

Attachment C

Clause 4.6 Variation – Height of Buildings

Clause 4.6 Variation
Request – Maximum Building Height –
Clause 4.3 Sydney Local Environmental
Plan 2012

17 Randle Street, Surry Hills

Prepared by Planning Lab
Issued 21 April 2026

Planninglab.com.au

1. Introduction

This request to vary a development standard has been prepared in accordance with Clause 4.6 (cl 4.6) of the Sydney Environmental Plan 2012 (SLEP 2012) which accompanies a development application to construct a residential addition above the existing commercial building located on the premises, 17 Randle Street, Surry Hills ('the site').

The DA primarily involves:

- The demolition of the existing internal layout of Level 5 and Roof Level;
- The adaptive internal replanning of Level 5 and construction of a new building level above with an outdoor terrace (Level 6) for a two level residence (Levels 5 and 6);
- Replacement of existing windows and new acoustic treated windows along the Randle and Chalmers Street elevations of Level 5;
- A new sculptural architectural roof feature above the new Level 6; and
- A new concrete wall located along the northern boundary (adjoining 38 Chalmers Street).

This request specifically seeks to vary the 27m maximum height of building development standard contained in Clause 4.3 of SLEP 2012.

This request has been prepared having regard to the following considerations:

- The Department of Planning and Environment's Guide to Varying Development Standards (November 2023);
- The objectives of Clause 4.3 of SLEP 2012 – Height of Buildings, being the development standard to which a variation is sought; and
- Relevant case law in the New South Wales Land and Environment Court and New South Wales Court of Appeal including *Wehbe v. Pittwater Council* [2007] NSWLEC 827.

This variation request provides an assessment of the development standard and the extent of variation proposed to the standard. The variation is then assessed in accordance with the principles set out in the *Wehbe*.



2. Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the SLEP 2012 provides that development consent may be granted for development even though the development would contravene a development standard imposed by the SLEP 2012.

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.

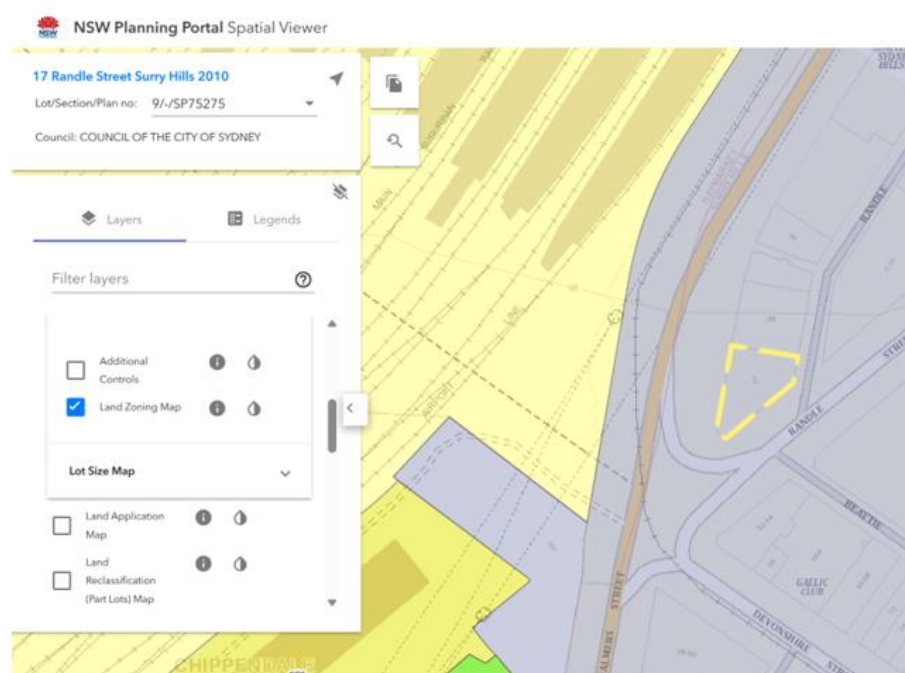
In accordance with clause 4.6(3) the applicant requests that the SLEP 2012 maximum height of building development standard be varied.

