

Attachment D

Clause 4.6 Variation – Floor Space Ratio

Clause 4.6 Variation
Request – Floor Space Ratio – Clause
4.4 Sydney Local Environmental Plan
2012

17 Randle Street, Surry Hills

Prepared by Planning Lab
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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 curved, pitch roof form 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 6:1 floor space ratio (FSR) development standard contained in Clause 4.4 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 4.4 of SLEP 2012 – Floor Space Ratio, 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.

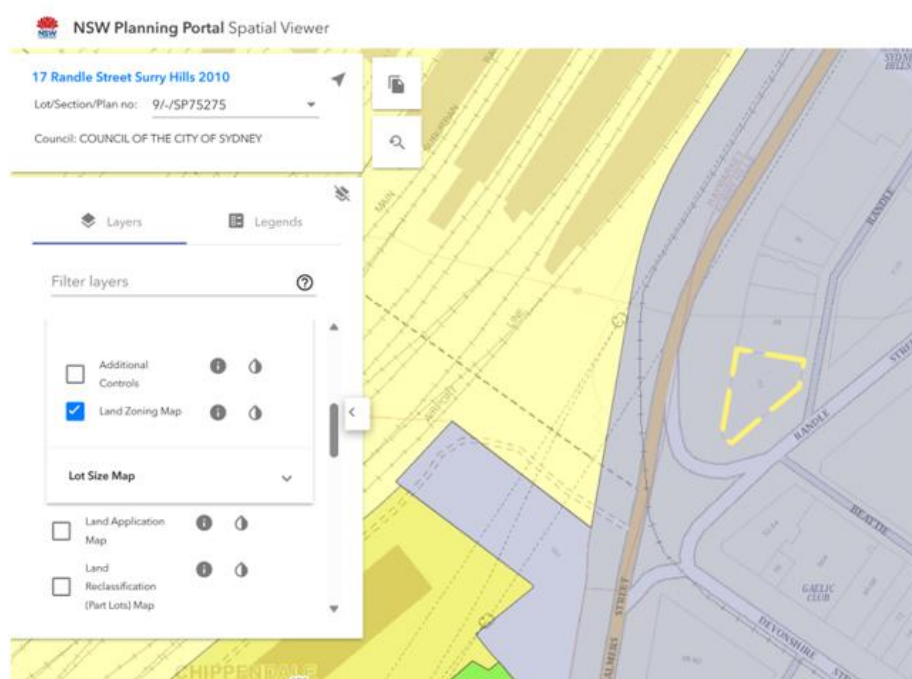
In accordance with clause 4.6(3) the applicant requests that the SLEP 2012 maximum FSR development standard be varied.

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 4.4 of the SLEP 2012 provides that the FSR on any land is not to exceed that shown for the land on the Height of Buildings Map. The site is within a 6:1 FSR area, as shown in **Figure 2**.

