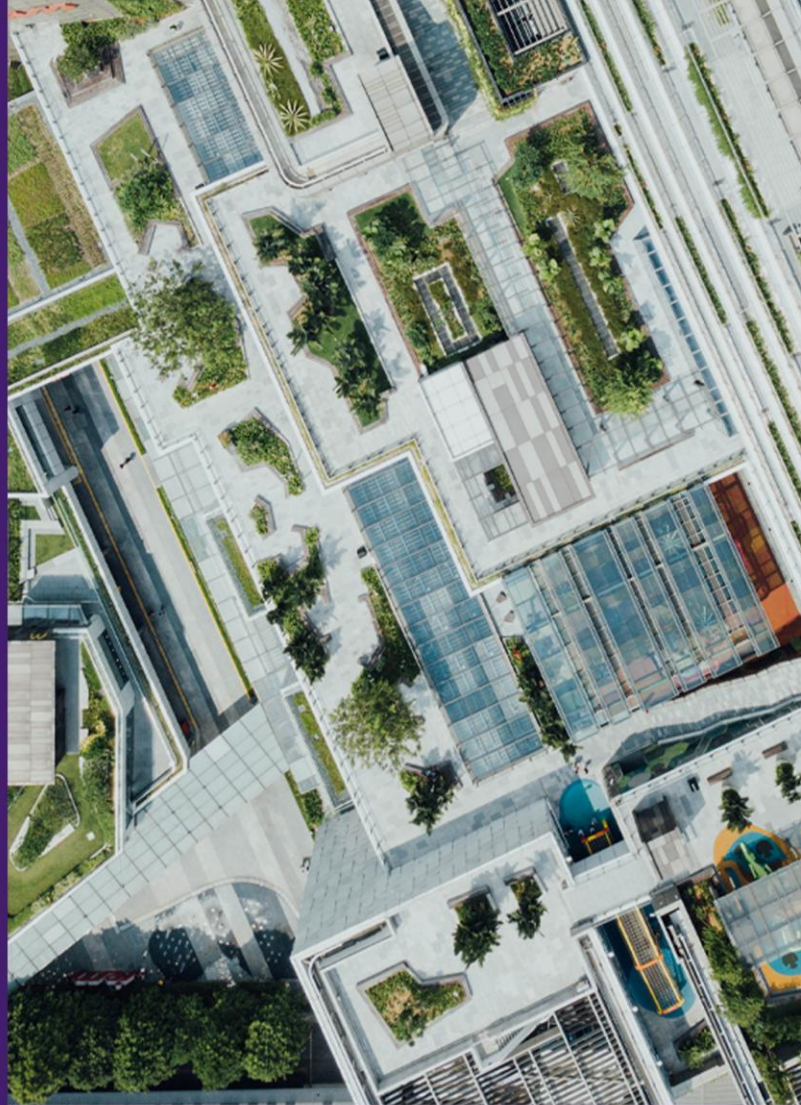


Attachment D

Clause 4.6 Variation Request – Minimum Landscaped Area
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98-106 Kippax Street, Surry Hills NSW 2010

Clause 4.6 Variation Request – Landscaped Area

On behalf of I.S.L Property
Investments Management Pty Ltd

3 March 2026

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.

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			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 precautionary Clause 4.6 Variation Request seeks to allow a variation to the Landscaped Area non-discretionary development standard associated with the Development Application (DA) 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. Components of 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 seven (7) double car stackers, 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 two (2) retail tenancies, 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 (including 7 dual key units) of which six (6) dual key units will be allocated as affordable housing for a period of 15 years:
 - 3 x studio;
 - 8 x 1-bedroom;
 - 20 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.

This Clause 4.6 Variation Request is submitted to accompany an amended development proposal submitted to Council in response to Council's RFI request issued on 21 October 2025 and 25 February 2026.