3. What is the Environmental Planning Instrument (EPI) that applies to the land?

The Environmental Planning Instrument (EPI) to which this variation relates is the Sydney Local Environmental Plan 2012 (SLEP 2012).

4. What is the zoning of the land?

The site is zoned MU1 Mixed Use pursuant to the SLEP 2012. Refer to **Figure 1**.

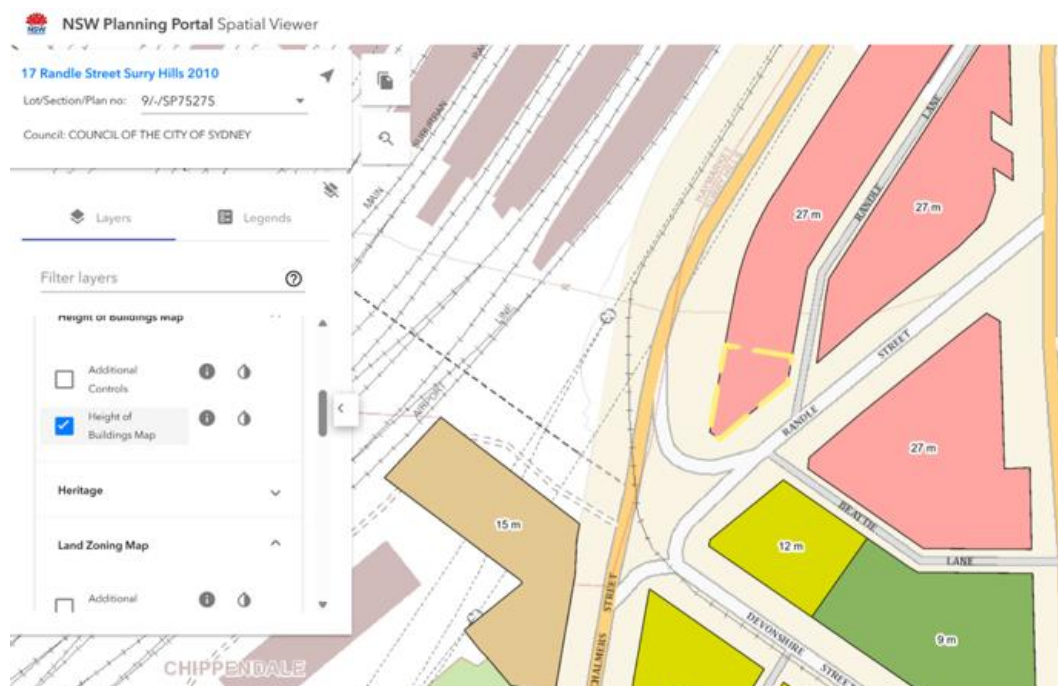


*Figure 1: Extract of Land Use Zoning Map (subject site shown with yellow dashed outline)
Source: NSW Planning Portal Spatial Viewer*



5. What is the development standard being varied?

Clause 4.3 of the SLEP 2012 provides that the height of a building on any land is not to exceed that shown for the land on the Height of Buildings Map. The site is within a 27m maximum height of building area, as shown in Figure 2.



*Figure 2: Extract of Height of Building Map (subject site shown with yellow dashed outline)
Source: NSW Planning Portal Spatial Viewer*

6. Is the development standard excluded from the operation of Clause 4.6 of the EPI?

CI 4.6(2) states that development consent may be granted for development even though the development would contravene a development standard. However, this does not apply to a development standard that is specifically excluded under ci 4.6(8) of the SLEP 2012. Given the maximum height development standard is not identified under subclause 4.6(8), it is therefore not specifically excluded from the operation of ci 4.6 of SLEP 2012.



7. The site and its context

7.1 The Site

The site has a legal description of SP 71953 and is commonly known as 17 Randle Street, Surry Hills.