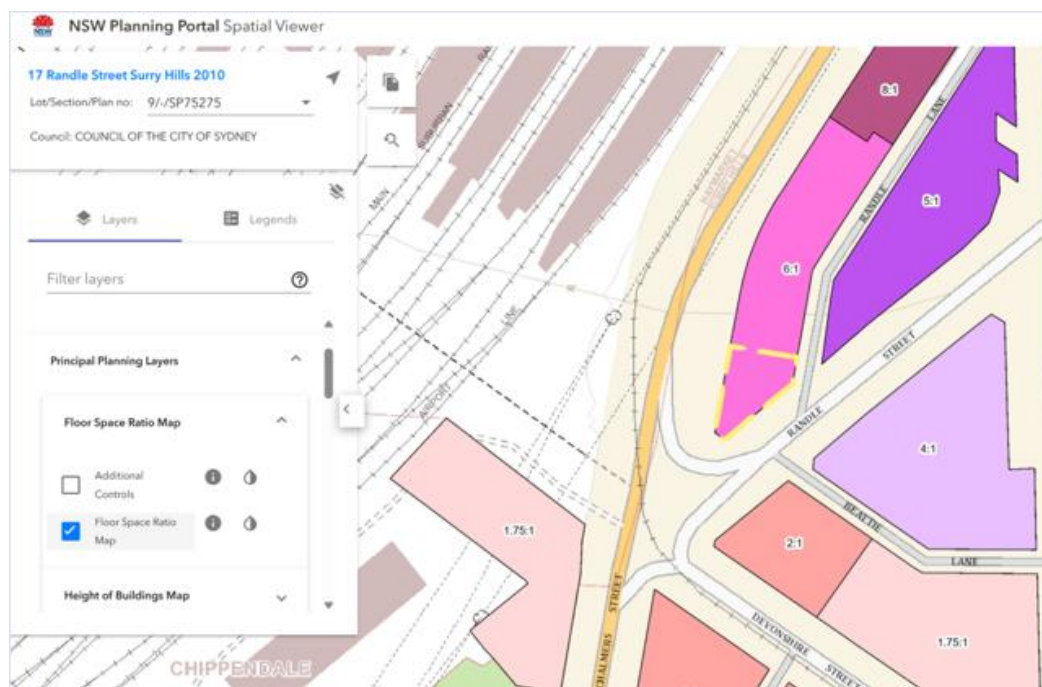


Figure 2: Extract of FSR Map (subject site shown with yellow dashed outline) Source: NSW Planning Portal Spatial Viewer

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 cl 4.6(8) of the SLEP 2012. Given the maximum FSR development standard is not identified under subclause 4.6(8), it is therefore not specifically excluded from the operation of cl 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.

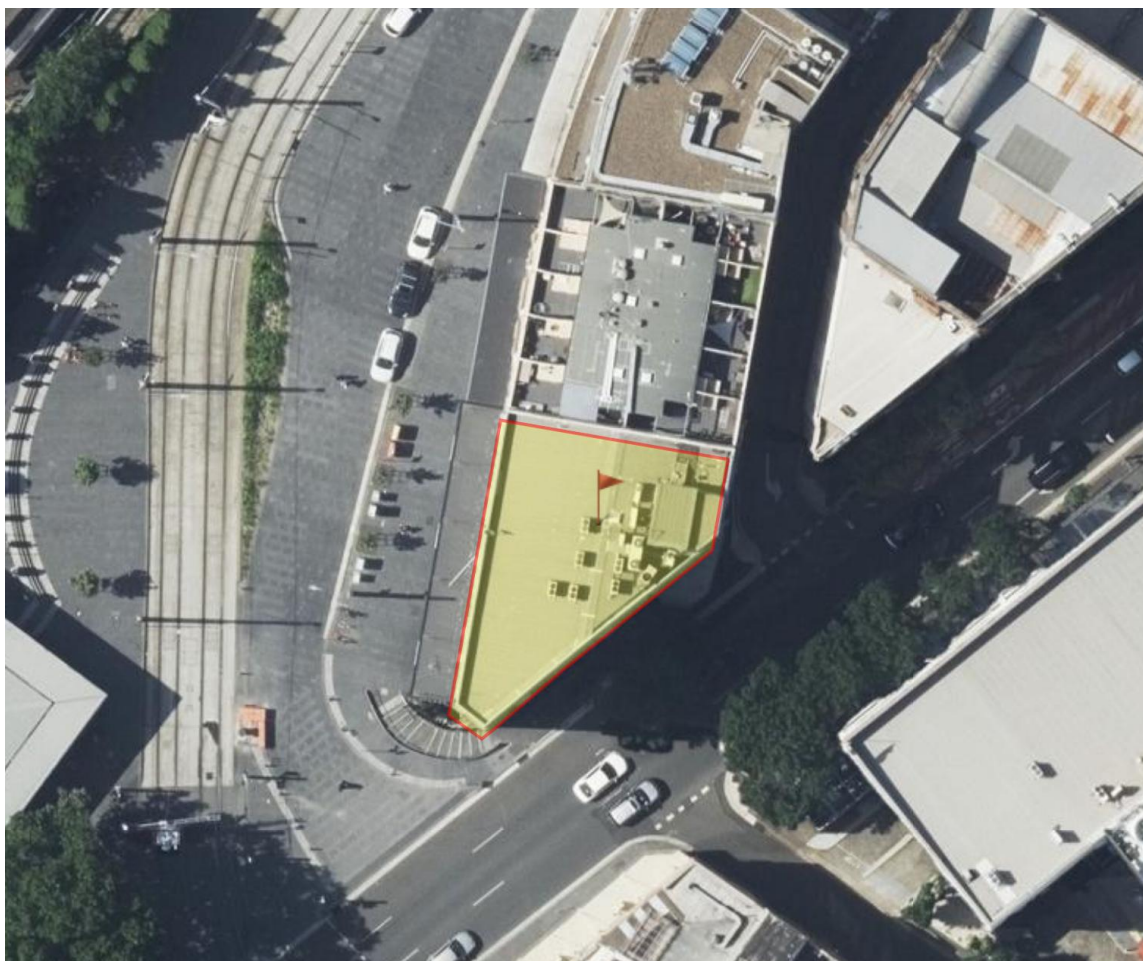


Figure 3 – Aerial image identifying the site (NSW SIX Maps)

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.





