

# **Attachment C**

<p><b>Clause 4.6 Variation Request – Height of Buildings</b></p>
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UPDATED CLAUSE 4.6 TO CLAUSE 4.3 OF SYDNEY LEP 2012

EXCEPTIONS TO DEVELOPMENT STANDARDS – **HEIGHT VARIATION**

*Demolition of the existing building and erection of a 6 storey retail/commercial building,  
basement parking and a roof terrace with associated landscaping.*

141 – 155 COMMONWEALTH STREET, SURRY HILLS

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**SYDNEY LEP 2012 - CLAUSE 4.6 EXCEPTION TO DEVELOPMENT STANDARDS**

This Clause 4.6 variation request has been prepared to accompany the development application for the demolition of the existing building and construction of a part 4 and part 5 commercial building.

Clause 4.6 of the Sydney LEP 2012 allows the consent authority to grant consent for development even though the development contravenes a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards.

**Clause 4.6 Exceptions to development standards**

- (1) *The objectives of this clause 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.*
- (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.*

Note—

*The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).*

- (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 6.16(3)(b)*

### **Development Standard to be Varied**

Pursuant to Clause 4.3 of the Sydney LEP 2012, the site is subject to a maximum building height of 18m. The proposal seeks variation to this height standard.

The proposed maximum height of 20.58m represents a variation of 2.58m (14.3%) from the numerical height standard in the LEP.

### **Justification for Contravention of the Development Standard**

This written request is considered to justify the contravention of the development standard and addresses the matters required to be demonstrated by Clause 4.6(3), of which there are two aspects. Both aspects are addressed below:

*(a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and*

### **Assessment:**

Whilst it pertained to SEPP 1, the Land and Environment Court judgment, *Wehbe v Pittwater Council* [2007] NSWLEC 827 (21 December 2007) (*Wehbe*), remains equally applicable to addressing this subclause. Specifically, in *Wehbe*, the Court identified five different 'ways' in which it can be established that compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. This list of ways is not exhaustive and provides as follows:

- 1. the objectives of the standard are achieved notwithstanding noncompliance 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 objective 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 compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

In regard to the circumstances of the proposed development and this Clause 4.6 Written Request, it is considered that strict compliance with the development standard for height on the

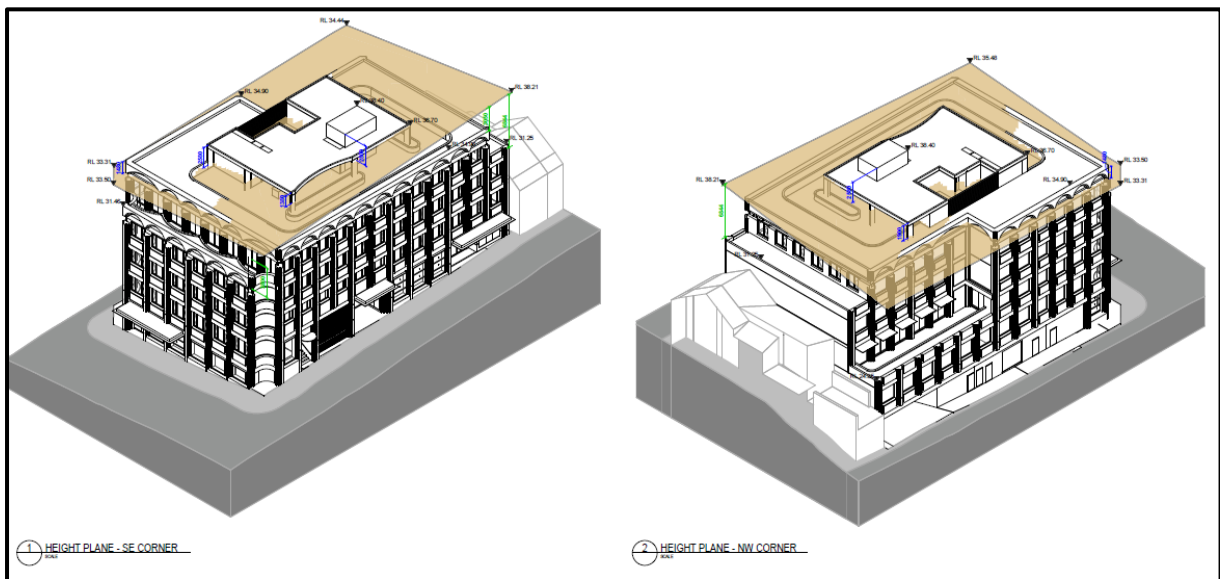
site is unreasonable or unnecessary because of the site's specific context in addition to Wehbe Ways 1 (as underlined above).

It is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (Initial Action Pty Limited v Woollahra Municipal Council [2018] NSWLEC 118 at [22], RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130 at [28]) and SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112 at [31]. Further, it is only necessary to demonstrate that strict compliance is either unreasonable or unnecessary.