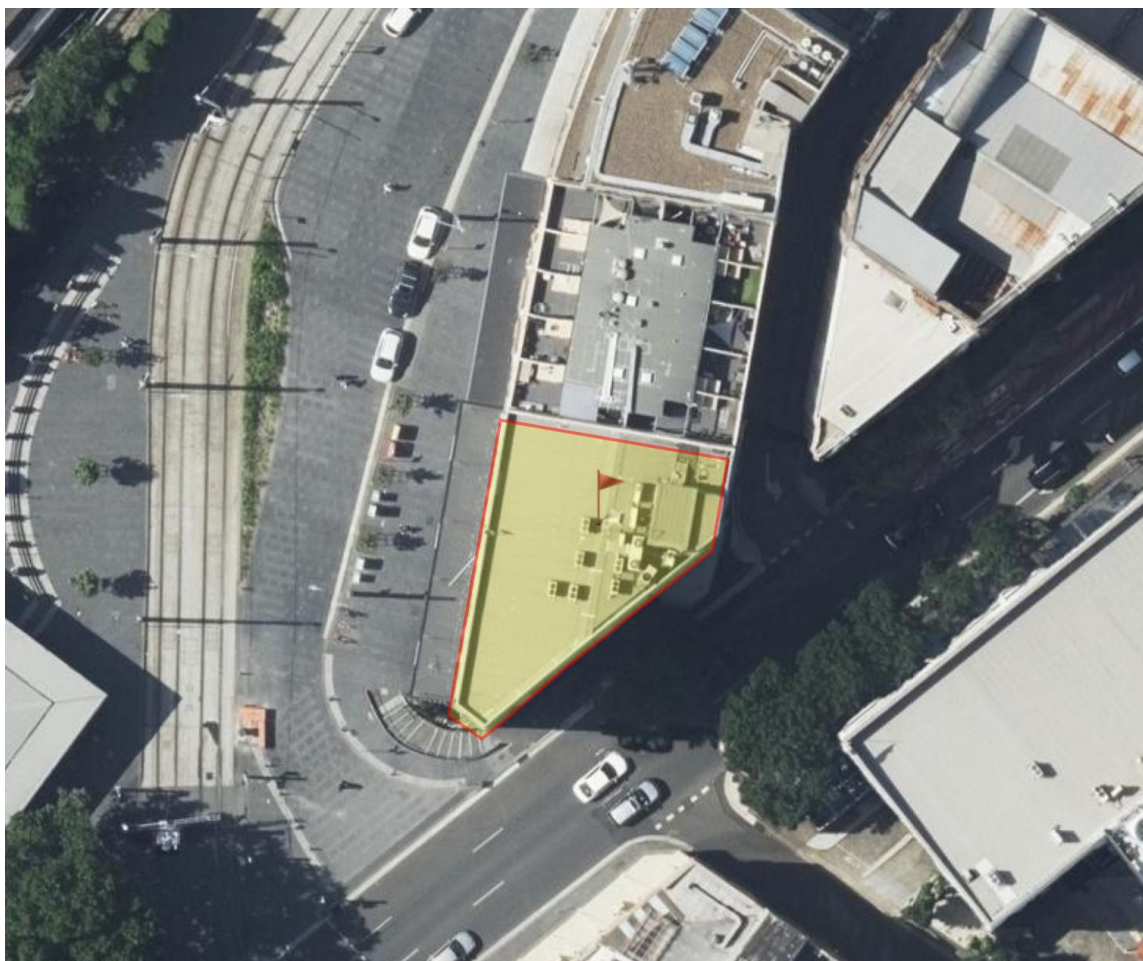


Figure 3 – Aerial image identifying the site (NSW SIX Maps)

The site is an irregular shape, with frontages to both Randle Street and Chalmers Street, with an area of approximately 317m². Levels on the site fall by 3.48m from the Randle Street frontage to the Chalmers Street frontage.

The site is occupied by a 7 storey commercial building, consisting of a ground level retail tenancy along Chalmers Street and commercial offices on the levels above. The site has no on site car parking.

The main building entrance, lift access and fire stairs are located along the Randle Street frontage.

The site is neither identified as a heritage item nor located within a Heritage Conservation Area under Sydney Local Environmental Plan 2012 (SLEP 2012). The site is located adjacent to the local and state heritage item – Central Railway Group (item numbers I824 and O1255 respectively).