The Clause 4.6 Variation Request seeks to vary the minimum Landscape Area non-discretionary development standard under Clause 19 of the Housing SEPP. It is noted that this Clause 4.6 Variation Request has been prepared on the request of Council as a precaution. However, it is noted that a non-discretionary standard within the SEPP allows the Council, as a consent authority, to exercise its discretion on how they administer the non-discretionary standard. Section 4.15(3) does not prevent development consent being granted if a non-discretionary development standard is not complied with.

This Clause 4.6 Variation Request demonstrates that, notwithstanding the landscaped area not meeting the minimum standard within the SEPP, the proposed development:

- Demonstrates that strict compliance with the standard is unreasonable or unnecessary as the development satisfies the in-fill affordable housing objectives within Chapter 2, Part 2, Division 1, Clause 15A of the Housing SEPP and zone objectives within Sydney Local Environmental Plan (SLEP) 2012 as the Housing SEPP does not prescribe development standard objectives; and
- Will deliver a development that is appropriate for its context and achieves compliance with the communal open space requirements which includes soft landscaping under the Apartment Design Guide (ADG) despite the numerical breach to the non-discretionary development standard in Clause 19 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 19 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 non-discretionary development standard.

3.1 Housing SEPP 2021 – Clause 19

Clause 19(1) of Housing SEPP prescribes minimum non-discretionary standards for infill affordable housing, if complied with, prevent the consent authority from requiring more onerous standards. The standards must not necessarily be achieved in all cases but rather they provide thresholds that, if met, cannot be used as reasons to refuse an application.

Clause 19(2)(b) of the Housing SEPP prescribes the following non-discretionary landscape area for the proposed development:

"(2) The following are non-discretionary development standards in relation to the residential development to which this division applies—...

(b) a minimum landscaped area that is the lesser of—

(i) 35m² per dwelling, or

(ii) 30% of the site area,"

In accordance with Schedule 10 of the Housing SEPP, landscaped area is defined as:

"the part of the site area not occupied by a building and includes a part used or intended to be used for a rainwater tank, swimming pool or open-air recreation facility, but does not include a part used or intended to be used for a driveway or parking area."

Based on the above definition and SEPP requirements, the proposed development is required to provide a landscaped area of 236.55m² (30% of the site area – 788.5m²).

The landscaped area definition contained within the Housing SEPP is considered to be akin to deep soil area which is defined as follows under Schedule 10 of the Housing SEPP:

"a landscaped area with no buildings or structures above or below the ground."

Part 3E of the ADG prescribes developments to provide a minimum of 7% of the site area in deep soil planting, equivalent of 55.2m² (based on a site area of 788.5m²). Despite this requirement, the ADG advises that compliance with this requirement may not be possible on some sites located in high density areas which have a 100% site coverage and contain non-residential uses on the ground floor, which is how this site is characterised.

In addition to the above, it should also be noted that Part 3D of the ADG prescribes a common open space requirement of 25% of the site area and is to include the provision of soft landscaping that could be located on rooftop areas within business zones and in high density areas. Based on these requirements the proposed development is required to provide a communal open space area of 197.1m² (25% of the site area – 788.5m²), which is broadly met in the subject development.



4 Extent of Variation to the Development Standard

The development does not provide landscaped area (including deep soil planting) that is not occupied by a building or structure in accordance with the Housing SEPP definition, which therefore results in a 100% variation (equivalent of 236.55m²).

Despite the above, the development provides a total green planting area of 129.1m², amounting to 16.4% of the site area which includes rooftop soft landscaping, and planters on the upper floors which is considered to meet the purpose of landscaping and greenery in a highly dense urban environment and the design guidance provided within Part 3D and 3E of the ADG.

To enhance the quality of open space areas in high density environments; the development is required to provide 197.1m² (25% of the site area – 788.5m²) of communal open space under the ADG that includes soft landscaping of which can be located on the rooftop in business zones. The development provides a rooftop communal open space amounting to 274.5m² (amounting to 34.8%) of which 84.5m² is soft landscaping consistent with the communal open space requirements of the ADG. The rooftop communal open space amounts to 39% above the ADG requirement.