It is considered that strict compliance with the development standard for height on the site is unreasonable and unnecessary in the circumstances for the following reasons:

**Height variations are isolated, setback and related to site topography.**

As outlined in Figure 22 below, the variation is isolated in nature and restricted to the awning of the roof terrace, lift overrun, and a small amount of parapet on the southwestern corner. The variation is generated by the site topography, which slopes steeply, with a drop of 4.41m from the high point in the northeastern corner (RL20.21) of the site down to the low point of the site in the southwestern corner (RL15.80).



**Figure 1: The height plane shows areas of departure from height control.**

The site slope is pronounced on the two primary street frontages. Along the Commonwealth Street frontage, the site drops 2.61m from the northeastern corner (RL20.21) to the southeast corner (RL17.60). And on the Reservoirs Street frontage, the site drops 1.8m from the south-east corner (RL17.60) to the southwestern corner (RL15.80)

As outlined in the building plane excerpt below, the parapet on the low southwestern corner exceeds the height limit by a maximum of 1.48m. In contrast, the parapets on all other corners comply with the height limit, with the northeastern corner being 3.05m under the height limit. The degree to which the root-top awning exceeds the height limit also varies from 1.38m at the

southeast corner to 2.58m at the northeastern corner. The lift overrun exceeds the height limit by 2.5m at the southwestern corner and 2.58m at the northwestern corner.

The landscaped rooftop terrace has been designed as a key element of the commercial space, which will be used by tenants and their visitors. The proposed height allows a roof structure to provide covered areas to the terrace to ensure its use can be maximised throughout the year. The lift overrun allows safe access to the rooftop for people with a range of mobility.

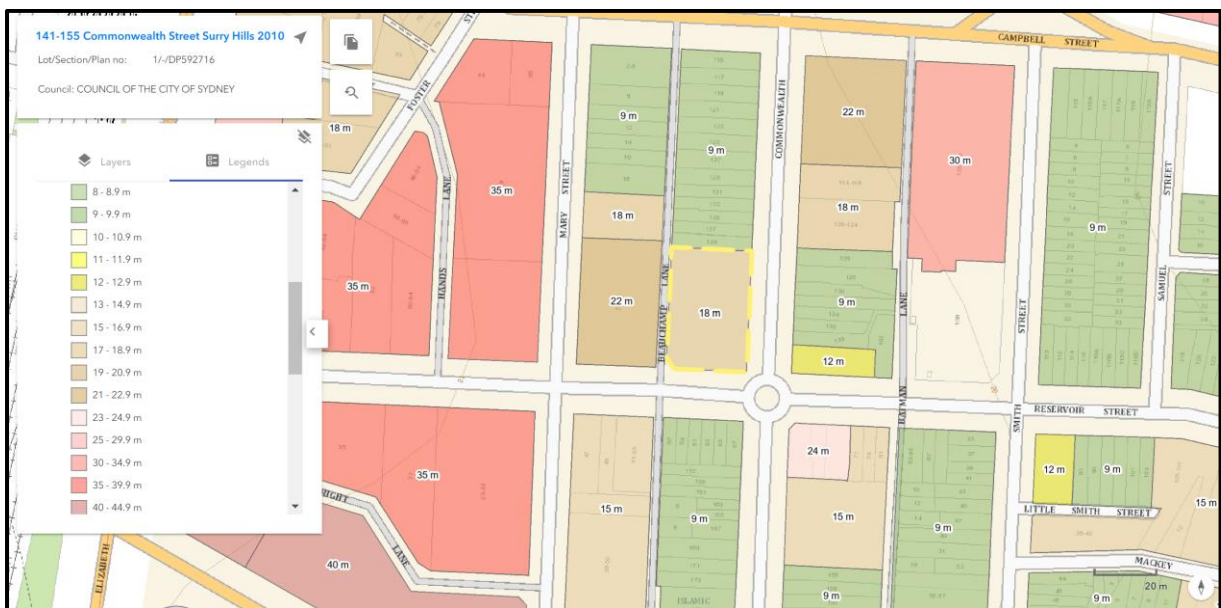
The proposed roof terrace will support extensive landscaping, as the Landscape Plan outlines. Perimeter planting will include trailing groundcovers that cascade over the parapet and canopy trees that define the green space internally and externally, softening the built form when viewed from the public domain.

On this basis, the height variation enhances the amenity of the proposal.

The non-compliant elements of the roof terrace are considerably setback from the building frontage by 4.85m to the Commonwealth Street/eastern frontage, 8.86m to the Reservoir Street/southern frontage, 5.91m to the Beauchamp Lane/western frontage and 10.32m to the northern boundary. The lift overrun is located in the centre of the building and is further setback from all frontages. As a result of these setbacks and the rooftop landscaping, the non-complying elements will be largely imperceptible from the public domain.

**Compatibility with the height of the surrounding streetscape**

The site is located in an urbanised, mixed-use area with a range of heights, as demonstrated in the LEP Height Map below.



