



**CLAUSE 4.6 VARIATION
REQUEST
NORTH SYDNEY LOCAL
ENVIRONMENTAL PLAN
2013
CLAUSE 4.3 HEIGHT OF
BUILDING**

SYDNEY METRO VICTORIA CROSS OSD

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FINAL
PREPARED FOR LENDLEASE (VICTORIA CROSS) PTY LTD



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1. INTRODUCTION

This clause 4.6 variation request has been prepared to support a State Significant Development (**SSD**) Development Application (**DA**) for the construction of a commercial mixed-use Over Station Development (**OSD**) above the new Sydney Metro Victoria Cross Station. This request has been prepared by Urbis on behalf of Lendlease (Victoria Cross) Pty Limited, the applicant of the SSD DA.

The detailed SSD DA is consistent with the Concept Approval (SSD 17_8874) granted for the maximum building envelope on the site, as proposed to be modified.

The Minister for Planning, or their delegate, is the consent authority for the SSD DA and this application is lodged with the NSW Department of Planning, Industry and Environmental (**NSW DPIE**) for assessment.

This written request provides justification for the development sought within the Detailed SSD DA to vary the height of building development standard prescribed for the site under clause 4.3 of *North Sydney Local Environmental Plan 2013* (**NSLEP**). It is noted that the maximum building envelope currently approved within SSD 17_8874 already varies the height of building development standard.

The site is subject to multiple height of building standards under the NSLEP. As illustrated within the Height of Buildings Map (defined by the NSLEP) the site is affected by four maximum building height controls that are described in terms of maximum RL metres, stepping generally from the Berry Street frontage down to the Denison Street frontage and southern site boundary. The proposed development complies with three of these height controls, and notably complies with the maximum RL that applies to the site, however it encroaches on the height of building standard as it steps down from RL 230 to RL 201 in a section of the central portion of the site.

. If the proposed modification to the Concept SSD DA is approved, the proposed Detailed SSD DA will be consistent with the approved envelope (as modified) and no further clause 4.6 variation to the height of building standard will be necessary. However this clause 4.6 variation is submitted with the Detailed SSD DA for abundant caution and as a matter of good practice for planning assessment.

As stated in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 (Initial Action)* at [25], clause 4.6(3) does not require the consent authority to form its own opinion of satisfaction regarding the matters identified in clause 4.6(3)(a) and (b), but only indirectly must be satisfied that the applicant's written request has adequately addressed those matters. This request does that, and therefore the consent authority is open to be satisfied that subclause 4.6(3) has been met.

Sections 6.3.3-6.3.6 of this request provide material to assist the consent authority to reach satisfaction under clause 4.6(4) that the development is consistent with the objectives for development within the B3 Commercial Core zone and usefully addresses the matters that the consent authority is required to address under clause 4.6(5) when exercising the function of the Secretary.

2. ASSESSMENT FRAMEWORK

2.1. CLAUSE 4.6 OF NORTH SYDNEY LOCAL ENVIRONMENTAL PLAN 2013

Clause 4.6 of NSLEP includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 are:

- *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a DA that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, clause 4.6 requires that the consent authority consider a written request from the applicant, which demonstrates:

- a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

Furthermore, the consent authority must be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone, and the concurrence of the Secretary has been obtained.

In deciding whether to grant concurrence, subclause (5) requires that the Secretary consider:

- a) Whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- b) The public benefit of maintaining the development standard, and*
- c) Any other matters required to be taken into consideration by the Secretary before granting concurrence.*

[Note: Concurrence is assumed pursuant to Planning Circular No. PS 18-003 Variations to Development Standards dated 21 February 2018].

This document forms a clause 4.6 written request to justify the contravention of the height of building development standard in clause 4.3 of the NSLEP. The assessment of the proposed variation has been undertaken in accordance with the requirements of the NSLEP, clause 4.6 Exceptions to development standards.

2.2. NSW LAND AND ENVIRONMENT COURT: CASE LAW

Several key New South Wales Land and Environment Court (**NSW LEC**) planning principles and judgements have refined the manner in which variations to development standards are required to be approached.

The correct approach to preparing and dealing with a request under clause 4.6 is neatly summarised by *Preston CJ in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, duplicated for ease of consent authority reference as follows:

[13] *The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.*

[14] *The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl*

4.6(4)(a) is a jurisdictional fact of a special kind: see *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5 at [28]; *Winten Property Group Limited v North Sydney Council* (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].