*Figure 4 – View of Chalmers Street Frontage of Existing Building – 17 Randle Street
(Source: City of Sydney)*



*Figure 5 – View of Randle Street Frontage of Existing Building – 17 Randle Street
(Source: City of Sydney)*





Figure 6 – View of Existing Building – 17 Randle Street from the South with Light Rail Lines in the foreground (Source: City of Sydney)

7.2 Adjoining and Surrounding Development

The site is immediately adjoined to the north by two, 8 storey, mixed use, shop top housing developments at 30-34 and 38 Chalmers Street. Located opposite to the east is the 7 storey, Newspoll Office Building at 407-419 Elizabeth Street, to the south-east is the 3 storey, Madison Hotel site at 52 Devonshire Street, a currently vacant redevelopment site to the north-east, 7-15 Randle Street, and to the west along Chalmers Street is the Sydney Light Rail network, and the large expanse of the Sydney Rail network leading into Central Station further to the west and north-west.

As identified in the photomontage of the proposed roof addition in **Figure 7** below, the subject site is well separated from the commercial buildings to the east and north-east, and the light and heavy rail corridor uses to the west.





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FOR APPROVAL 1:100 (A1) Photomontage: Surry Hills, Surry Hills 1188 (Late Project 1188)		Site Name: Surry Hills 1188 Site No: 1188 Site Area: 1188 sqm Site Address: 1188 Surry Hills, Surry Hills 1188	Project Name: XCOMMERCIAL Project Address: 17 Randle Street, Surry Hills, 2010, NSW Project Description: PHOTOMONTAGE - CHALMERS STREET	Date: 20-04-2020 Drawn By: A1 Scale: 1:100 Sheet No: 7186 DA-8701 14	SJB Architects Level 2, 1188 Surry Hills Phone: 02 9550 1188 www.sjb.com.au
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Figure 7 – Photomontage looking to the proposed roof addition of the subject site (SJB Architects)

The sites in closest proximity to the subject site is the shop top housing development immediately adjoining to the north (38 Chalmers Street), and the future redevelopment site to the north-east (7-15 Randle Street).

As identified in **Figure 8** below, 38 Chalmers Street consists of a series of multi-level residential units, with part enclosed living areas and open terraces at roof level. The southernmost of these units are currently separated by a privacy screen, built at various heights adjoining the common boundary with 17 Randle Street.





Figure 8 – Aerial view of the roof level residential units and open terraces of 38 Chalmers Street (shaded yellow) and their proximity to the adjoining roof level of 17 Randle Street site (SIX Maps)



Figure 9 – Photos taken from the existing roof of 17 Randle Street looking toward the common boundary and existing privacy screen located along the boundary of the adjoining roof level apartments of 38 Chalmers Street. (SJB Architects)



The property located opposite Randle Lane to the northeast, 7-15 Randle Street, is currently vacant and is a future redevelopment site. Following an earlier design competition, Council granted deferred development consent for D/2019/1292 on 18 August 2020 for the demolition of the existing buildings at 7-9 and 15 Randle Street, retention and re-use of 11-13 Randle Street (an existing heritage item) and construction of a 9 storey mixed use building with 2 levels of basement across the sites including a through site link between Randle Lane and Randle Street and use of the building as hotel accommodation (123 rooms) with 2 restaurants, small bar and café. However, all the buildings on site were substantially damaged by a fire that occurred within 11-13 Randle Street on 25 May 2023. Council has subsequently granted consent to an amending DA (D/2023/1170) to enable the main development concept of D/2019/1292 to advance, but including a rebuild of the former heritage building at 11-13 Randle Street, utilizing remnant building materials. Both consents have since been modified, with the latest modification application D/2019/1292/E being undetermined at the time of lodging the current DA for 17 Randle Street. It is worth noting that the current modification includes a proposal for a rooftop bar (181 seats - 65 outdoor and 116 internal). A photomontage of the 7-15 Randle Street design concept is provided in **Figure 10** below.



Figure 10 – Photomontage of current amended design of mixed-use building at 7-15 Randle Street – D/2019/1292/E (Tonkin Zulaikha Greer Architects Architects)



Whilst located just outside of the Central Sydney area, the site is located within the Railway Square/Central Station Special Character Area of Sydney Development Control Plan 2012 (SDCP 2012).