NOT FOR CONSTRUCTION	
FOR APPROVAL	COMMERCIAL
AYV9 PENTHOUSE 17 RANDLE STREET, SURRY HILLS, NSW	DA-8701
PHOTOMONTAGE - CHALMERS STREET	7/4

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 **Figures 8 and 9** 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).

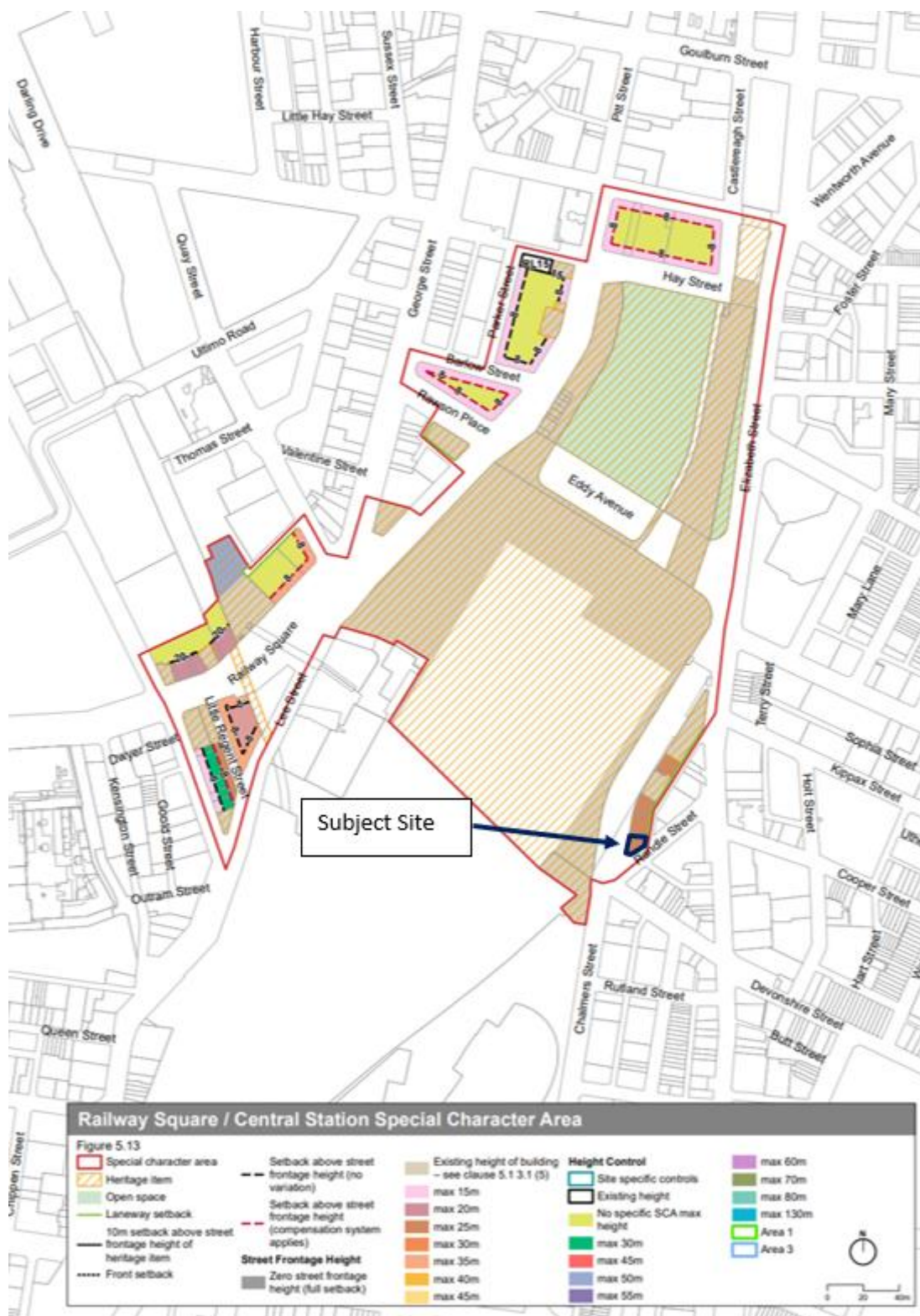


Figure 11 – Extract of Figure 5.13 Special Character Map SDCP 2012 (Source: City of Sydney)