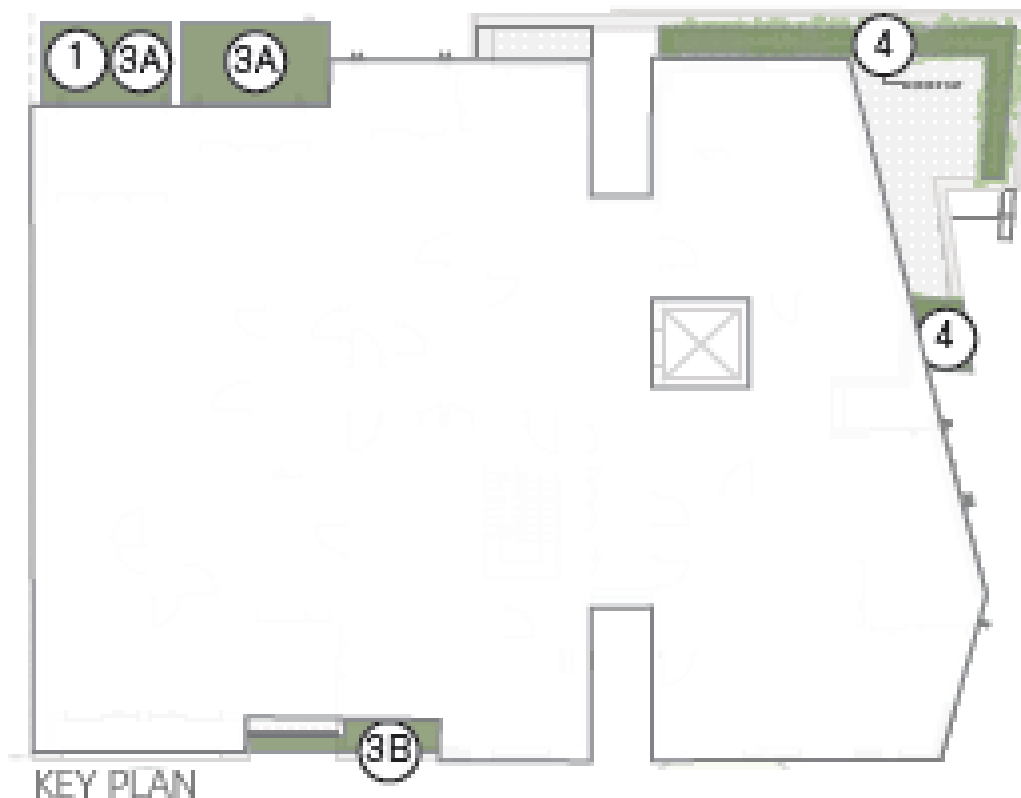
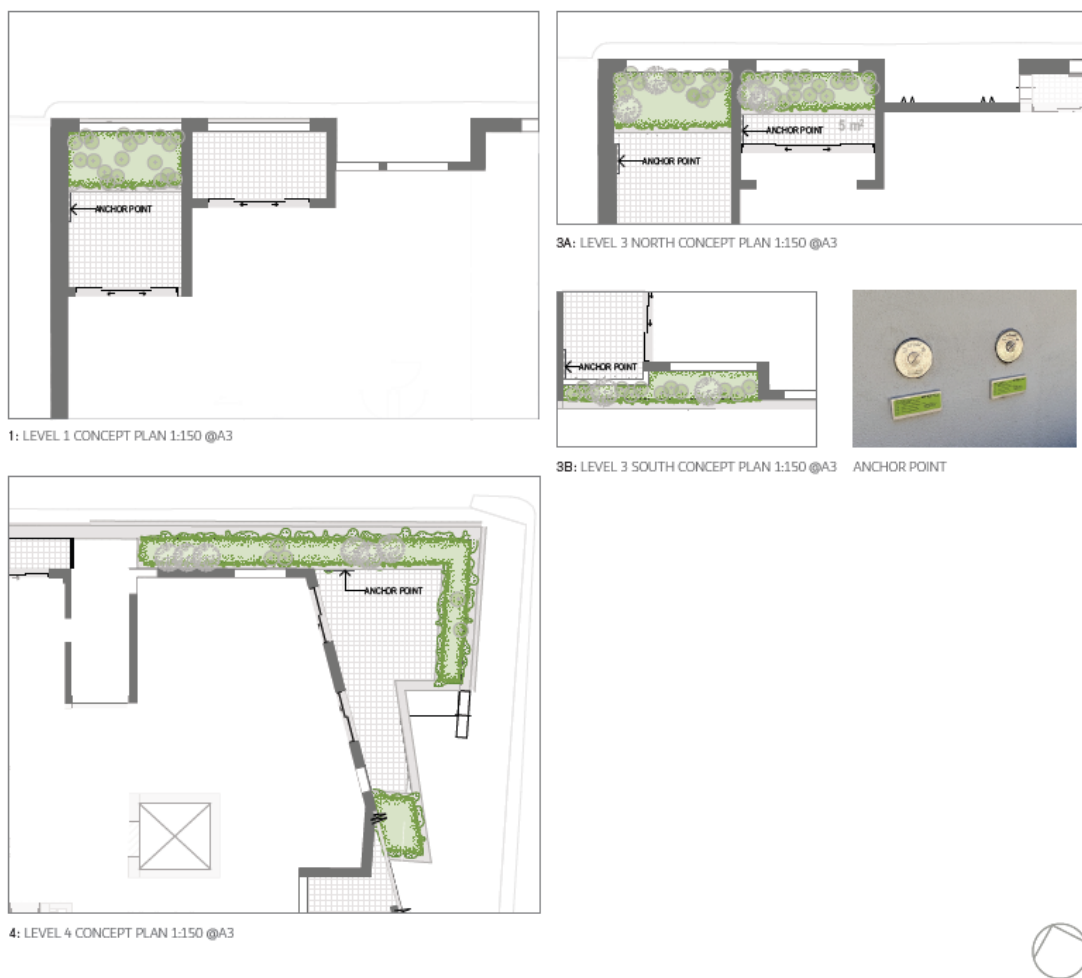