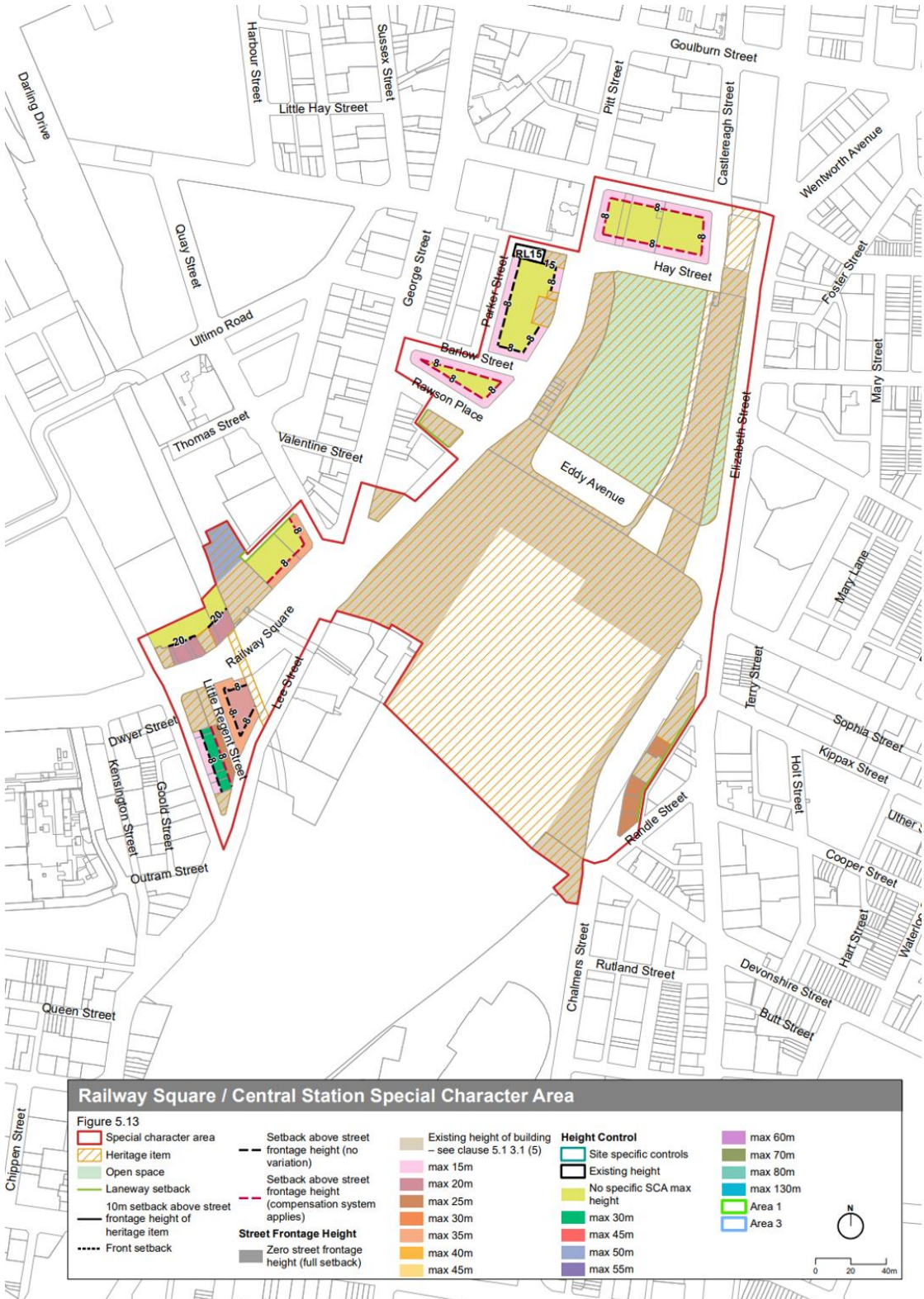


Figure 11 – Extract of Figure 5.13 Special Character Map SDCP 2012 (Source: City of Sydney)



8. Extent of Variation to the Development Standard

This Variation Request accompanies a Development Application to construct a residential addition above the existing commercial building located on the premises, 17 Randle Street, Surry Hills ('the site').

