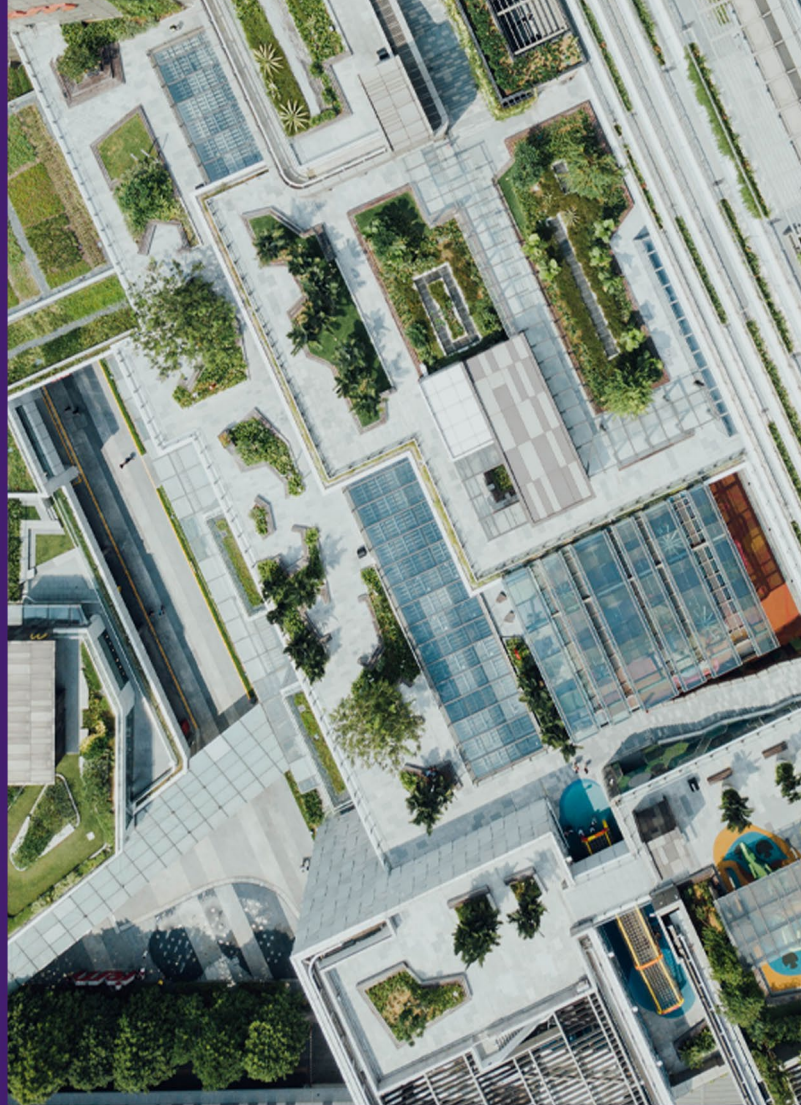


Attachment C

Clause 4.6 Variation Request – Height of Buildings
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98-106 Kippax Street, Surry Hills NSW 2010

Clause 4.6 Variation Request – Building Height

On behalf of ISL Property
Investments Management Pty Ltd

29 July 2025

The Planning Studio acknowledges the traditional custodians of the lands + waters of Australia, particularly the Gadigal People on whose traditional lands our office is located, and pay our respects to Elders past, present + emerging. We deeply respect the enduring Connection to Country + culture of Aboriginal and Torres Strait Islander peoples and are committed to walk alongside, listen + learn with community as we plan for equitable, sustainable, generous, and connected places. Always was, Always will be.

Project Director

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Revision	Revision Date	Status	Authorised	
			Name	Signature
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* This document is for discussion purposes only unless signed and dated by the persons identified. This document has been reviewed by the Project Director.