[15] The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.

[16] As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe v Pittwater Council* at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.

[17] The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: *Wehbe v Pittwater Council* at [42] and [43].

[18] A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: *Wehbe v Pittwater Council* at [45].

[19] A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: *Wehbe v Pittwater Council* at [46].

[20] A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: *Wehbe v Pittwater Council* at [47].

[21] A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: *Wehbe v Pittwater Council* at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in *Wehbe v Pittwater Council* at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

[22] These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

[23] As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

[24] The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on

environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].

[25] The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant's written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). As I observed in *Randwick City Council v Micaul Holdings Pty Ltd* at [39], the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant's written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction: see *Wehbe v Pittwater Council* at [38].

[26] The second opinion of satisfaction, in cl 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in cl 4.6(4)(a)(ii).

[27] The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).

[28] The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the *Planning Circular PS 18-003* issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

[29] On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the *Court Act*. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41].

3. THE PROPOSED DEVELOPMENT

3.1. SYDNEY METRO

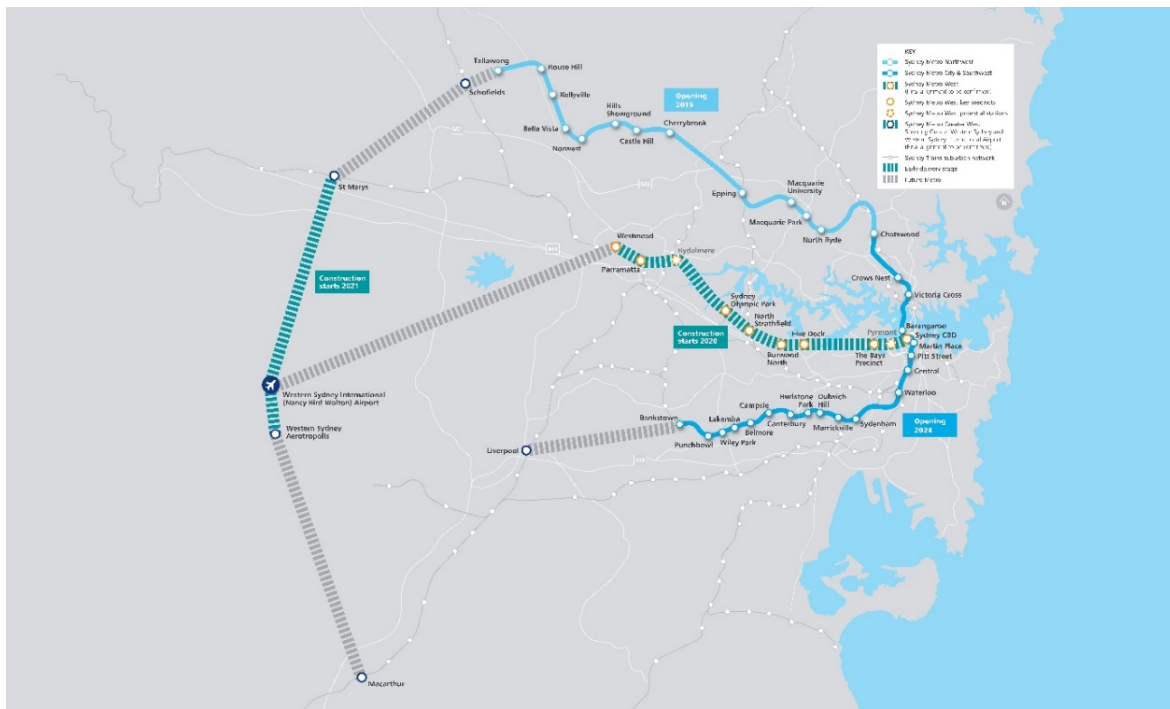
Sydney Metro is Australia's biggest public transport project. Services started in May 2019 in the city's North West with a train every four minutes in the peak. Metro rail will be extended into the CBD and beyond to Bankstown in 2024. There will be new metro railway stations underground at Crows Nest, Victoria Cross, Barangaroo, Martin Place, Pitt Street, Waterloo and new metro platforms under Central.

In 2024, Sydney will have 31 metro railway stations and a 66 km standalone metro railway system – the biggest urban rail project in Australian history. There will be ultimate capacity for a metro train every two minutes in each direction under the Sydney city centre. The Sydney Metro project is illustrated in the Figure below.