8.1 Extent of Maximum Building Height Variation

In accordance with Clause 4.3 of Sydney LEP 2012, the maximum building height for the subject site is **27m**.

The proposed maximum height of the roof of the new residential addition is **RL 54.39**, representing a maximum vertical height of the existing ground level of **29.92m**, a variation of **2.92m**, or a margin of **10.8%** of the existing LEP maximum of **27m**.



Figure 12: Extract of East Elevation from Architectural Drawings (Source: SJB Architects)



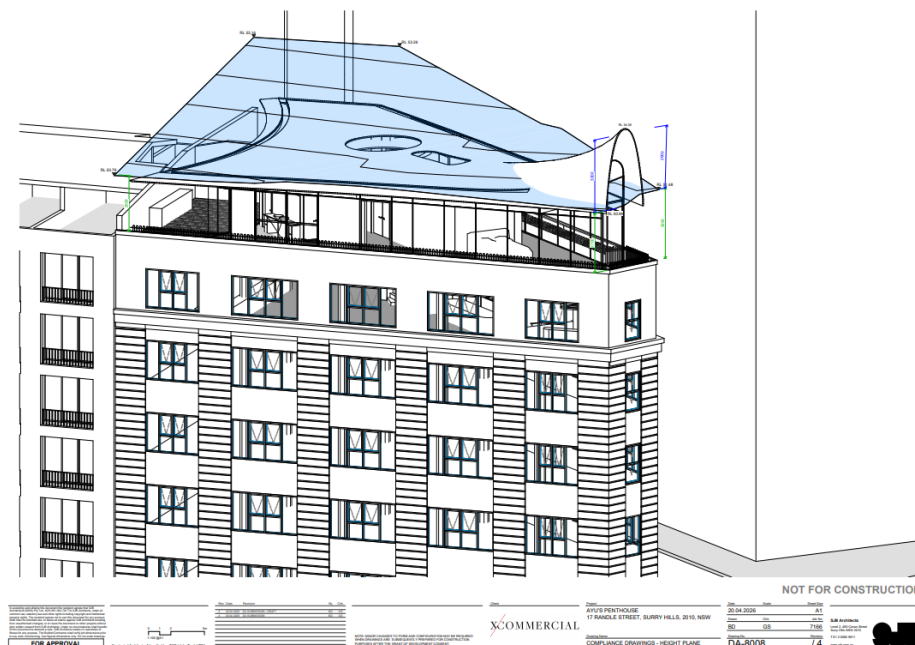


Figure 13: Extract of Building Height Plane Diagram from Architectural Drawings (Source: SJB Architects)

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

Clause 4.6(3)(a) of the SLEP 2012 requires that the request to vary a development standard demonstrate that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case.

Historically the most commonly used way to establish that a development standard was unreasonable or unnecessary was the satisfaction of the first test of the alternative five tests established 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 *Wehbe* at [42] – [51] and repeated in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [17]-[21] the Chief Judge identified five alternative ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established.

Although *Wehbe* concerned a SEPP 1 objection, it remains relevant to requests under clause 4.6 (as confirmed by Preston CJ in *Initial Action* at [16]).

The five potential methods established under *Wehbe* are that:

1. the objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;



3. the objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
4. the development standard has been virtually abandoned or destroyed by the Council's actions in granting consents departing from the standard and hence the standard is unreasonable; or,
5. the zoning of the land is unreasonable or inappropriate.

The five ways are not exhaustive, and it may be sufficient to establish only one to satisfy cl 4.6(3)(a).

For completeness, this request addresses the first of the five alternative tests established - 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.

9.1 The Objectives of the standard are achieved notwithstanding non-compliance with the standard;

Compliance with the building height development standard is unreasonable or unnecessary in the circumstances of this case because, as explained in Table 1 (below), the objectives of the development standard are achieved, notwithstanding non-compliance with the standard.

