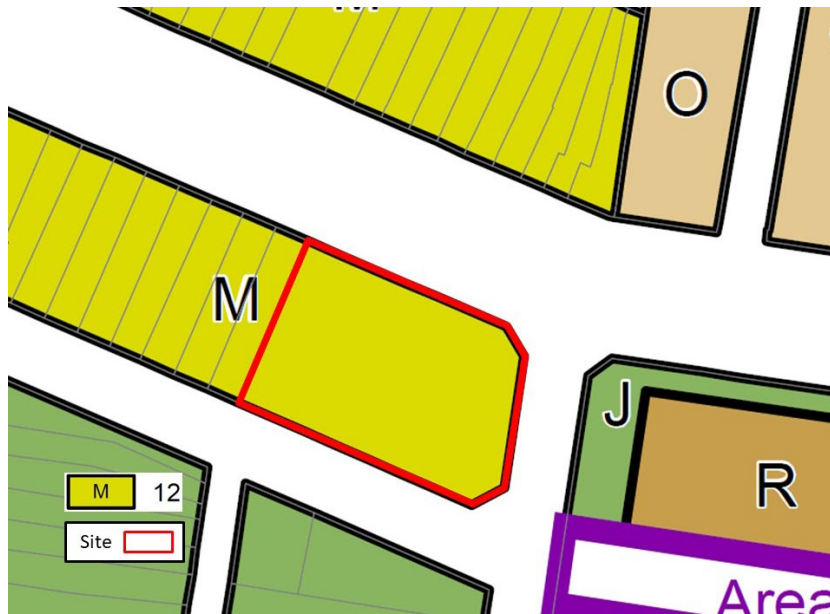


Figure 1:

Extract from the SLEP
Height of Buildings
Map

1.4 Extent of Variation to the Development Standard

The roof height plan prepared by Architectus Conrad Gargett (with exception below) illustrates that whilst the parapet of the building around the site is below the height control, the roof of the building marginally exceeds the height control, with a maximum height of 13.3 metres at the south-eastern corner which is a 1.3 metre or 10.8% variation. The lift overrun also exceeds the 12 metre height control, with a maximum height of 14.3 metres which is a 2.3 metre or 19.1% variation.

These elements are illustrated in the 3D height plane diagram in Figure 2 below. A comparison of the proposed heights against the development standard applicable to the site is illustrated below:

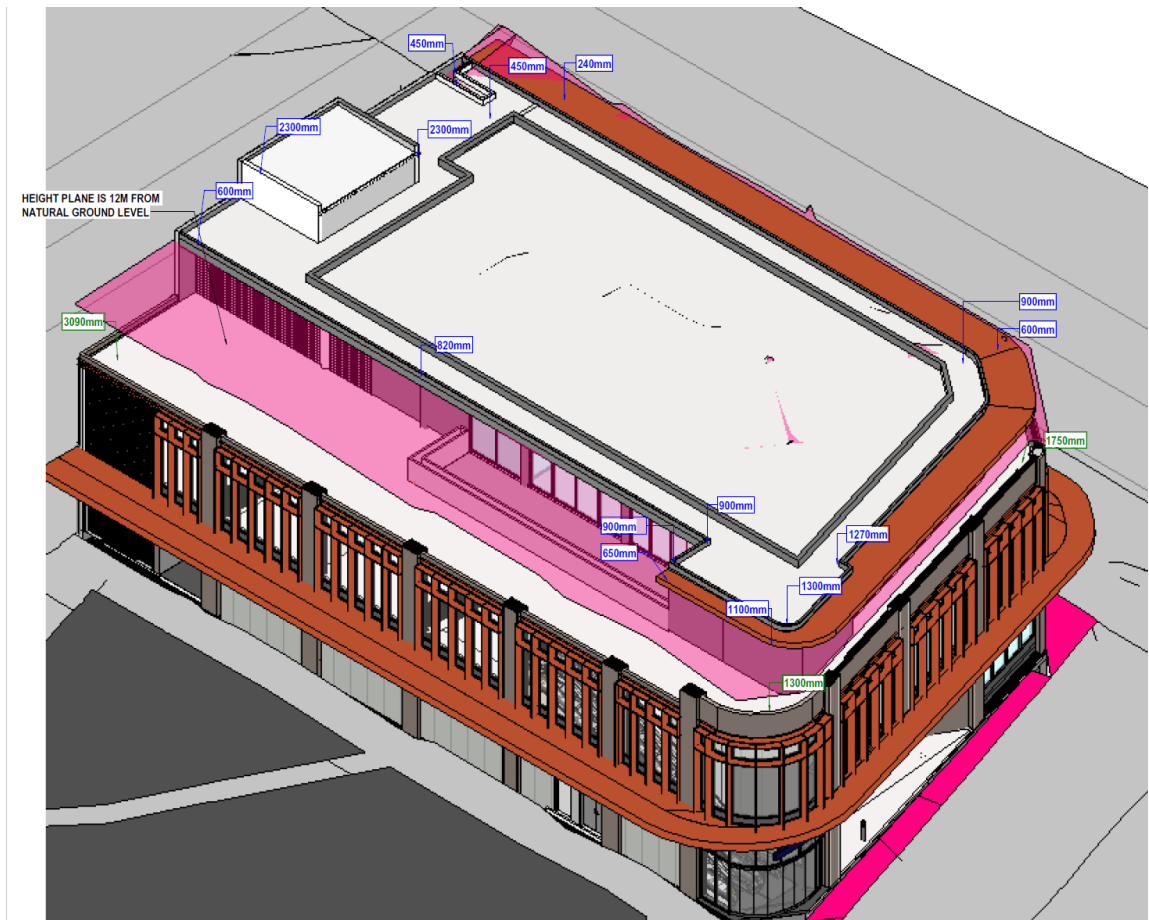


Figure 2:

Height plane drawing which illustrates the components which are above the height control

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

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was 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 addition, in the matter of *Randwick City Council v Mical Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Justice 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 five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

The specific objectives of the building height development standard, as specified in clause 4.3 of the Sydney Local Environmental Plan 2012 are identified below. A comment on the proposal’s consistency with each objective is also provided.

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

The proposal is 3 storeys in height as anticipated by the DCP for the site, and is therefore broadly appropriate to the condition of the site and its context. However, as a result of the commercial uses in the building instead of residential, the required floor to floor heights result in a minor variation to the height control.

In order to mitigate the impact of the height variation and to achieve a more appropriate contextual design response, the development has been designed with a two storey base with a masonry grid which is proportioned as an interpretation of the fine grain vertical pattern of the immediately adjacent row of terraces. The top floor, which comprises the elements which exceed the height control, is set back from the levels below and proposed with a predominantly glazed wall with fine window detailing and a light weight projecting roof element to float above the base of the building. This achieves a recessive termination for the top of the building. The expressed scale of the street wall as 2 storeys is a sympathetic response to the context of the site.

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

The proposal is located within a heritage conservation area and the development provides a design response which specifically acknowledges the adjacent contributory items by providing a lower two storey street wall which achieves an appropriate transition in scale between this new development and the context of the site.

(c) to promote the sharing of views,

The proposed development will not impact on any scenic or iconic views.

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

Not applicable.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The underlying objectives and purpose of the height control are relevant to the proposed development. However, the proposed development is consistent with those objectives on the basis that the proposed height is compatible with the existing and future scale of the surrounding buildings and will sit comfortably with the context of the site with no significant adverse impacts to adjacent properties.

3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The underlying objective of the height control is to achieve an appropriate height on the site which is compatible with the emerging context of the site. Due to the design, location and configuration of the

proposed development, it successfully achieves these objectives. Strict compliance with the height control would lead to a less satisfactory outcome as it would negatively impact on the quality of the design and the ability to provide a building which is entirely commercial. Strict compliance would encourage the introduction of residential uses within the upper levels of the development which is not a preferred outcome due to the hostile nature of Cleveland Street. Accordingly, it is considered that strict compliance would likely result in the defeat of the underlying object and purpose of the height control because it would encourage a less desirable outcome for the subject site.

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;**

Council has historically adopted a relatively flexible approach to the implementation of the height control in circumstances where the objectives of the control are achieved.