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1 Introduction

This Clause 4.6 Variation Request seeks to allow a variation to the Height of Buildings development standard associated with the Development Application at 98-106 Kippax Street, Surry Hills NSW 2010 (the site). The DA seeks approval for the partial retention of the existing contributory commercial building and construction of an 8-storey shop top housing development with retail tenancies on the ground floor levels, one level of basement carparking, 35 residential units (including 7 dual key units) with affordable housing units and associated landscaping, specifically:

- Partial retention of the existing contributory commercial building occupying the site. The existing external walls, vaulted slabs, columns and ground level ramp on Sophia Street and Waterloo Street will be retained across the lower ground floor / ground floor / first floor level;
- Excavation of the site to accommodate one basement level;
- The basement level will comprise of:
 - 18 spaces, including six (6) double car stackers, two (2) tandem car spaces, two (2) accessible spaces and two (2) standard spaces;
 - Car lift;
 - Two (2) motorcycle spaces;
 - Residential storage area; and
 - Building services.
- Lower ground floor level to include one retail tenancy, loading dock, car lift, substation, bicycle storage, residential storage, waste storage and plant rooms;
- Ground floor level includes one retail tenancy, residential lobby entry and building services.
- Levels 1 - 7 comprise 35 residential units:
 - 3 x studio;
 - 7 x 1-bedroom;
 - 21 x 2-bedrooms (including 7 dual key units); and
 - 4 x 3-bedrooms.
- Rooftop communal open space with landscaping and plant equipment

The development is seeking to utilise the affordable housing provisions under Chapter 2, Part 2, Division 1 (In-fill affordable housing) under State Environmental Planning Policy (Housing) 2021 (Housing SEPP), which can deliver up to an additional 30% of Floor Space Ratio (FSR) and Building Height, subject to delivery of affordable housing dwellings for a minimum of 15 years.

The Clause 4.6 Variation Request seeks to vary the maximum Building Height development standard under Clause 16 of the Housing SEPP.

This Clause 4.6 Variation Request demonstrates that, notwithstanding the non-compliances, the proposed development:

- Demonstrates that strict compliance with the standard is unreasonable or unnecessary as the development achieves the objectives of the height of building



development standard in Clause 4.3 of Sydney Local Environmental Plan (SLEP) 2012, despite the non-compliance with the numerical standard under Clause 16 of the Housing SEPP; and

- Will deliver a development that is appropriate for its context, despite the numerical breach to development standard in Clause 16 of the Housing SEPP and therefore has sufficient environmental planning grounds to permit the variation.

As a result, the DA may be approved as proposed in accordance with the flexibility afforded under Clause 4.6 of the SLEP 2012 and Clause 16 of the Housing SEPP.

2 Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the SLEP 2012 aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

The SLEP2012 Clause 4.6 Exceptions to development standards of the reads as follows:

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.*
4. *The consent authority must keep a record of its assessment carried out under subclause (3).*

3 The Development Standard to be varied

This Clause 4.6 Variation Request has been prepared in a written format, seeking to justify the variation to the following development standards.

3.1 Sydney LEP 2012

Clause 4.3 (Height of Buildings) permits a maximum Height of Buildings of 22m. Refer to the Figure below.