Demonstrating that the proposal will have no adverse amenity impacts is, therefore, one way of showing consistency with the objectives of a development standard.

Table 1: Achievement of Development Standard Objectives of Clause 4.3 of Sydney LEP 2012

Objective	Discussion
(a) to ensure the height of development is appropriate to the condition of the site and its context,	As identified in the LEP Height of Buildings Map in Figure 2 , the subject site and the blocks immediately to the north, north-east and east have a maximum height of 27m. Lower height limits of 12m and 9m are identified for properties located to the south-east along Devonshire Street. A similar pattern of restrictions has been applied through the Height in Storeys Map of SDCP 2012, with 8 storeys being the prevailing, immediately surrounding control. The actual existing built form and approved DAs of the subject site and surrounding properties have heights ranging from 7 to 9 stories, and up to 29m. Importantly, Council has already approved a DA for a rooftop addition to the commercial



Objective	Discussion
	building on the subject site (DU/2003/76/E) up to 8 storeys and 27.71m. The current DA for a residential roof top addition and adaptive use proposes an 8-storey building, with a slightly higher maximum height of 29.92m, which primarily derives from providing a more attractive and roof form, which is shaped to rise up to its highest point on the south-east corner of the building. It is therefore considered that the proposed height and design is highly appropriate for its current context, with minimal environmental impacts for adjoining and surrounding properties and the public domain.
(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,	In terms of Clause 5.10 of the LEP - Heritage Conservation, the SEE identifies that the site is neither identified as a heritage item nor located within a Heritage Conservation Area under Sydney Local Environmental Plan 2012 (SLEP 2012). However, it is located adjacent to the local and state heritage item – Central Railway Group, and in the vicinity of other nearby items. This significance is addressed in an accompanying Heritage Impact Statement prepared by Urbis which concludes: <i>The proposed development has been assessed to have a positive heritage impact on the heritage items in the vicinity.</i> <i>The proposed works are confined to the upper levels of the building and will not result in intrusion, overhang or adverse impacts on nearby heritage items, surrounding hardscape, archaeological resources, or views to and from Central Railway Station.</i> <i>Overall, the proposal is appropriately designed to protect the heritage significance of the surrounding area while supporting its continued evolution.</i>



Objective	Discussion
(c) to promote the sharing of views outside Central Sydney,	Given the primary focus of the scale and orientation of the subject commercial building to the south and south-east, and being well separated from buildings to the north and north-east, and south and east by adjoining streets, and the open visual landscape of the light rail and heavy rail corridors to the west, the proposed roof top addition will have minimal to negligible impact on existing view corridors to the more iconic locations of Sydney Harbour and the CBD to the north, thereby maintaining a satisfactory level of view sharing in this locality.
(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,	As identified in objectives (a) to (c) above, the proposed height of the current DA is highly consistent and substantially compliant with Council's LEP and DCP controls, as well as the scale, urban form and character of this locality.
(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.

Compliance with the maximum building height development standard is therefore unreasonable or unnecessary in the circumstances of this case because the objectives of the standard are achieved, and the non-compliance will not result in any major adverse environmental impact.



10. Clause 4.6(3)(b) Are there any sufficient environmental planning grounds to justify contravening the development standard?

Clause 4.6 (3) (b) of the LEP necessitates a specific focus of assessment of the extent of environmental impacts of that part of the proposed development that exceeds the relevant LEP development standard, which is the Clause 4.3 maximum building height requirement of 27m.

Section 8 of this report identifies that the proposed maximum height of the roof of the new residential addition is **RL 54.39**, representing a maximum vertical height of the existing ground level of **29.92m**, a variation of **2.92m**, or a margin of **10.8%** of the existing LEP maximum of **27m**.

In the context of this environmental impact assessment, an important design reference for the current DA, is the active development consent for the site, DU/2003/76/E, which involved a relatively similar adaptive re-use of the existing Level 5 and erection of a new Level 6 at the current Roof Level for a commercial use, as compared to the proposed residential use of the current DA.

DU/2003/76/E also included a flat roof form with a maximum height of RL 51.00 at the parapet level.