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.**

The proposed zoning of the land is considered to be reasonable and appropriate.

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

- The proposal is for a 3 storey development as anticipated by the 12 metre height control and compliant with the Sydney DCP 2012 height in storeys control.
- The building is entirely commercial and does not include any residential levels, which requires higher floor to floor heights than anticipated by the height control and results in the height breach. Due to the hostile interface with Cleveland Street, it is preferable to only have commercial uses on the subject site when compared with more sensitive residential uses. It is not possible to reduce the overall height of the development and also achieve the required floor to floor levels for commercial development as required by the Sydney Development Control Plan 2012.
- The perimeter of the development is compliant with the height control. The areas of the top floor which exceed the height control, have been deliberately set back from the edges of the site and are recessive in language which effectively mitigates the visual impact of the proposed height variation.
- The component on the building which exceeds the 12 metre height plane to the greatest extent, being the lift overrun, has been discreetly located centrally within the roof of the building which is well setback from the edges of the building. This component is unlikely to be readily visible from the street or the ground floor plane of surrounding sites. Accordingly, the proposed areas of variation to the height control do not result in any adverse impact to adjacent properties.
- The scale of the development in terms of its three dimensional size will not be perceived as jarring or antipathetic in a streetscape and urban design context.
- The elements of the development which exceed a height of 12 metres do not result in any unreasonable impacts on the amenity of the adjoining properties in terms of loss of solar access, loss of privacy or view loss. In particular, the shadow diagrams which support this application demonstrate the shadow which would be cast by a compliant envelope on the site and the proposed shadow, and it is evident that there is negligible difference between the two shadows. This is largely because the top level has been set back from the edges of the site.

- The locality is undergoing a transition in its character, which is evident from the Surry Hills Village development which is currently under construction directly opposite the site to the east. The proposed variation to the height control is minor and will not result in a building which is inconsistent with the desired future character of development in the zone and locality generally.
- Given that there is no adverse impact in relation to the proposed variation, strict compliance would not result in any benefit to the streetscape or the amenity of the adjoining properties.

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

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

The Land & Environment Court matter of *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- 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

The 12 metre height control for the subject site is intended to work in tandem with a 3 storey height control in the DCP. However, the 12 metre height control in the LEP assumes a shop-top form of development which includes upper level residential uses which have a reduced floor to floor requirement when compared within commercial uses on the upper floors.

The subject site is located adjacent to an especially busy classified road being Cleveland Street and residential development on the subject site does not represent an optimal design outcome due to the adverse amenity outcomes for more sensitive residential use. It is preferable to provide an entirely commercial building on the subject site, however, this requires higher floor to floor heights which challenges the 12 metre height control.

Notwithstanding this environmental planning ground as the basis for the height breach, the proposed development has been designed to mitigate the impact of the overall height of the development. In particular, the proposal has been designed with an expressed two storey base with a masonry grid façade with a height of approximately 10 metres, and the top level is setback from all edges of the building and proposed with a predominantly glazed wall with fine window detailing and a light weight projecting roof element to float above the base of the building. This achieves a recessive termination for the top of the building.

The setback of the top floor, which is the element which exceeds the height control, is such that the proposed development actually results in a reduced shadow when compared with the shadow cast by a strictly height compliant building envelope on the site. This is illustrated in Figures 3, 4 and 5 below.