On 9 January 2017, the Minister for Planning approved the Sydney Metro City & Southwest - Chatswood to Sydenham project as a Critical State Significant Infrastructure project (reference SSI 15_7400) (CSSI Approval). The terms of the CSSI Approval includes all works required to construct the Sydney Metro Victoria Cross Station, including the demolition of existing buildings and structures on both sites. The CSSI Approval also includes construction of below and above ground improvements with the metro station structure for appropriate integration with the OSD.

With regards to CSSI related works, any changes to the “metro box envelope” and public domain will be pursued in satisfaction of the CSSI conditions of approval and do not form part of the scope of the detailed SSD DA for the OSD.

Figure 1 – Sydney Metro Alignment Map



Source: Sydney Metro

3.2. CONCEPT SSD DA (SSD 17_8874)

The Minister for Planning granted development consent to SSD 17_8874 for Concept Approval of a commercial mixed-use OSD above the new Sydney Metro Victoria Cross Station on 18 December 2018. This concept development consent includes conceptual approval for:

- A maximum building envelope, including street-wall and setbacks for the over station development

- A maximum building height of RL 230 or 168 metres, providing:
 - Approximately 40 commercial storeys and 2 additional storeys for rooftop plant for the high-rise portion of the building envelope
 - Approximately 13 storeys for the lower eastern portion of the building envelope at RL 118 or 55 metres
- A maximum gross floor area (**GFA**) of 60,000sqm, excluding station floor space
- Basement car parking for a maximum 150 parking spaces

Following Sydney Metro's appointment of Lendlease (Victoria Cross) Pty Limited as the preferred development partner to deliver the Victoria Cross Station OSD, and ongoing design development, minor modifications to the approved building envelope are now required to accommodate the detailed design.

A modification application to the Concept SSD DA has therefore been lodged concurrently with the Detailed SSD DA. The section 4.55(2) modification application seeks consent for the following amendments to the approved building envelope:

- Reduction in the massing and overall dimensions of the building cantilever above the Miller Street special area setback;
- Relocation of building massing from the low-rise levels of the tower, north of the through-site link, to the high-rise levels of the tower;
- Increase in the setback of the proposed tower from the MLC building by 10 metres;
- Reduction of the Berry Street setback from 5 metres to 4.5 metres, extending the building envelope marginally to the north; and
- Increase in the total GFA across the site to 61,500sqm.

3.3. DETAILED SSD DA (SSD-10294)

The Detailed SSD DA (**SSD-10294**) seeks approval for the detailed design of the OSD above the new Sydney Metro Victoria Cross Station. The Detailed SSD DA is consistent with the Concept Approval (**SSD 17_8874**) granted for the maximum building envelope on the site, as proposed to be modified.

The Detailed SSD DA seeks development consent for:

- The design, construction and operation of a new commercial office tower with a maximum building height of RL 230 or 168 metres (42 storeys). The commercial tower includes 61,500sqm of GFA, excluding floor space approved in the CSSI.
- Physical integration with the approved Sydney Metro works including:
 - Structures, mechanical and electronic systems, and services; and
 - Vertical transfers.
- Use of spaces within approved Sydney Metro envelope for the purposes of:
 - Retail tenancies;
 - Commercial office lobbies and space;
 - 161 car parking spaces within the basement for the purposes of the commercial office and retail use, with a maximum of 150 of these car parking spaces to the OSD;
 - End of trip facilities; and
 - Loading and services access.
- Provision and augmentation of utilities and services.
- Provision of rooftop business identification signage zones.

- Stratum subdivision (staged).

The proposed development provides A-grade commercial floorspace in a singular tower form to deliver an integrated development where the OSD, Sydney Metro Victoria Cross Station and the public domain function together.

The proposal responds to the key site constraints, such as surrounding heritage-built form and visual and view impacts (solar access and overshadowing), to deliver an integrated OSD which exhibits design excellence as illustrated at **Figure 2**.

The proposed development is detailed further in the Environmental Impact Statement (**EIS**) submitted with the detailed SSD DA, and in the Architectural Plans (**Appendix C**) and Design Report (**Appendix E**) prepared by Bates Smart.