This maximum level has been used as a reference point in the design of the proposed residential addition in the current DA, which retains the approved parapet height of RL 51.00, but provides an architecturally interpreted, curved pitch roof above.

It is also important to note that the latest modified DU/2003/76/E included the approval of the following variation to the maximum LEP height requirement:

Clause 4.3 – Maximum Height of Building – 27m

- A section of the western elevation of the upper roof level addition enabled a maximum a maximum height of **27.71m**, a variation of **0.71m**, or **2.63%**.

The proposed variation primarily derives from providing a more visually interesting architectural roof feature, which is shaped to rise up to its highest point on the south-east corner of the building.





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FOR APPROVAL 1:100 0 1m 2m	Project Name: AYU'S PENTHOUSE Address: 17 RANDLE STREET, SURRY HILLS, 2010, NSW Client: XCOMMERCIAL Architect: SJB ARCHITECTS DA Number: DA-8702	Date: 20.04.2025 Drawn By: A1 Scale: 1:100 Sheet: 1 of 1	Project Name: AYU'S PENTHOUSE Address: 17 RANDLE STREET, SURRY HILLS, 2010, NSW Client: XCOMMERCIAL Architect: SJB ARCHITECTS DA Number: DA-8702

Figure 14: Photomontage of Chalmers Street elevation, demonstrating the additional height of the proposed new addition (Source: SJB Architects)

10.1 Overshadowing

The Mid-Winter shadow diagrams that accompany the DA (see below) demonstrate that the extent of additional overshadowing created for surrounding residents and the public domain by the exceedance of the LEP maximum height of 27m will be compliant with Council's DCP controls and provide relatively minimal overshadowing impacts across the following parts of the day.

Given the site's solar orientation, separation from surrounding buildings by multiple street frontages, and the proposed sensitively scaled and design roof top addition, there will be minimal overshadowing impacts for both surrounding properties and the public domain.

The most significant additional overshadowing is expected to occur between 9-10am mid-winter and only impacts on a limited section of the adjoining roads to the south.



10.2 Visual and Acoustic Privacy

Substantive efforts have been made in the DA design to provide suitable building setbacks, and orient the main living areas and windows of the proposed roof level residential building to the main west and south street elevations, in order to minimise any unreasonable noise impacts and overlooking of the more sensitive areas of roof level living areas and private open space terraces of residential units of the adjoining mixed-use building to the north, 38 Chalmers Street.

It is proposed to further reduce privacy impacts for the adjoining properties to the north and north-east by constructing a concrete wall along the entire length of the site's northern boundary.

It is therefore considered that the area of exceeded height limit of the proposed building addition roof, which primarily occurs in the south-east corner of the site will have negligible noise and privacy impact on adjoining and surrounding residential and commercial buildings.

10.3 Visual Appearance and Views

A key design strategy of this DA is to minimise the upper level building bulk through generous building setbacks for the proposed roof level residential addition and to provide a more interesting and visually appealing roof form above this addition, when compared to the parapet style, flat roof form above the approved roof level commercial addition of DU/2003/76/E.

As shown in **Figure 15** below, the proposed new roof form has been designed to gradually rise up to a high point in the south-east corner of the site. At that point the proposal exceeds the LEP's 27m height limit by 2.92m.



Figure 15: Photomontage of proposed roof form from the south (Source: SJB Architects)



This gradual increase in the roof plane to its highest point provides and elegant, sculptural architectural roof feature to the building, in that part of the site well separated from the surrounding built form, and enhancing the visual character of this locality.

Furthermore, the extent of the roof's exceeded LEP height limit (up to 2.92m), does not result in any unreasonable impact on the visual amenity or view corridors of surrounding private properties and the public domain.

In summary, there are sufficient environmental planning grounds to justify the proposed variation of the LEP maximum building height development standard.

11. Conclusion

Strict compliance with the maximum building height development standard contained within Clause 4.3 of Sydney Local Environmental Plan 2012 has been found to be unreasonable and unnecessary in the circumstances of the case. There are sufficient environmental planning grounds to justify the proposed height variation. In this regard, it is reasonable and appropriate to vary the maximum building height development standard to the extent proposed.



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