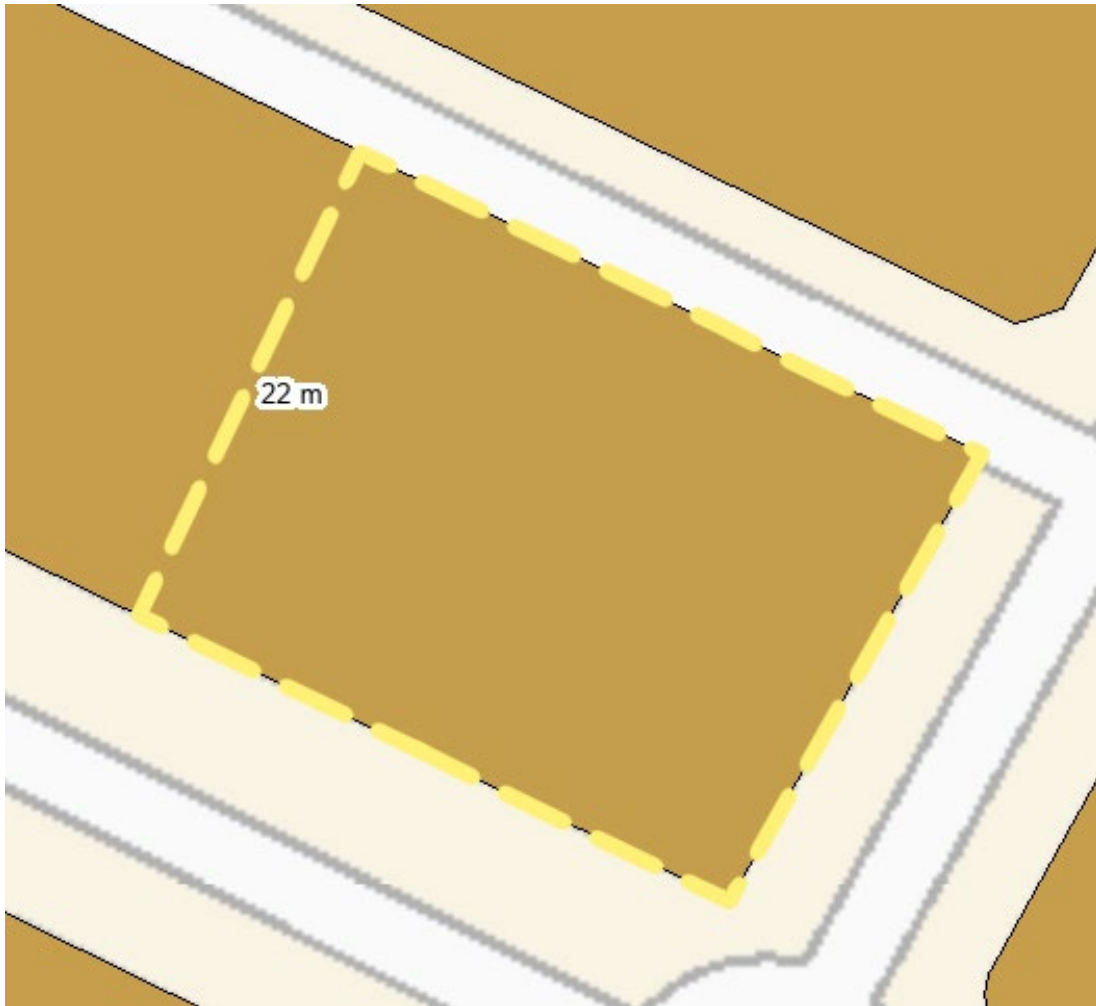


Figure 1: Height of Buildings SLEP 2012 map extract (NSW Planning Spatial Viewer)

4.3 Height of buildings

- 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.

3.2 Housing SEPP 2021 – Clause 16

In addition, the site is eligible to utilise the affordable housing provisions under Chapter 2, Part 2, Division 1 (In-fill affordable housing), which can deliver up to an additional 30% of FSR and Building Height, subject to delivery of affordable housing dwellings for a minimum of 15 years. The development proposes five (5) units of the 35 dual key residential units to be allocated as affordable housing. The affordable housing component amounts to a total of 539m², which amounts to 15% of the overall gross floor area of the development.

As a consequence of these provisions, the maximum Building Height permitted on the site is 28.6m specifically through Clause 16 of the Housing SEPP.

4 Extent of Variation to the Development Standard

The subject application proposes a maximum building height of 28.6m for the bulk of the building with only the roof area of the lift overrun amounting to 29.14m and the roof area of the stairway amounting to 29.04m provided only for the purpose of access to a landscaped communal rooftop area. This proposal amounts to a maximum breach of 540mm or 1.9% from the building height permitted by the Housing SEPP.



Figure 2: Proposed Height Plane Diagram (DKO Architecture)



Figure 3: Proposed South Elevation - Kippax Street (DKO Architecture)



Figure 4: Proposed North Elevation - Sophia Street (DKO Architecture)



Figure 5: Proposed East Elevation - Waterloo Street (DKO Architecture)