Figure 2 – Proposed development (photomontage)



Source: Bates Smart

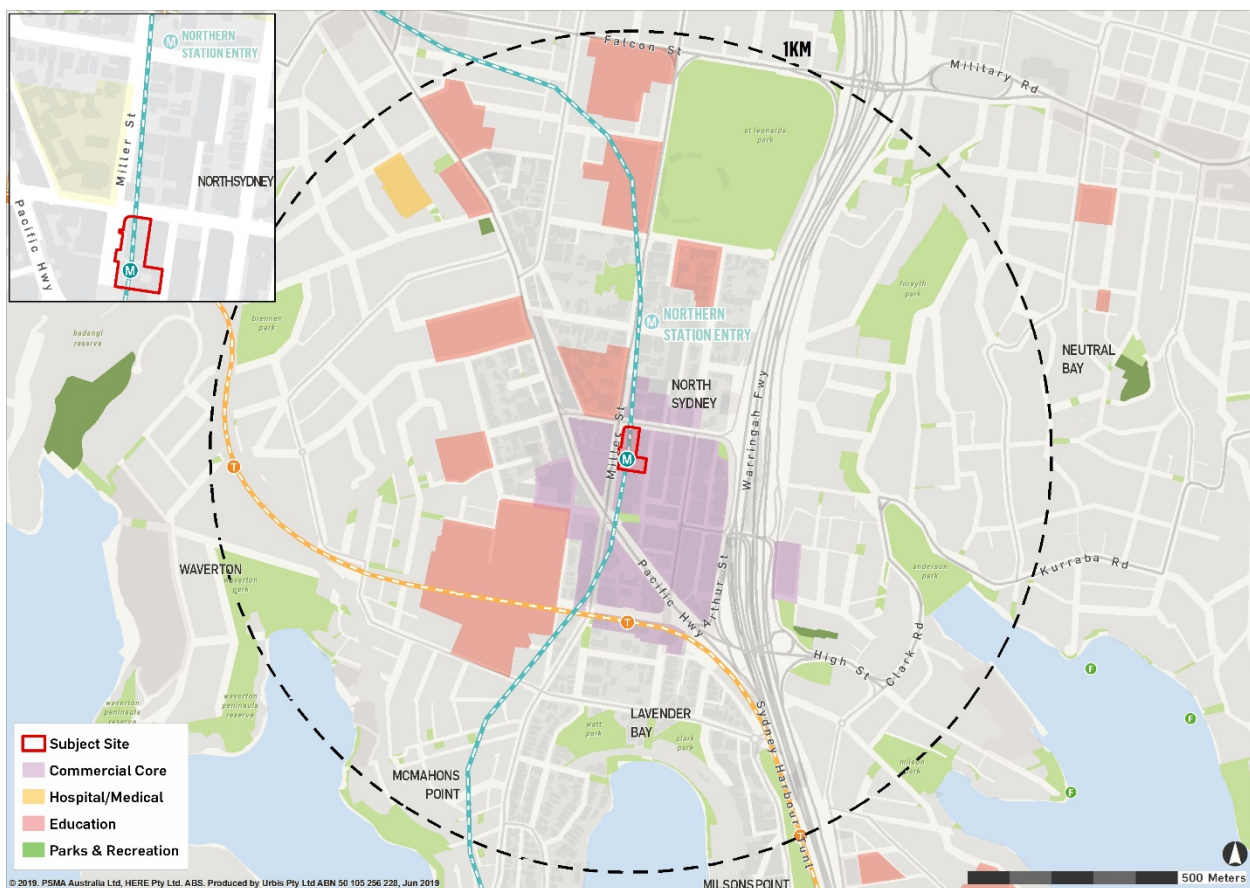
4. SITE AND LOCALITY

4.1. SITE CONTEXT AND LOCATION

The site is generally described as 155-167 Miller Street, 181 Miller Street, 187-189 Miller Street and part of 65 Berry Street, North Sydney (**the site**). The site is centrally located within the North Sydney Centre which forms part of the North Sydney Local Government Area (**LGA**). The North Sydney CBD is situated approximately 3 kilometres north of Sydney CBD and 5 kilometres southeast of Chatswood (refer **Figure 3**).

North Sydney Centre is a “strategic centre” as identified in Sydney’s overarching strategic plan, *A Plan for Growing Sydney*. It is Sydney’s third largest commercial precinct, after Sydney CBD and North Ryde/Macquarie Park, functioning as a fundamental component of the cities Global Economic Corridor. The area is characterised by a consolidated commercial core (with key public open spaces), views to Sydney Harbour and Sydney CBD, a skilled labour force and surrounding high-amenity residential and mixed-use precincts.