Figure 1: Proposed Landscape Key Plan of planters on the upper floors (DKO Landscape)



5 Assessment

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

Compliance with the landscaped area non-discretionary development standard is unreasonable and unnecessary as the development achieves compliance with in-fill affordable housing division objectives within Chapter 2, Part 2, Division 1, Clause 15A of the Housing SEPP and the MU1 – Mixed Use zone objectives applying to the land under SLEP 2012 notwithstanding non-compliance with the numerical standard under the Housing SEPP (Wehbe 1# test).

In this instance the in-fill affordable housing objectives within Division 1 of the Housing SEPP and zone objectives are considered as the Housing SEPP does not prescribe objectives for the Landscaped Area non-discretionary development standard.

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)

The Housing SEPP does not prescribe objectives for the non-discretionary development standard, and in the absence of objectives for the standard, the in-fill affordable housing



objectives within Division 1 of the Housing SEPP and the MU1 – Mixed Use zone objectives applying to the land under SLEP 2012 are to be considered.

5.2.1 Division 1 - Infill Affordable Housing Objectives of the Housing SEPP

The proposal will be in the public interest as it meets the infill affordable housing division objectives within Division 1, Clause 15A of the SEPP as follows:

The objective of this division is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.

The development proposes the construction of a shop top housing development, which contains 35 residential units (including 7 dual key units) of which six (6) dual key units will be allocated as affordable housing for a period of 15 years. The affordable housing component amounts to a total of 575.4m², which amounts to 16% of the overall GFA, that exceeds the Housing SEPP requirement of 15%.