**Figure 2: The height of the building map shows the varied heights of the locality, including land with heights of 22m to the west and 24m to the southeast.**

This variation in height is also a key characteristic of the Reservoir Street and Fosterville Conservation Area, which celebrates the pockets of terraces alongside warehouses and newer buildings providing commercial floor space. Opposite the site to the west is a 7-storey building, with 2-storey buildings to the north, south and east. An 8-storey building is located diagonally opposite the site to the southeast. In this regard, the development provides an appropriate height transition between the 7-storey residential flat building to the west and the two-storey terraces to the north whilst being clearly subservient to the two taller buildings to the west and southeast. The proposal will not adversely impact the heritage values of the conservation area or neighbouring heritage items. On this basis, the proposed height variation will not appear out of character with the surrounding context.

The proposal complies with the other building envelope controls, including setbacks, demonstrating that the building has been designed to be compatible with the current and desired future character of the area despite the minor height variation.

The proposal is largely compliant with the 5-storey maximum for the site, with the Commonwealth Street frontage presenting as 4-storeys and the Reservoir Street and Beauchamp Lane frontages as 5-storeys.

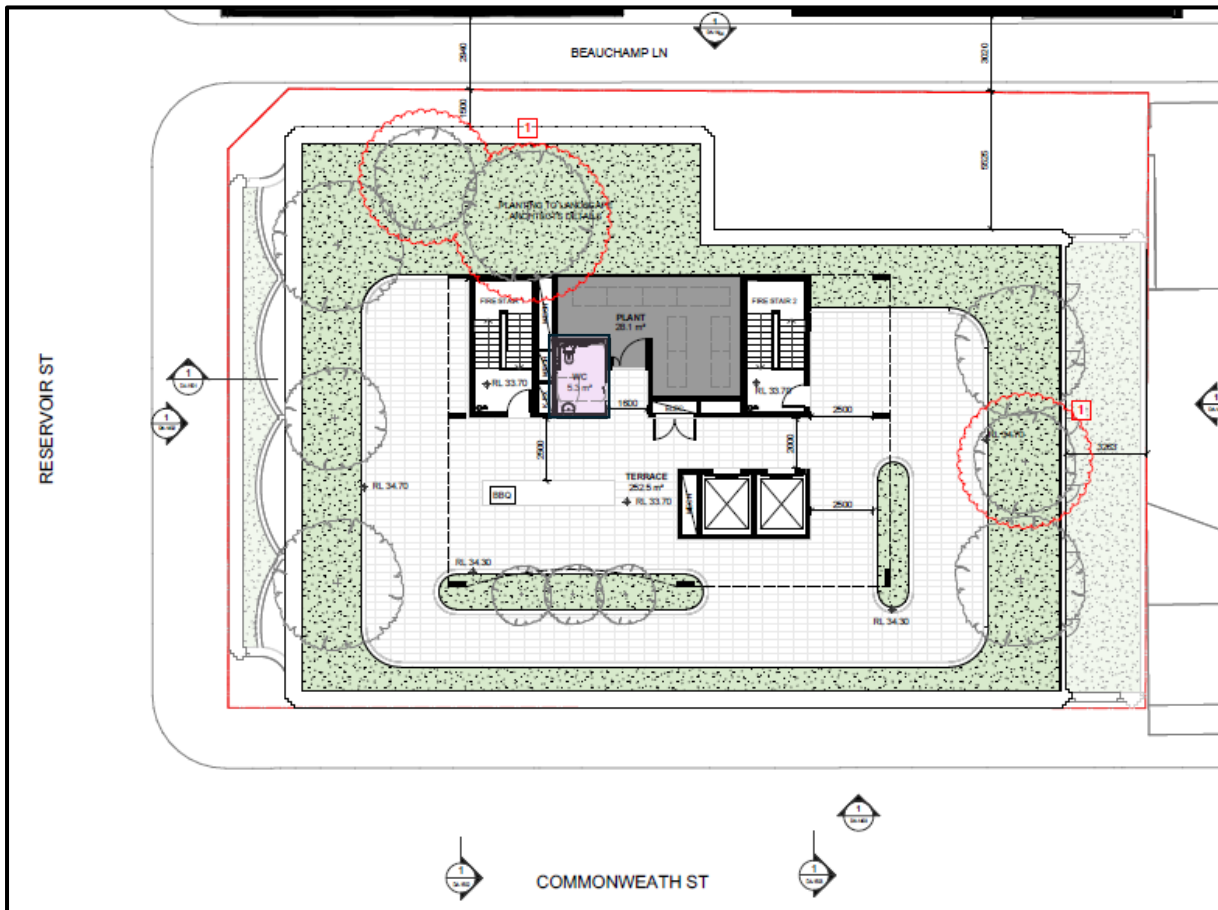
The definition of a storey is provided below:

**storey** means a space within a building that is situated between one floor level and the floor level next above, or if there is no floor above, the ceiling or roof above, but does not include—

- (a) a space that contains only a lift shaft, stairway or meter room, or
- (b) a mezzanine, or
- (c) an attic.

The recessed roof terrace level, which includes a bathroom, will not be perceptible from the public domain, ensuring that the building is visually compliant with the storey control as it presents to the street and lane frontages.