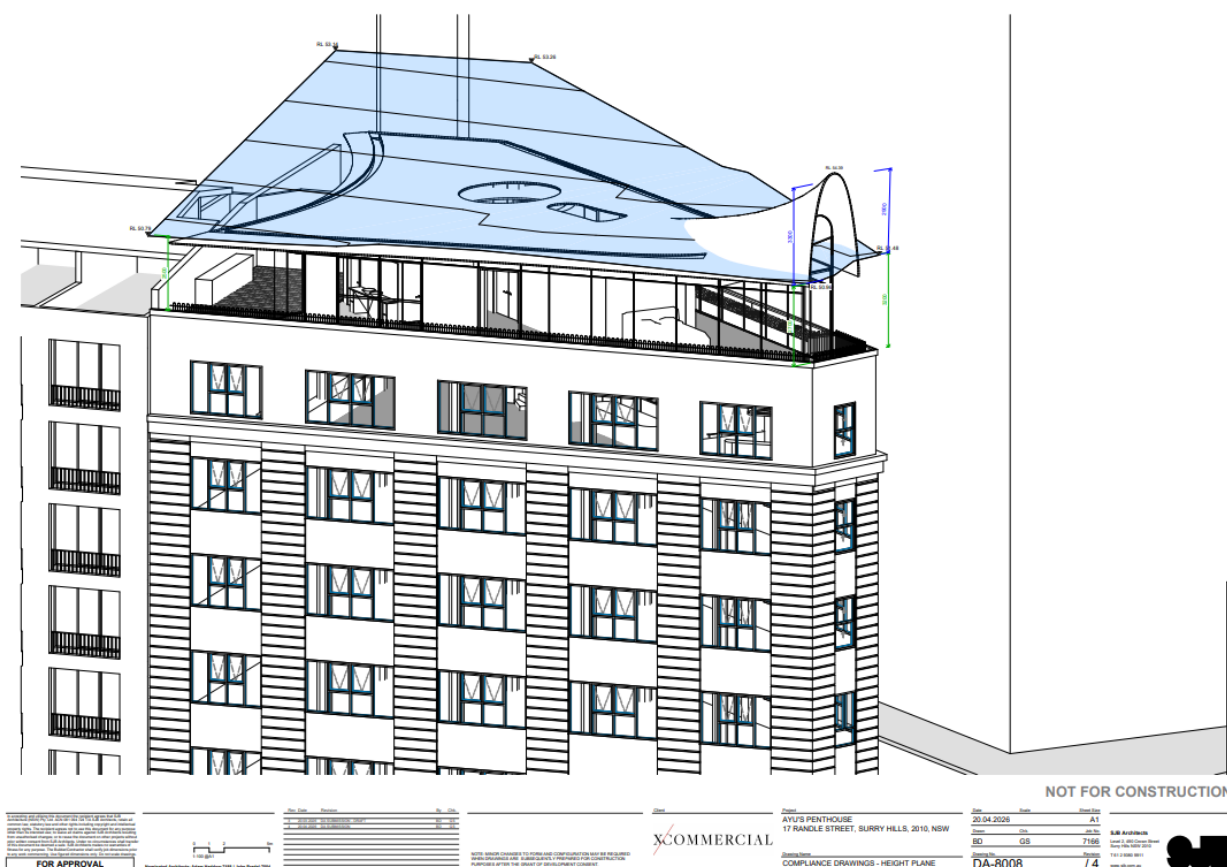


Figure 13: Extract of Building Height Plane Diagram from Architectural Drawings (Source: Loucas Architects)

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 maximum FSR 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 4.4 of Sydney LEP 2012

Objective	Discussion
(a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,	The SLEP 2012 provides a maximum FSR of 6:1 for the site and surrounding area, complemented by an 8 storey DCP maximum which enables a suitable flexibility for maximising FSR yield in an area characterised by boundary-to-boundary built forms. It also provides a scale that reflects the former warehouse and commercial character of the heritage of this precinct. The LEP Mixed Use zone also facilitates a flexibility in the use of these sites,