The affordable housing component will be managed and operated by EchoRealty, a registered community housing provider based in Parramatta with operations in New South Wales, Australian Capital Territory and Victoria. It is the largest provider of affordable housing in Australia and forms part of the Evolve Housing Group, who boasts a successful track record in managing community housing assets for over 30 years.

The proposed development will facilitate an increase in housing diversity and the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households within the Sydney City local government area. The non-compliance with the landscaped area non-discretionary development standard should not prevent the provision of affordable housing within the area.

5.2.2 Zone Objectives under SLEP 2012

The proposal will be in the public interest as it meets the MU1 – Mixed Use zone objectives as follows:

Objective (a) to encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.

The development proposes a shop top housing development with three (3) lower ground / ground floor retail tenancies and residential units (including affordable housing units) above. The proposal enables the urban renewal of the site which will provide employment during the construction and operational stages of the development. The proposed retail tenancies are of varying sizes to attract a variety of commercial and cultural uses and generate employment opportunities. In addition, the retail tenancies would serve the needs of the residents within the proposed building and broader community providing greater activation of the area.

Objective (b) 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 proposed development has been designed to deliver an active and engaging street frontage that contributes positively to the vibrancy, diversity and functionality of the public domain. The adaptive reuse of the existing contributory building for shop-top housing, including affordable housing, retains the established streetscape character while introducing new activity and occupation at street level.



The proposed lower ground / ground floor retail tenancies are oriented to the primary street frontages of Kippax Street, Waterloo Street and Sophia Street and are designed to maximise visual connection between internal spaces and the public domain through active frontages and frequent entry points. This will encourage pedestrian interaction, increase passive surveillance and enhance the overall safety and vitality of the street.

The provision of new retail floorspace will generate additional business opportunities and employment, strengthen the local economy and reinforce the role of the corner site within the local centre. The introduction of new residential uses above the ground floor will increase population density and extend activity beyond business hours, supporting a more vibrant and functional streetscape throughout the day and evening.

Overall, the proposal facilitates the urban renewal of the corner site in a manner that activates the street, attracts pedestrian movement and contributes to the creation of a lively and diverse public realm consistent with Objective (b).

Objective (c) to minimise conflict between land uses within this zone and land uses within adjoining zones.

The site is zoned MU1 – Mixed Use under SLEP, within which shop top housing is a permissible land use. The surrounding area is characterised by MU1 – Mixed Use zoning, with the nearest R1 – General Residential zoned land located some distance from the site and separated by intervening mixed-use and commercial development. The proposed development responds appropriately to this zoning context through the adaptive reuse of the existing contributory building and the delivery of a mixed-use form that is consistent with the established building typology and scale of development in the area and revitalise the corner of Kippax Street, Waterloo Street and Sophia Street.

The proposal utilises the affordable housing provisions under the Housing SEPP, which permit an increase in FSR and building height in exchange for the delivery of affordable housing for a minimum period of 15 years. In accordance with these provisions, the development achieves an FSR of 4.55:1 and a height that largely complies with the 28.6m requirement, resulting in a density that is consistent with the intended planning framework for the zone.

While the proposal includes a minor height variation of 540mm (1.9%) associated with the lift overrun and stairway, this variation is acceptable as the overall built form remains consistent with the prevailing seven (7) and nine (9) storey development within the immediate vicinity. Also, the minor departure will not result in adverse environmental impacts or generate land use conflict with adjoining properties and is supported by a Clause 4.6 Variation Request prepared by The Planning Studio.

The development is also not able to provide landscaped area in accordance with the definition prescribed by the Housing SEPP, due to the dense urban location of the site and the proposal seeking to retain significant building elements of the contributory building. As such the development proposes alternative landscaping features (rooftop soft landscaping and planters on the upper floor) consistent with the surrounding building topology. In addition, the development proposes rooftop communal area that includes soft landscaping that exceeds the ADG numerical area requirements.