**Figure 3: Excerpt of the 4<sup>th</sup> storey, noting that the W/C (highlighted in purple) is the only element that contributes to this level being counted as a storey**

The building design has also incorporated setbacks on the western façade and upper level of the southern facade to reduce any perceived visual bulk and shadow impacts and minimise any impacts associated with the height exceedance. In addition, to further create a better transition, the building steps down to 3 storeys on the northern frontage as it adjoins the two-storey terraces at the northeastern corner of the site.

The variation is not associated with additional floor space or a building with inappropriate bulk and scale. Rather, the exceedance is related to the provision of the high amenity roof terrace for the building tenants, which will incorporate a range of canopy trees, shrubs, and ground covers to provide a green roof that will add amenity and visual interest to building users and the wider locality.

**Comparable to 2 previous height variations under DA/2017/1283 and DA/2014/1060**

The 18m height limit under the same LEP standard has been approved on two occasions as outlined below:

DA/2017/1283 was approved for *demolition of the existing building and erection of part 5, part 6 storey mixed-use building comprising a 96-room hotel, an ancillary retail space fronting Reservoir*

Street, and basement parking with associated motorcycle and bicycle parking with access from Beauchamp Lane.

An excerpt of the section shows that the 6th-storey form is more prominent than the proposed built form, as shown below:



Figure 4: Excerpt of the section A diagram



Figure 5: Approved montage



Figure 6: Proposed montage

That proposal presented as five storeys to Commonwealth Street and six storeys to Reservoir Street.

The proposed height of 20.3m is considered acceptable in this instance, and is consistent with the objectives for height contained in Clause 4.3(1) of the Sydney LEP 2012 as:

- (a) The proposed development provides suitable development opportunities in a highly accessible location and is therefore consistent with the objectives of the B4 – Mixed Use zone;
- (b) The proposal is consistent with the objectives of the building height development standard pursuant to Clause 4.3 of the Sydney LEP 2012 as the proposal is appropriate to the context of the site and the desired future character of Surry Hills, and does not result in any view loss of significant views;
- (c) The proposal is consistent with the objectives of the building height in storeys control pursuant to Clause 4.2 of the Sydney DCP 2012 as the proposal reinforces the existing neighbourhood character;

The development presents as a five storey building to Commonwealth Street, stepping down to two storeys (with the third storey set back) as it adjoins the two storey terraces at the north corner of the site. To Reservoir Street, the building transitions to six storeys because of the slope of the site from east to west;

Whilst this results in a variation to the height in storeys control, the breach is largely due to the slope of the site and is primarily confined to the lift over-run and rooftop plant. These elements of the building are set back from Commonwealth Street by approximately 3.4m, and set back from Reservoir Street by approximately 8.7m;

- (d) The site is located opposite a seven storey building to the west, and two storey buildings to the north, south and east. An eight storey building is located diagonally opposite the site to the south-east. The development provides an appropriate height transition between the seven storey residential flat building to the west and the two storey terraces to the north, and overall responds appropriately to the context of surrounding development of varied bulk and scale; and
- (e) The proposed exceedance of the height of buildings standard will not result in any significant adverse amenity impacts to surrounding development.

**Figure 7: Excerpt of council's acceptance of the justification**

Another approval that included variation to the height control was:

**DA/2014/1060-** was approved for demolition of the existing building and erection of part 5, part 6 storey building (with one partial lower ground level) to provide student accommodation (affordable housing/boarding house development) and one retail space accessed from Reservoir Street.



Figure 8: Montage of the approved boarding house

Council's assessment included the following justification in support of the height variation:

The Sydney LEP 2012 permits a maximum building height of 18m, and an FSR of 3:1. The Sydney DCP 2012 permits a building height in storeys of 5.

The proposed development has a maximum height of 20.3m to the top of the lift overrun, a height in storeys of 6 to Reservoir Street, and 5 storeys to Commonwealth Street. The variation to height results in an exceedance of up to 2.3m or 12.8%. See Figure 17 below:

Figure 9: Excerpt of height variation

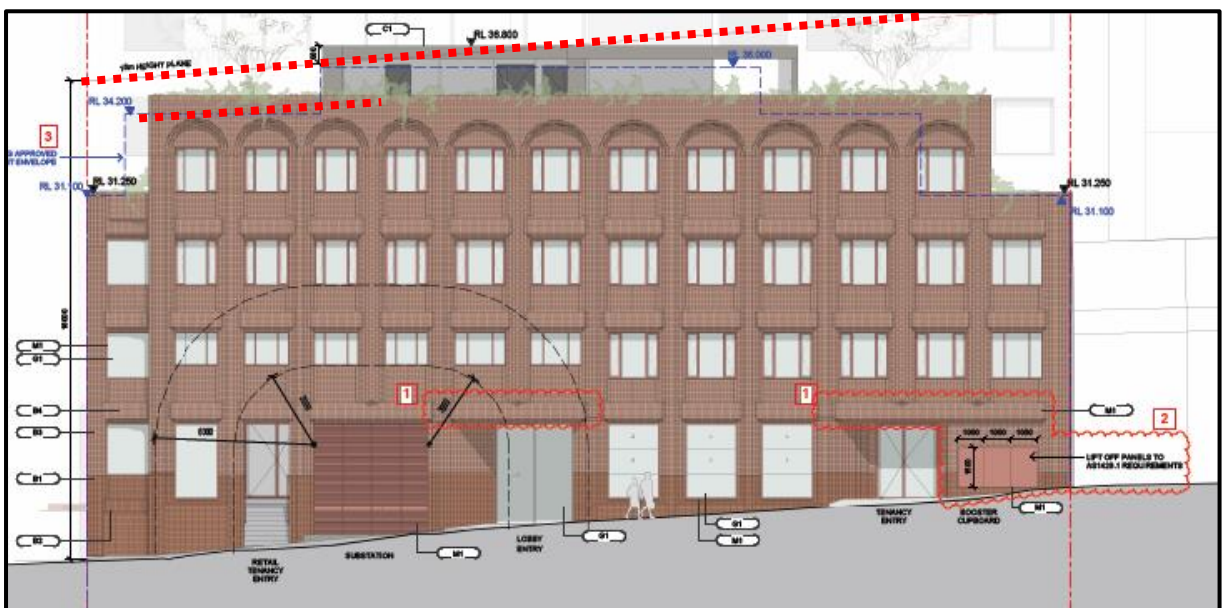


Figure 10: Excerpt of east elevation (dotted line depicting height plane)

The proposed height of 20.3m is acceptable in this instance, and is consistent with the objectives for height contained in Clause 4.3(1) of the Sydney LEP 2012 as:

- (a) the site is located opposite a 7 storey building to the west and two storey buildings to the north, south and east. An 8 storey building is located diagonally opposite the site to the south-east. The exceedance of the height control by 2.3m for the most part, is limited to the lift overrun and roof top plant room and is setback from Commonwealth Street approximately 3.7m; and 10m from Reservoir Street. The development overall responds appropriately to the context of surrounding development of varied bulk and scale;
- (b) the development provides an appropriate height transition between the 7 storey residential flat building to the west and the two storey terraces to the north; and
- (c) the variation to height does not result in any view loss of significant views or overshadowing.

The development presents as a 5 storey building to Commonwealth Street, stepping down to two storeys (with the third storey setback) as it adjoins the two storey terraces at the north corner of the site. To Reservoir Street, the building transitions to 6 storeys because of the sloping of the site from east to west.

The departure from the maximum height development standard and the height in storeys control is appropriate in this instance and will not result in any significant adverse amenity impacts to surrounding development.

Figure 11: Excerpt of council’s acceptance to the justification

The proposed development, including the height variation, is considered to have a higher level of design quality, as evident from the comparison between the respective montages.

**Minimal environmental amenity impacts generated by the height variation**

The height variation is not responsible for any significantly greater amenity impacts than a compliant height. There are no views or privacy impacts associated with non-compliance. As discussed above, non-compliance does not create visual bulk or scale impacts due to the imperceptible and recessed nature of the non-complying areas.

Despite the non-compliance, the proposal achieves the objectives of the development standard and the zoning, as demonstrated in the following table:

Consistency with the objectives of the height standard in the LEP	
Objectives	Assessment
4.3	The variation is generated by the steep slope of the site topography, which drops 4.41m from the high point in the

<p><i>1 (a) to ensure the height of development is appropriate to the condition of the site and its context</i></p>	<p>northeastern corner (RL20.21) to the low point in the southwestern corner (RL15.80).</p> <p>The proposal largely complies with the Sydney DCP 2012 control for height in storeys, demonstrating that it will be perceived and experienced as envisaged within the streetscape. The proposal also complies with the other building envelope controls, including setbacks, demonstrating that the building has a scale compatible with the area's current and desired future character despite the minor height variation.</p> <p>The height still provides an appropriate transition between the varying building heights in the locality. Opposite the site to the west is a 7-storey building, with 2-storey buildings to the north, south and east. An 8-storey building is located diagonally opposite the site to the southeast. In this regard, the development provides an appropriate height transition between the 7-storey residential flat building to the west and the two-storey terraces to the north whilst being clearly subservient to the two taller buildings to the west and southeast.</p> <p>The awning to the roof terrace and lift overrun are considerably setback and not perceptible from the public domain when viewed directly in front of the development. In longer oblique views, they will be viewed against the greater bulk of the proposed development.</p> <p>Considered setbacks to the southern and western facades further reduced any amenity impacts related to overshadowing while maintaining the building's overall design coherence.</p> <p>Overall, the development's height is appropriate for the subject site and compatible with the surrounding development. Non-compliance with the height control is minor in nature, and height variations have been permitted in this locality, including D/2017/1283, which has a similar height and massing to the proposal.</p>
<p><i>1 (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 site is located in a mixed-use area with various commercial and residential uses of varying character and scale.</p> <p>The proposed height and the development, in general, have been supported by URBIS in the accompanying heritage report. The heritage report supports the scale and presentation of the building in the conservation area. The height breach is not adjacent to the adjoining terraces to the</p>