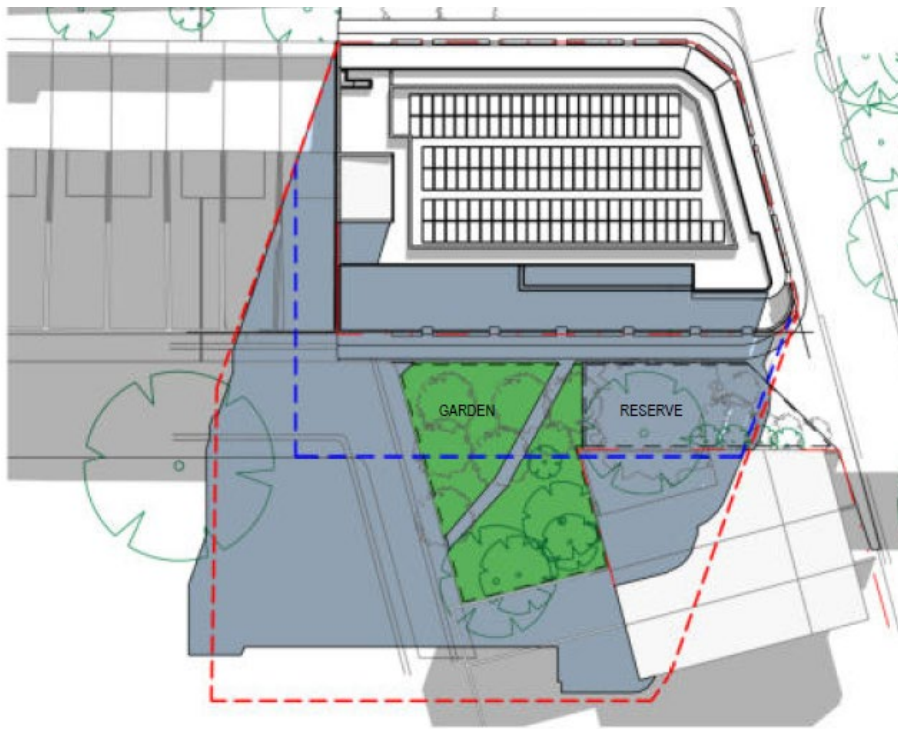


Figure 3:

9am shadow
(red dotted line
is a height
compliant
shadow)

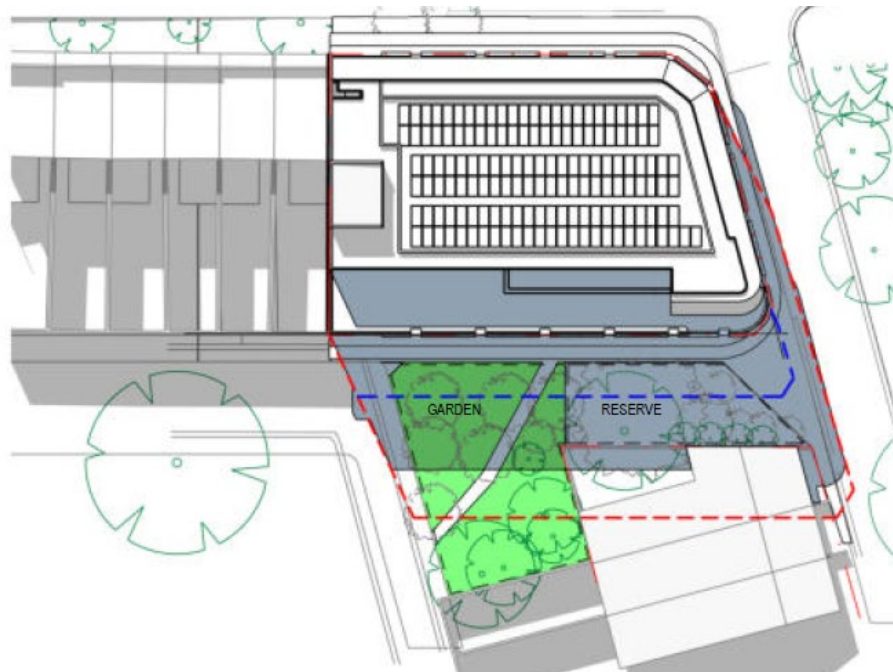


Figure 4:

12pm shadow
(red dotted line
is a height
compliant
shadow)