It is considered that the proposed development will not prejudice the orderly and economic redevelopment of surrounding land or adjoining zones. The scale, use and built form are compatible with both the mixed-use and commercial character of the area and the nearby residential interface, thereby minimising potential conflict between land uses and achieving an appropriate transition between zones in accordance with Objective (c).



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

The development proposes non-residential uses at the lower ground and ground floor levels in the form of three (3) retail tenancies, with residential accommodation located above. This configuration reinforces the intended mixed-use character of the land use zone and ensures that active commercial uses are concentrated at street level which revitalise the corner of Kippax Street, Waterloo Street and Sophia Street.

The retail tenancies are provided in varying sizes to accommodate a range of commercial, cultural and community-oriented uses, supporting flexibility in tenancy occupation and encouraging a diverse mix of retail and service activities. This approach promotes economic vitality and strengthens the role of the site within the local centre.

The ground floor layout has been designed to maximise interaction with the public domain through active frontages, clear pedestrian entry points and strong visual connectivity between internal commercial spaces and the street. This will contribute to a lively and functional streetscape, encourage pedestrian movement and enhance the overall vibrancy of the area.

Accordingly, the proposal encourages business, retail and other non-residential land uses at ground level in a manner consistent with this objective.

Objective (e) to ensure land uses support the viability of nearby centres.

The proposed development supports the viability of nearby centres by reinforcing the established mixed-use and commercial character of the locality and strengthening the role of the corner site as part of the broader Surry Hills commercial and activity precinct. The site is zoned MU1 – Mixed Use under SLEP, within which shop top housing is a permissible land use, and approval is sought for the partial retention of the existing contributory building and the construction of an 8-storey shop top housing development comprising retail tenancies at the lower ground / ground floor levels and residential accommodation above, including affordable housing.

The provision of ground floor retail tenancies will contribute directly to the local economy by accommodating new businesses and services that complement existing commercial activity within nearby centres. These uses will enhance day-to-day amenity for workers, residents and visitors, encouraging pedestrian movement and supporting the continued vitality of surrounding retail and commercial precincts.

The introduction of 35 residential units (including 7 dual key units), including affordable housing, will increase the local population within walking distance of established centres, generating ongoing demand for shops, services and community facilities. This concentration of residents in close proximity to employment, public transport and amenities promotes sustainable patterns of growth and reinforces the economic resilience of nearby centres.

The development has been designed to integrate sensitively with its evolving urban context, retaining the contributory building and responding to the prevailing seven (7) to nine (9) storey built form through a compact footprint, narrow setbacks and articulated facades. This approach ensures the proposal complements rather than competes with surrounding centres, while contributing to urban renewal in a manner that strengthens the commercial and social fabric of the area.

Accordingly, the proposal will support and enhance the viability of nearby centres by delivering additional retail opportunities, increasing local patronage through new housing,



and reinforcing the mixed-use / commercial function of the precinct in accordance with this objective.

Objective (f) 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 proposed development is seeking the adaptive reuse of the existing contributory building and the construction of a shop top housing development has been carefully designed to integrate both non-residential and residential components of the development to successfully revive the corner site and the immediate locality.

As mentioned in the above objectives, the proposed retail tenancies have been designed to accommodate a diversity of commercial and cultural uses, generate local employment opportunities, and serve both residents and the wider community. Concentrating active non-residential uses at street level reinforces the mixed-use / commercial character of the area, enhances the streetscape, and encourages pedestrian activity.

Residential accommodation above is designed to maximise solar access, visual and acoustic privacy, and amenity through thoughtfully integrated landscaping features, including rooftop communal areas with soft landscaping and upper-floor planters. While the compact, boundary-to-boundary footprint limits traditional landscaping in accordance with the definition of the Housing SEPP, the adaptive reuse approach respects the existing building form and high-density environment of the area and is consistent with the surrounding commercial and mixed-use context.