	<p>north nor harms the heritage-listed warehouse to the west, which it is clearly subservient to.</p> <p>Council’s height controls step down from 35m, 22m, and 18m to 12m along the northern side of Reservoir Street and travelling in an eastern direction, from Hands Lane to the eastern side of Commonwealth Street. The proposal will create an appropriate height transition along the Reservoir Street frontage.</p> <p>The subject site will not adversely impact the heritage conservation area and is of an appropriate height to the heritage item located directly west of the subject site.</p>
<p>1 (c) to promote the sharing of views</p>	<p>The proposed building height will not affect views from surrounding properties, which is further evidence that the variation in the height control is considered acceptable.</p>
<p>1 (d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas</p>	<p>The built form will be compatible with surrounding built forms, including the 7—and 8-storey buildings within the site's direct visual catchment.</p> <p>SDCP floor-to-floor height controls</p>
<p>1 (e) in respect of Green Square</p> <p>(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and</p> <p>(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.</p>	<p>This is not applicable; the site is not located in Green Square.</p>

**Consistency with the objectives of the MU1 Mixed Use zone**

<b>Objectives</b>	<b>Assessment</b>
<ul style="list-style-type: none"> <li>• To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.</li> <li>• 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.</li> <li>• To minimise conflict between land uses within this zone and land uses within adjoining zones.</li> </ul>	<p>The proposed height variation will not generate any inconsistency with the zone objectives.</p> <p>The recessed nature of the elements, which are above the height limit, ensures no conflict exists between the Mixed-Use zoning on the subject site and the land zoned R1 General Residential to the southeast.</p> <p>The height variation also is not inconsistent with achieving the other objectives, as the proposed retail/commercial building with ground-floor retail and offices above is compatible with the surrounding land uses and will generate a range of employment floorspace in this well-located part of Surry Hills.</p>

<ul style="list-style-type: none"> <li>• To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.</li> <li>• To ensure land uses support the viability of nearby centres.</li> <li>• To integrate suitable business, office, residential, retail and other land uses in accessible locations that maximise public transport patronage and encourage walking and cycling.</li> </ul>	<p>The proposal is considered to satisfy the objectives of the zone as the height of the mixed-use development will be compatible with the western neighbours and achieve an appropriate transition with the surrounding lower-density developments to the east. The height variation will not be detrimental to or dominate the appearance of the development, given the southeastern corner is the only location in excess of the height limit, in addition to the lift overrun/ services, which are recessed and obscured from visibility.</p> <p>The proposed height is contextually appropriate and will achieve suitable streetscape, urban design and amenity outcomes (both internally and externally).</p> <p>Overall, the proposal and height will align with this zone's objectives.</p>
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The proposal complies with the objectives of the height control and the MU1 Mixed Use Zone, as indicated in the assessment in the table above.

Based on the above assessment, it is considered that strict compliance with the LEP height standard is unreasonable and unnecessary in this instance.