Figure 3 – Site Context



4.2. SITE DESCRIPTION

The site is situated on the south-east corner of the Berry Street and Miller Street intersection (see **Figure 4**), North Sydney. The site is an irregular shaped allotment with street frontages of approximately 37 metres to Berry Street, 34 metres to Denison Street and 102 metres to Miller Street, yielding an overall site area of approximately 4,815 square metres. The Miller and Berry Street frontages contain a series of street trees within the footpath areas.

The site occupies various addresses/allotments and is legally described as follows:

- 155-167 Miller Street (Strata Plan (SP) 35644) (which incorporates lots 40 and 41 of SP 81092 and lots 37, 38 and 39 of SP 79612)
- 181 Miller Street (Lot 15 in Deposited Plan (DP) 69345, Lot 1 & 2/DP 123056, Lot 10/DP 70667)

- 187 Miller Street (Lot A/DP 160018)
- 189 Miller Street (Lot 1/DP 633088)
- Formerly part 65 Berry Street (Lot 1/DP 1230458)

The allotments include a series of easements affecting parts of the land for stormwater drainage and sewer, as outlined within the Site Survey submitted with the Detailed SSD DA. The existing easements however do not impede the construction of the proposed development.

Figure 4 – Site Aerial



4.3. EXISTING DEVELOPMENT

Prior to the demolition of all buildings across the site under the terms of CSSI Approval, the site was previously occupied by a mix of low-rise retail and mid-rise office developments. These are briefly discussed below:

- **155-167 Miller Street (formerly Tower Square)** – Previously comprised a two-storey shopping centre between Miller and Denison Street, including restaurants, cafes, retail shops, basement parking and an outdoor eating area;
- **181 Miller Street** – Previously comprised a 14-storey commercial tower with a frontage to Miller Street. Retail premises occupied the lower levels with office spaces above. There was a consistent setback with no pronounced podium;
- **187 Miller Street** – Previously comprised a two-storey shop (Jewellers) with frontage to Miller Street. The Jewellery shop was listed as a heritage item in *NSLEP 2013*;
- **189 Miller Street** – Previously comprised a seven-storey commercial building with frontage to Miller Street. Retail premises occupied the lower levels with office spaces above. There was a consistent setback with no pronounced podium; and

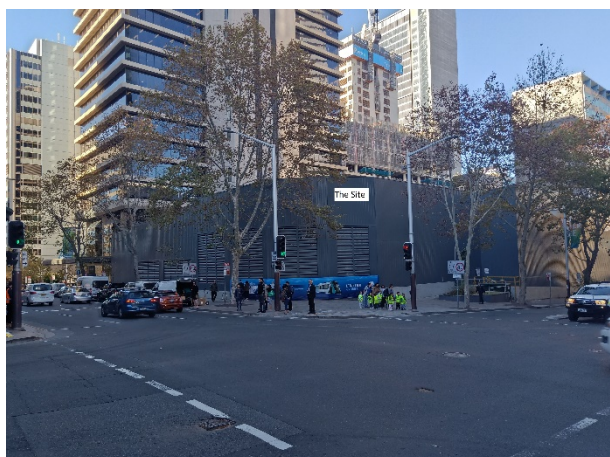
- **Part 65 Berry Street** – Previously comprised an access way to 65 Berry Street and no buildings / structures. The site was bounded by external walls of Tower Square and 65 Berry Street.

The previous site conditions displayed a pattern of development with very little consistency in scale, form or alignment. Mid-rise commercial buildings were abutting low-rise retail/food and drink premises, intertwined with an outdoor eating area.

Denison street is frequently used by pedestrians as a thoroughfare during peak times and is anticipated to support increased pedestrian traffic once Victoria Cross Station is constructed. The current pathway conditions are narrow and illegible due in part to the presence of construction hoardings, and overall is considered to be a poor interface for pedestrians and vehicles using the road.

As discussed, all the buildings / structures previously on the site have now been demolished under the CSSI Approval for the Victoria Cross Station. Construction of the Victoria Cross Station is currently underway on the site and the site is occupied by a large temporary shed structure (see **Figure 5**).