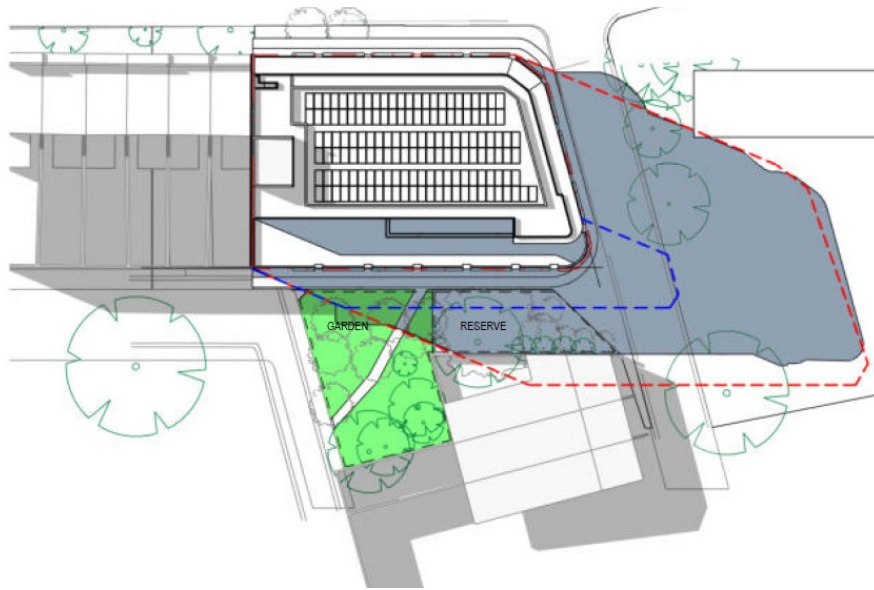


Figure 5:

3pm shadow (red dotted line is a height compliant shadow)

Due to the particular site circumstances and the design of the subject proposal, the majority of the components which breach the height control will not be dominant when viewed from the public domain or the ground floor plane of the site. Furthermore, the lift overrun which has the greatest extent of breach is set well back within the site with essentially no impact. Accordingly, the proposed areas of variation to the height control do not result in any adverse impact to adjacent properties.

The setback of the elements which breach the height control also prevents any overlooking or privacy impacts to the southern adjacent dwellings. This is illustrated in the view lines in the Section shown in Figure 6 below.

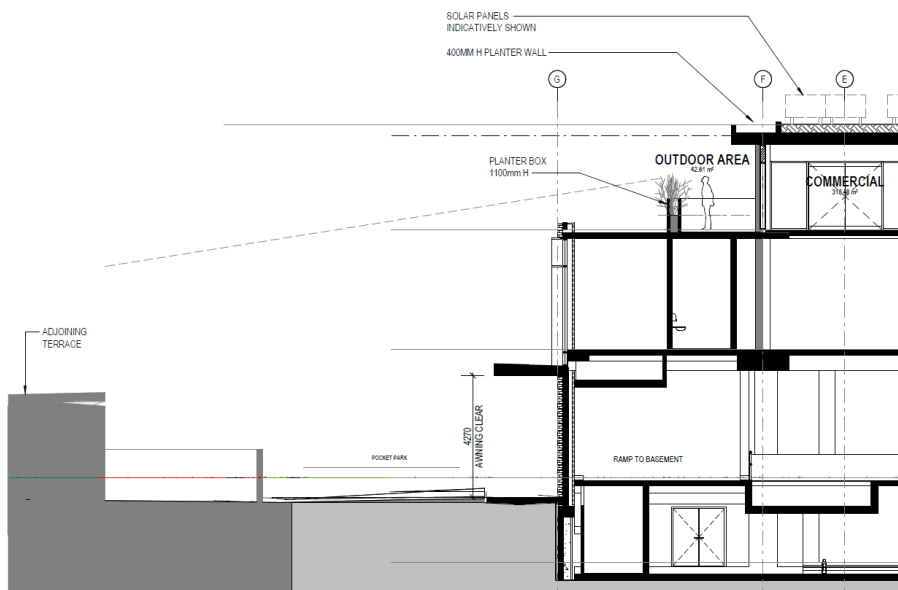


Figure 6:

Section illustrating setback top floor which prevents overlooking of immediately adjacent terrace

Having regard to the planning principle established in the matter of Project Venture Developments v Pittwater Council [2005] NSWLEC 191 most observers would not find the proposed development offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context.

Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public in the particular circumstance of this site and this proposal, but would only serve to encourage the introduction of residential use of the upper levels of the building.

In this particular circumstance there are sufficient environmental planning grounds to warrant the proposed variation to the current height control as the proposal will achieve a superior outcome with an entirely commercial building on the site and without any adverse impact to adjacent sites.