Objective	Discussion
	ensuring that their maximum potential can be achieved in a form that meets the housing and employment needs of this transitional part of the City of Sydney.
(b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,	The density, built form and land use intensity of the proposed adaptive re-use (Level 5) and roof top addition for a new 2 storey residence is entirely appropriate for the existing 7 storey commercial building and surrounding mixed use area, given the buildings previous history of mixed hotel, commercial office, pub and retail uses, its general consistency with the Sydney LEP and DCP 2012 maximum height, FSR, number of storeys and Special Character areas, and Council's previous support for a variation to the LEP maximum height and FSR controls for a similar commercial use roof top addition for the development consent DU/2003/76/E. The proposed single residence use at Levels 5 and 6 will also have minimal impact on the extent of vehicular and pedestrian movement to the site.
(c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,	The subject proposal to convert Level 5 from commercial office and construct a roof level addition for a new 2 storey dwelling will have minimal impact of the capacity of existing and planned infrastructure in this part of the City of Sydney, which is already highly accessible and in close proximity to a wide range of public transport, retail, commercial, community and public open space facilities and services.



Objective	Discussion
(d) to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.	The proposal is highly complementary to the desired character and function of the LEP Mixed Use MU1 zone and DCP Railway Square/Central Station Special Character Area, with a roof top addition design that minimizes the bulk and potential amenity impacts on adjoining and surrounding residential and commercial uses to the north and north-east by providing generous setbacks and an orientation of its main livings areas and windows to the south and west of the site along its Chalmers and Randle Street frontages, and an elegant and architectural roof feature that provides a gradual increase in height to its highest point in the south-east of the site, further protecting the amenity of surrounding land uses, and providing a lively and interesting visual focal point for the public domain in this highly active, transport hub precinct.

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 4.4 maximum FSR requirement of 6:1.

Section 8 of this report identifies that the proposed maximum FSR of this DA is **6.54:1**, and total GFA of **2,073m²**, representing a variation to the LEP **6:1** maximum FSR of **173m²**, or a margin of **9.1 %**.

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 sculptural architectural roof feature 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 FSR requirement:

Clause 4.4 – Maximum Floor Space Ratio – 6:1

- The approved total GFA for the modified building was **2,072m²**, resulting in a FSR of **6.54:1**, a variation of **172.4m²**, or **9%**.

The FSR of the current proposed DA is therefore equivalent to the FSR approved by Council for the previous DA DU/2003/76/E.

The common variation of these 2 DAs (approximately 170m²) closely reflects the GFA of the proposed new roof level addition of 164m².

It is therefore necessary under Clause 4.6 to assess the environmental impacts of the proposed new roof level addition.