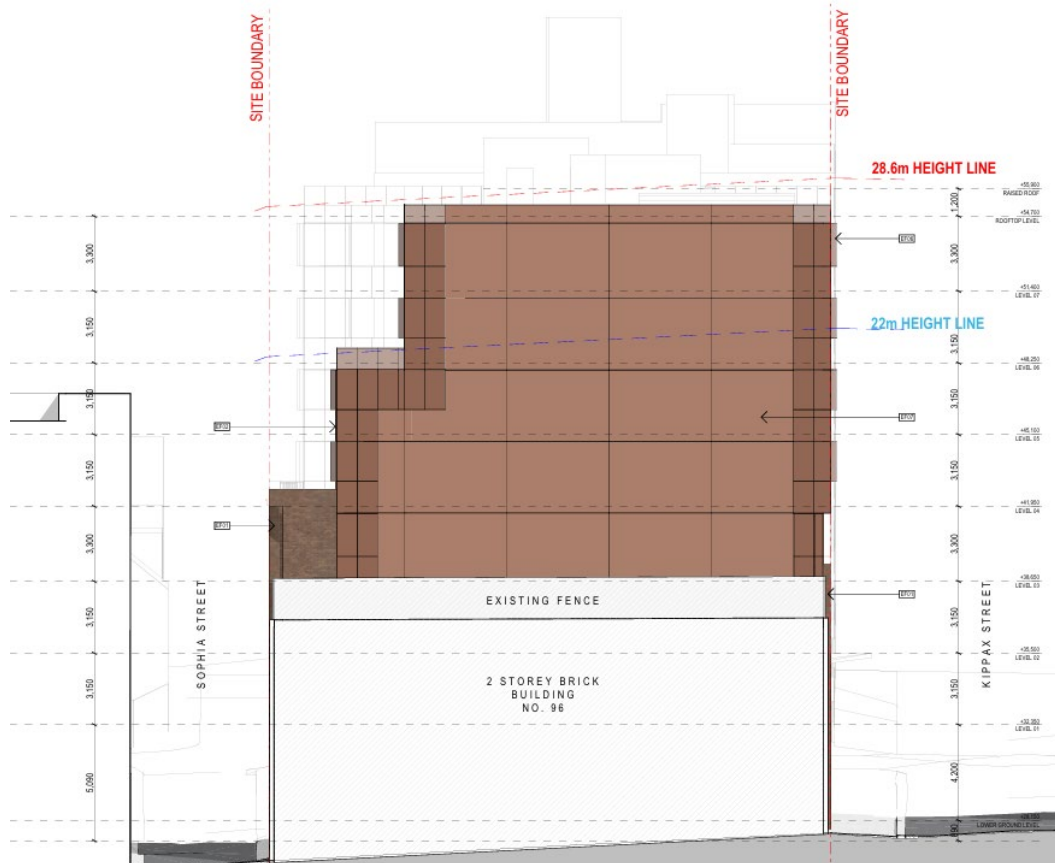


Figure 6: Proposed West Elevation (DKO Architecture)

5 Assessment

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

As detailed in *Williams v Ku-ring-gai Municipal Council* [2017] NSWLEC 1098, *Wehbe v Pittwater Council* [2007] NSWLEC 827 at [44]–[48], a number of approaches could be used to establish that compliance with a development standard is unreasonable or unnecessary.

Furthermore, *Preston CJ in Wehbe v Pittwater Council* (2007) 156 LGERA 446 [42]–[51] outlined five common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable and unnecessary which are summarised below:

- **Test 1:** The objectives of the standard are achieved notwithstanding non-compliance with the standard;
- **Test 2:** The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
- **Test 3:** The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
- **Test 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; or

- Test 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.

These five ways to demonstrate that compliance is unreasonable or unnecessary are not exhaustive, and it may be sufficient to establish only one way.

With respect to the subject application, we consider that the proposed development meets the requirements of Wehbe Test #1 and therefore compliance with the development standard is unreasonable and unnecessary when considered holistically with the development outcome being sought.

5.2 Objectives of the standard are achieved notwithstanding non-compliance with the standard (Wehbe#1)

5.2.1 Wehbe Test 1 – Objectives of the Standard are achieved

The proposal will be in the public interest as it meets the objectives of the building height development standard as follows:

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

The proposed development has been carefully designed to deliver a contextually appropriate built form that preserves the environmental amenity of neighbouring properties and public spaces. Almost all of the built form is located below the building height allowable under proposal once the Housing SEPP uplift is applied. The only elements proposed above the building height control is the roof area of the lift overrun and stairway (provided only for the purpose of access to a communal rooftop area) which have a substantive setback from all the property boundaries and will not be readily visible from the public domain. In addition will not result in any adverse environmental amenity impacts.