The site's location supports high levels of accessibility and sustainable transport use. Central Station and Central Chalmers Tram Stop are approximately 300 metres to the east, and multiple bus routes along Foveaux and Elizabeth Streets provide convenient connections to the CBD and surrounding centres. The proximity of these transport nodes encourages residents, employees, and visitors to walk, cycle, and utilise public transport, reducing reliance on private vehicles and enhancing the functionality of the mixed-use precinct.

Overall, the development integrates complementary land uses in a highly accessible location, maximising public transport patronage and promoting active, sustainable modes of travel in line with Objective (f).

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 SLEP 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 in Section 3 of this report, the Housing SEPP prescribes a landscape area numerical requirement (30% of site area). The definition of landscaped area under the SEPP does not permit landscaping on structures or occupied by buildings and does not require any form of actual landscaping or planting to meet the definition. The development does not provide landscaped area that is not occupied by a building or structure in accordance with the Housing SEPP definition, which results in a 100% variation (equivalent of 236.55m²).

Notwithstanding this, the development provides a total green planting area of 129.1m², amounting to 16.4% of the site area which includes rooftop soft landscaping, and planters on the upper floors which is considered to meet the purpose of landscaping and greenery in a highly dense urban environment. This is consistent with design guidance provided within the ADG, which recognises that strict compliance with this requirement may not be possible on some sites located in high density areas which have a 100% site coverage and contain non-residential uses on the ground floor, which is how this site is characterised.

To enhance the quality of open space areas in high density environments; the development is required to provide 197.1m² (25% of the site area – 788.5m²) of communal open space under the ADG that includes soft landscaping of which can be located on the rooftop in business zones. The development provides a rooftop communal open space amounting to 274.5m² (amounting to 34.8%) of which 84.5m² is soft landscaping consistent with the communal open space requirements of the ADG. The rooftop communal open space amounts to 39% above the ADG requirement.

Given the site's high-density, City Edge, Surry Hills location, and the proposal's aim to retain significant building elements of the contributory building, it is not possible to achieve landscaped area not affected by building structures, as the SEPP 'landscaped area' definition requires. Rather, the proposed design has grasses, plants and small trees at all levels of the building, which is a particular environmental planning ground relevant to the site and its high-density location. This also achieves an improved urban heat island reduction than a development that strictly complied with the Housing SEPP definition.

Despite the non-compliance with the SEPP landscape area definition, the development is considered to provide a high-quality outcome that will deliver much needed affordable housing for the local area with high quality living environment for residents by maximising solar amenity, visual and acoustic privacy and diverse landscaping features whilst encourage growth of the local economy with lower ground / ground floor retail uses.

The alternative soft landscape features contribute to the overall amenity of the building, enhance the landscape setting of the existing site within the streetscape, and contribute to the overall environmental performance of the building from a sustainability perspective.

The proposed built form seeks to respect the diverse building typology of the surrounding locality and is consistent with landscaped area typical to an employment / mixed use land use zone for mixed use buildings. In addition, the proposed building footprint and landscaped areas (consisting of roof top planting and upper floor planters) are consistent to the previously approved shop top housing development on the site under D/2017/225 approved by the City of Sydney Local Planning Panel on 11 April 2018.

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 Landscape Area for the non-discretionary development standard under Clause 19 of Housing SEPP 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 Landscaped Area non-discretionary development standard, the proposal:

- Achieves the In-fill affordable housing division objectives within Chapter 2, Part 2, Division 1, Clause 15A of the Housing SEPP in the absence of the development standard objectives under the SEPP;
- Achieves the objectives of the of the MU1 – Mixed Use zone in the absence of the development standard objectives under the Housing SEPP;
- Delivers a development that is appropriate for its context and achieves compliance with the communal open space requirements under the ADG therefore has sufficient environmental planning grounds to permit the variation;
- Are consistent to the previously approved shop top housing development on the site under D/2017/225 approved by the City of Sydney Local Planning Panel on 11 April 2018; and therefore
- Compliance with the development standard is unreasonable or unnecessary in the circumstances of this proposal.