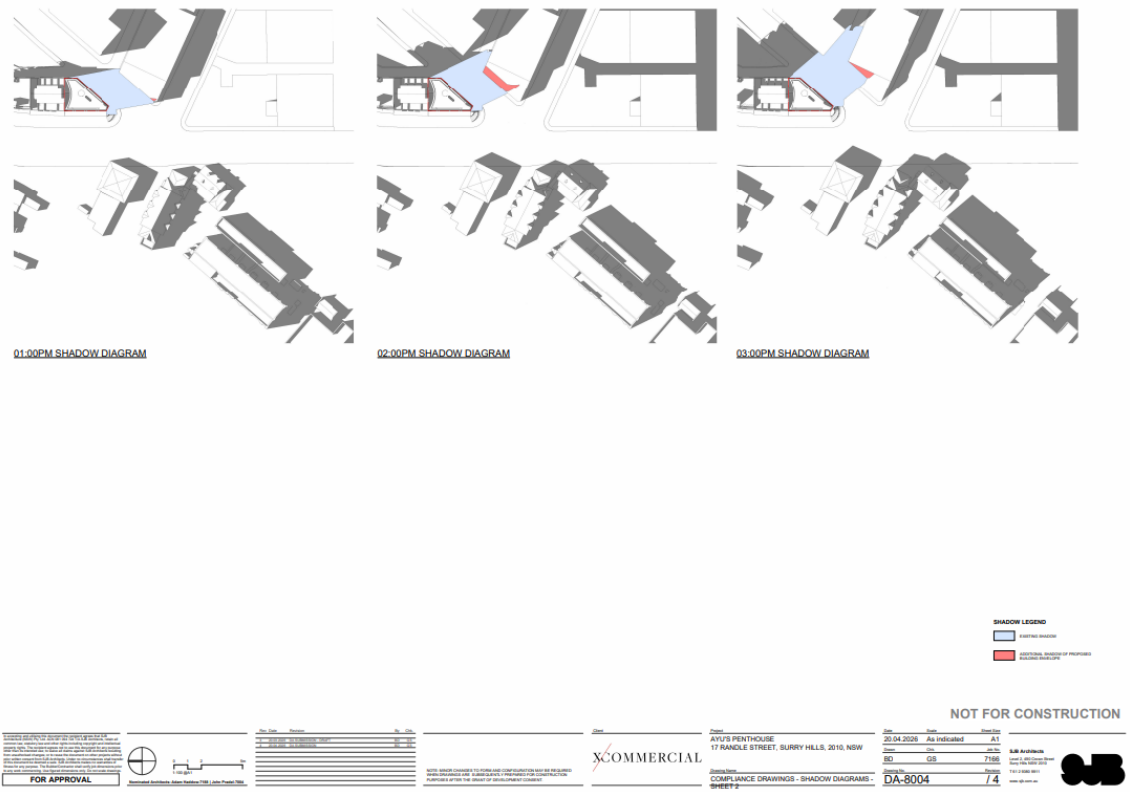
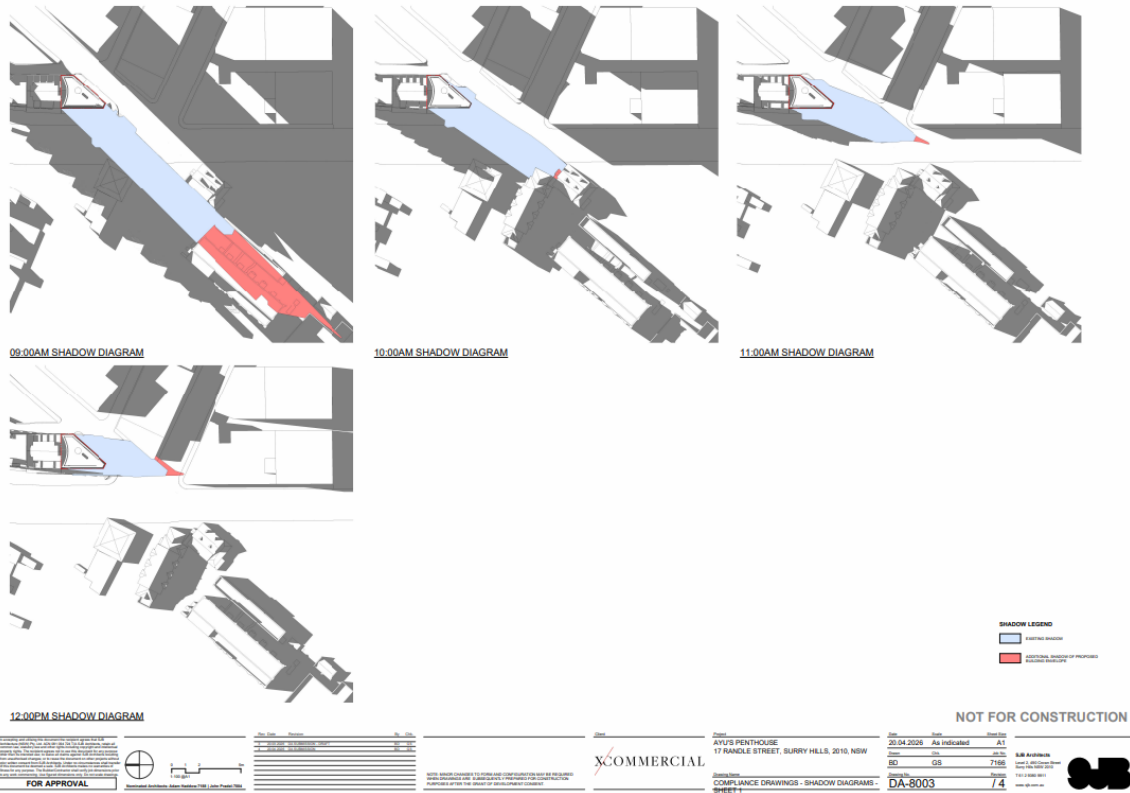
10.1 Overshadowing

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 6:1 FSR 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 sculptural architectural roof feature, 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 FSR 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 14** below, the proposed new sculptural architectural roof feature 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 14: 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) and exceeded 6;1 FSR, 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 FSR development standard.

11. Conclusion

Strict compliance with the maximum FSR development standard contained within Clause 4.4 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 FSR variation. In this regard, it is reasonable and appropriate to vary the maximum FSR development standard to the extent proposed.



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