The development is surrounded by seven (7) and nine (9) storey forms within the immediate vicinity and it is considered that the proposed eight (8) storey form is consistent with the height of the surrounding context.

Further, Council's draft LEP (Housekeeping Amendment) that was recently endorsed by Council post exhibition, specifically proposes to include an amendment to Clause 4.3 of the LEP to permit additional height to buildings where it is only for the purpose of access to a communal or green rooftop area.

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

The site is not identified as a heritage item or located within a heritage conservation area (HCA). The site is located adjacent the Little Riley Street HCA and the following heritage items:

- 63 Foveaux Street, Surry Hills, Former "Schweppes Building" including interior, I1548;
- 65–67 Foveaux Street, Surry Hills, Former "Schweppes Building" (65–67 Foveaux Street) including interior, I1550; and
- 119–127 Kippax Street, Surry Hills, Former Ford Sherington Trunk Factory including interior, I1563A



The site is occupied by a contributory building as it is identified as a warehouse building older than 50 years in accordance with SDCP. The proposed development seeks to undertake an adaptive reuse of the existing building for the purposes of shop top housing with affordable housing. NBRIS has prepared a Heritage Impact Statement (HIS) which undertook an assessment of the proposal against the relevant provisions of SLEP and SDCP. The Statement concluded that the development will have a neutral impact on the heritage significance of the Little Riley Street Conservation Area and those heritage items in the vicinity noted above.

The design of the proposal has been carefully considered and responds to the current planning controls and the existing character of this precinct in Surry Hills which has retained a number of multi storied buildings demonstrating similar development over a number of decades.

All existing views to and from the heritage items in the vicinity, and the character of adjoining Conservation Area will be retained and conserved.

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

The subject application proposes a maximum building height of 28.6m for the bulk of the building consistent with Clause 16 of the Housing SEPP. The development proposes a minor departure with only the roof area of the lift overrun and stairway provided only for the purpose of access to a communal rooftop area. This proposal amounts to a minor breach of 540mm or 1.9% from the building height permitted by the Housing SEPP.

This minor height breach will not have any impacts on the sharing of views for the surrounding properties.

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

Not applicable.

Objective (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 applicable

5.3 Clause 4.6(3)(b) - There are sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

Clause 4.6(3)(b) of the WLEP 2012 requires that the consent authority be satisfied that the applicant's written request has adequately demonstrated that:

There are sufficient environmental planning grounds to justify contravening the development standard.

The environmental planning grounds relied on in the written request under Clause 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Turland v Wingecarribee Shire Council*



[2018] NSWLEC 1511 and Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118), also 'Rebel MH' and 'Baron' (2019).

The environmental planning grounds relied upon to justify the exceedance of the development standard in the circumstances of the proposal are considered sufficient and specific to the site and the proposed contravention.

As confirmed by Section 5 of the report the development amounts to a minor breach due to the roof area of the lift overrun and stairway provided only for the purpose of access to a communal rooftop area. These elements have a substantive setback from all the property boundaries and will not be readily visible from the public domain. In addition will not result in any adverse environmental amenity impacts.

The proposal is compliant with the FSR development standard, and no portion of the height variation is attributable to gross floor area.

It is also noted that the City of Sydney Council has recently exhibited and then endorsed draft amendments to the SLEP2012 (Housekeeping Amendment), to permit variations to building height controls where they only relate to granting access to rooftop communal and green spaces. It is anticipated that this draft LEP will be gazetted prior to the determination of this application, which is a particular environmental planning ground relevant to the proposal that supports a breach to the standard.

For the reasons discussed above, it is contended that there are sufficient environmental planning grounds to justify the contravention to the development standard in the circumstances of the case.

6 Conclusion

The assessment above confirms that compliance with the maximum height limit permitted under Clause 16 of SEPP Housing is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify the contravention to the development standard.

This Clause 4.6 variation request demonstrates that notwithstanding the non-compliance with the Height of Buildings development standard, the proposal:

- Achieves the objectives of the development standard in Clause 4.3 of SLEP 2012;
- Delivers a development that is appropriate for its context despite the breaches to development standards, and therefore has sufficient environmental planning grounds to permit the variation; and
- Compliance with the development standard is unreasonable or unnecessary in the circumstances of this proposal.