*(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.*

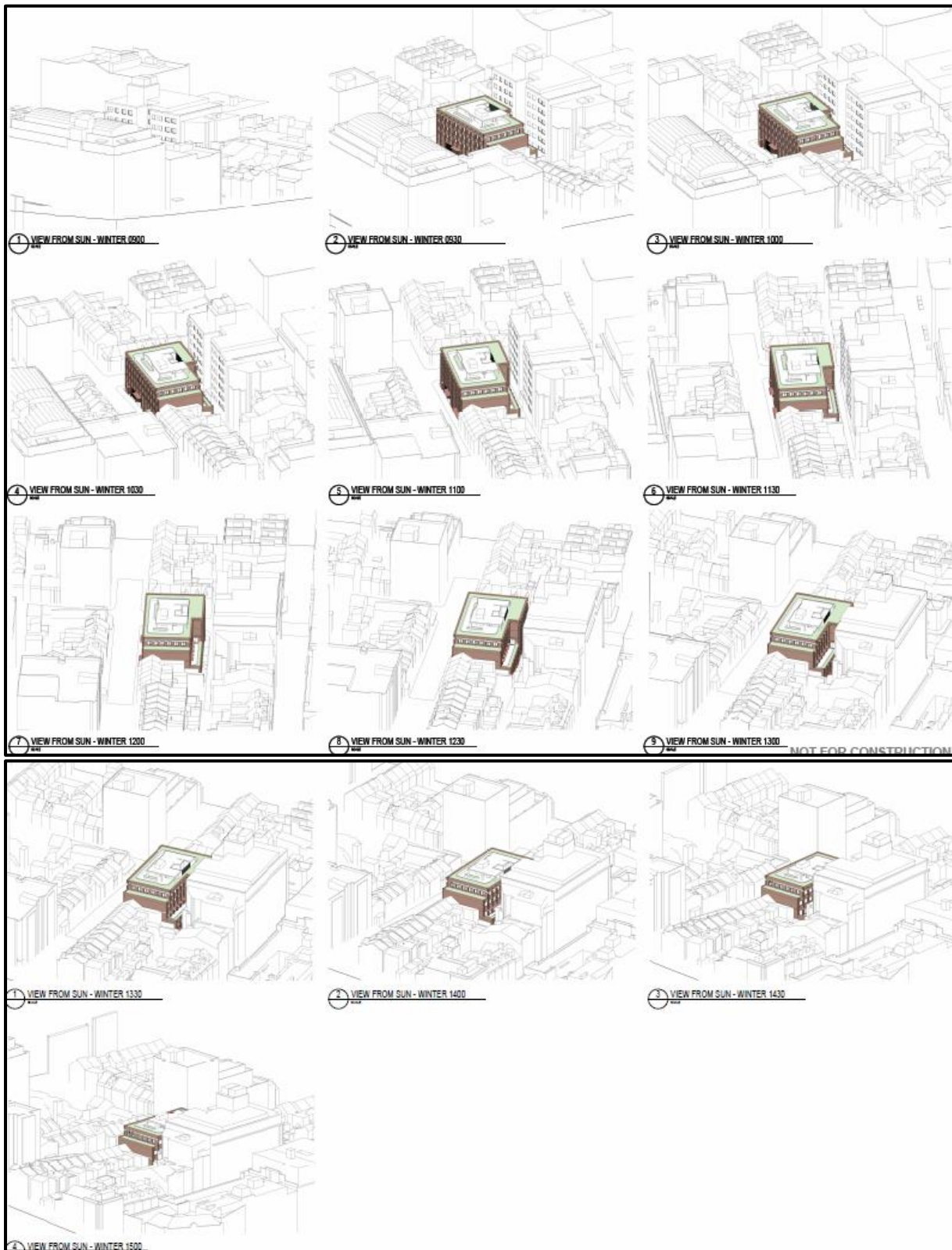
**Assessment:** It is considered that there are sufficient environmental planning grounds to justify varying the building height development standard, which includes:

- The site has a fall of approximately 4.41m from the northeastern corner to the southwestern corner. This level change results in the parapets on the southwestern parts of the building exceeding the height control. As discussed above, the parapet and architectural detail have been designed to respond to the surrounding heritage context and align with the compliant level of the Commonwealth Street frontage. This level significantly influences the degree of non-compliance with the rooftop awning. The sloping nature of the site is considered to constitute an environmental planning ground.
- Sydney DCP 2012 (Part 4.2.1.2) includes minimum floor-to-floor heights of 4.5m for ground floor and 3.6m for commercial floors above. The DCP also applies a 5-storey height limit to the site. Based on the above floor-to-floor heights and five storeys, this generates a height of 18.9m without allowing for lift overrun (at least 1 metre for a building of this size). The floor-to-floor heights were introduced after the LEP height limit, and it is thereby considered that some flexibility to the height standard would be justified. Furthermore, the sloping nature of the site is also considered to generate justification for a height variation. On this basis, it is considered that the variation in the height standard is not unreasonable, as the DCP floor-to-floor would anticipate a variation in the LEP



height standard. Such factors are considered to constitute environmental planning grounds.