The objects specified in section 5(a)(i) and (ii) of the EP&A Act are:

`to encourage:

i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

ii) the promotion and co-ordination of the orderly and economic use and development of land..’

The proposed development is consistent with the aims of the Policy and the objects of the EP&A Act in that:

- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- The proposed variation allows for the most appropriate use of the land, which is also the most efficient and economic use of the land, without adversely impacting on amenity of adjacent sites.

On the basis of the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed height non-compliance in this instance.

1.7 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.

1.8 [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 proposal's consistency with the objectives of the development standard have been addressed in detail in this clause 4.6 request.

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the MU1 Mixed Use zone pursuant to the SLEP 2012

The objectives of the MU1 Mixed Use zone are:

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

The proposal provides for a commercial building which will support a diversity of business, retail and office uses which will provide employment opportunities.

- To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.

The proposal has maximised active frontages having regard to the constraints of the site. In particular, the proposal provides a fine grain active retail frontage to Cleveland Street.

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

The proposal has been designed to minimise conflict with nearby residential uses by reducing shadow impacts when compared with a strictly compliant height, and setting back the top floor from the southern edge to mitigate privacy impacts.

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

The proposal provides retail uses on the ground floor.

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

The proposal is only for fine grain retail uses and will not threaten the viability of nearby centres.

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

The proposal integrates business, office and retail uses in an ideal location which will encourage users to walk or cycle.

In summary, the proposed development will support the ongoing use of the site for commercial purposes in an ideal development which will contribute positively to the vibrancy of the location. The proposal also represents a more compatible use with the surrounding context, which has gradually changed to include significantly more residential dwellings. The site is well located to encourage walking and cycling. End of Journey facilities are integrated into the design of the development that will encourage users to walk and cycle. The proposal will support rather than detract from the viability of the nearby centres and will ensure the continuation of employment generating uses on the site. For the reasons given the proposal is considered to be consistent with the objectives of the MU1 zone in that it provides appropriately for a compatible land use.

The above discussion demonstrates that the proposal development will be in the public interest notwithstanding the proposed variation to the building height development standard 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. There is no material public benefit in maintaining the standard generally or in relation to the site specifically as the built form outcomes and development proposed accord with the vision for the area. Accordingly, there is no material impact or public benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard.

1.9 Clause 4.6(5) Secretary Considerations

The matters for consideration under Clause 4.6(5) are addressed below:

(5) In deciding whether to grant concurrence, the Secretary must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning,

The contravention of the standard does not raise any matters of significance for state or regional environmental planning. The development does not impact upon or have implications for any state policies in the locality or impacts which would be considered to be of state or regional significance.

(5) In deciding whether to grant concurrence, the Secretary must consider:

(b) the public benefit of maintaining the development standard,

This Clause 4.6 request has demonstrated there are benefits associated with the contravention of the standard as it will support an entirely commercial use of the site in a building which has been very sensitively designed having regard to the context of the site with an expressed two storey base and setback and recessive top floor which does not result in any meaningful impact beyond a fully height compliant proposal. Accordingly, there is no material public benefit in maintaining the standard generally or in relation to the site specifically as the built form outcomes and development proposed accords with the vision for the area. 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 maintenance of the standard.

1.10 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.

As demonstrated above the proposal is consistent with the objectives of the zone and the objectives of Clause 4.3 notwithstanding the proposed variation to the maximum height of buildings development standard.

Requiring strict compliance with the height of buildings development standard on the subject site would result in an inferior use of the site that would contextually be essentially no different from the proposed development and would not result in any meaningful benefit to the streetscape or the amenity of adjoining properties. Strict compliance would discourage an entirely commercial use of the site with residential components likely introduced with compromised amenity outcomes.

Allowing the flexible application of the maximum height of buildings development standard in this instance is not only reasonable but also desirable given the positive result for the amenity of the development.

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 minimum height of buildings development standard and will achieve a better design outcome in this instance in accordance with objective 1(b).

1.11 Conclusion

Strict compliance with the height of buildings development standard contained within clause 4.3 of the Sydney Local Environmental Plan 2012 has been found to be unreasonable and unnecessary in the circumstances of the case. In addition, 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.