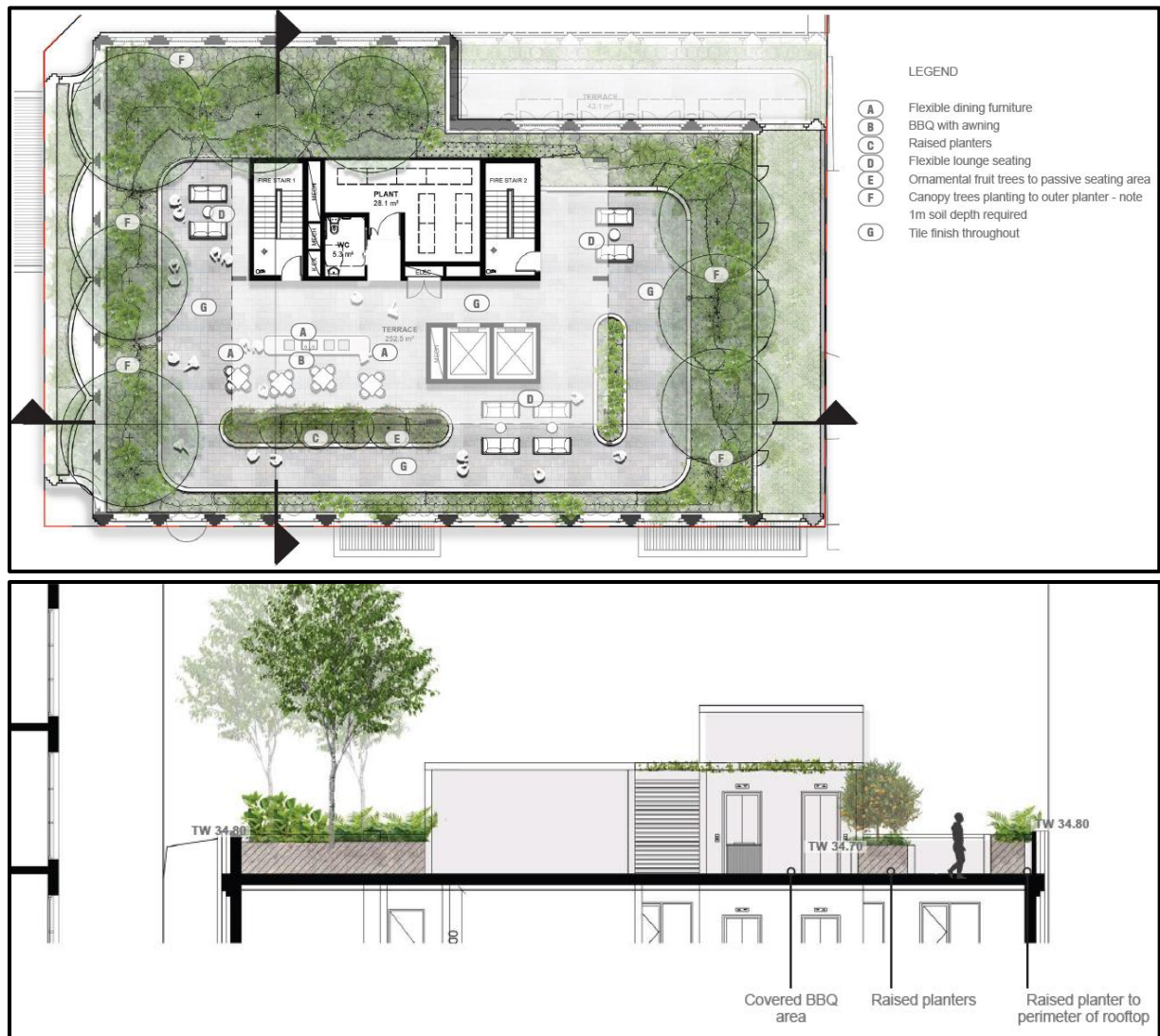
- The recessed nature of the components that breach the height limit ensures that they will not be responsible for any discernible streetscape impacts from any of the street frontages. The main built form as it presents to the respective frontages to Commonwealth and Reservoir Streets and Beauchamp Lane ensures that the height variation will be generally indiscernible when viewed from the surrounding streets. The surrounding built forms to the west and southeast, which are significantly greater in height and scale than that proposed, also ensure that the height variation will not generate any incompatibility with the surrounding built environment. Such factors are considered to constitute an environmental planning ground.
- Much of the additional height comprises the roof feature, lift overrun and stairs, which provide access to the rooftop garden terrace. The landscaped rooftop terrace has been designed as a key commercial space element. It will be used by tenants and their visitors and provide a high amenity space with extensive landscaping that will add visual interest to the building when viewed from the public domain. The height variation thereby facilitates a higher level of amenity than a building that would be otherwise compliant. Such facts are considered to constitute an environmental planning ground.
- The proposed height variation has no adverse or unreasonable environmental impacts in regard to loss of views, shadowing or visual bulk, as the components over the height are minor and recessed from the perimeter of the building. Such a factor is considered to constitute an environmental planning ground.
- It is apparent from the 3D view from the sun diagrams on Plans DA-8005/6 that the components over the height limit are not responsible for any greater shadow impacts than that of a building with a compliant height. The recessed nature of the built form components over the height is sufficiently recessed to avoid overshadowing the surrounding properties, most importantly, the adjoining units within the converted warehouse development to the west across Beauchamp Lane at 74-80 Reservoir Street:



**Figure 12: View from the sun diagrams 1/2 hourly between 9am and 3pm on June 21, which confirms that the proposed height variation will not generate any greater shadow impacts beyond that of a built form with a compliant height**

The components over the height will not generate any view issues as there are no significant views in an easterly direction from the east-facing windows of the apartments at 74-80 Reservoir Street.

The physical elements associated with the height variation (consisting of the roof parapet roof/pergola structure, and lift overrun will not be responsible for any adverse privacy impacts. The trafficable areas associated with the communal roof area are suitably recessed and screened with effective planting (as shown in the plan and section diagram below) to avoid any unreasonable visual privacy impacts. Conditions of consent in relation to hours of usage of the terrace areas will also address potential visual and acoustic privacy impacts. It is noted that the terrace area itself is below the height limit. However, it is acknowledged that the components over the height are associated with the terrace area.



**Figure 13: Plan and section diagram showing the raised planters and separation distance, which provide an effective buffer to the western neighbouring units (excerpt from landscape plan set from Site Image)**

Based on the above points, it is considered that there are sufficient environmental planning grounds to permit the height variation in this instance.

**Conclusion**

For reasons mentioned herein, this Clause 4.6 variation is forwarded in support of the development proposal at 141 – 155 Commonwealth Street, Surry Hills. The consent authority is requested to consider it favourably.