Figure 5 – Site Photos



Picture 1 – View from the north-west at the Miller and Berry Street intersection



Picture 2 – View from the north-west at Berry Street



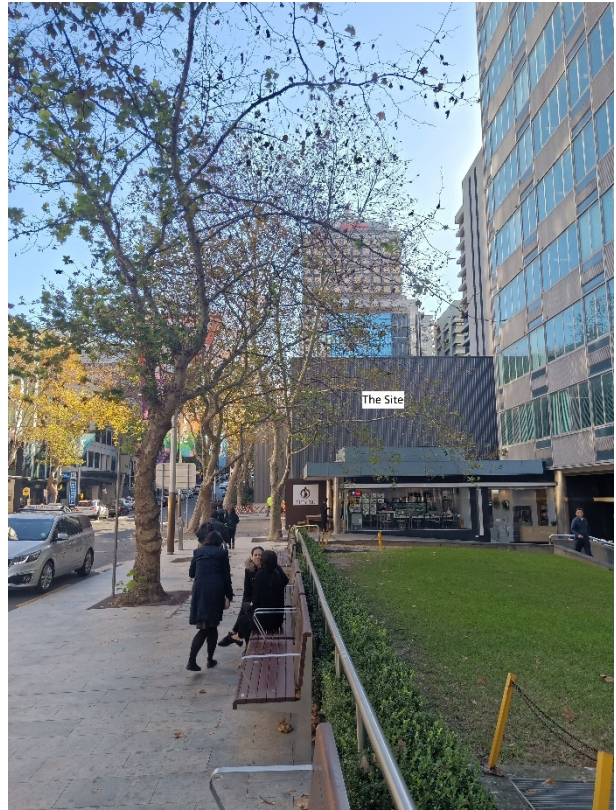
Picture 3 – View from the West (Miller Street)



Picture 4 – Internal view from the east (Denison Street)



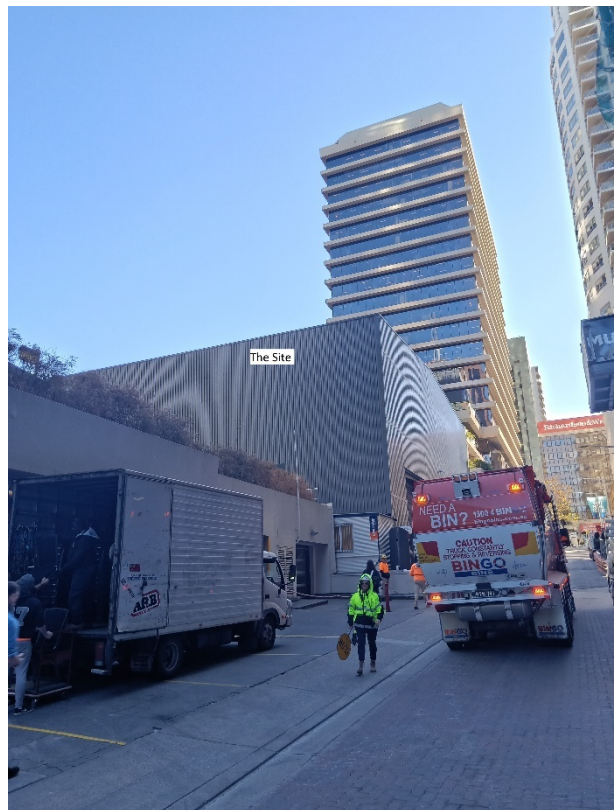
Picture 5 – View from the south-west



Picture 6 – View from the south (MLC Building)



Picture 7 – View of the southern portion from the north-east (Denison Street)



Picture 8 – View of the southern portion from the south-east (Denison Street)

4.4. SURROUNDING DEVELOPMENT

The surrounding context is characterised by a mix of mid to high density commercial developments, interspersed with lower scale heritage items, educational institutions (e.g. Australian Catholic University), retail developments and civic uses such as the North Sydney Council Chambers (Miller Street). One isolated residential building form exists in the centre which is considered an uncharacteristic land use in the wider context. The site is generally bound as follows:

- **North** – Berry Street directly to the north along with the heritage listed Rag & Famish Hotel. Further north beyond the hotel are high density residential and commercial developments.
- **South** – The site abuts the heritage listed MLC commercial office building to the south with higher density commercial developments towards North Sydney Station and Greenwood Plaza.
- **East** – Group House (65 Berry Street) and Denison Street are situated immediately east of the site. Immediately east of Denison Street are the Alexander Apartments, a 36-storey residential building. Further east are similar high-density commercial developments towards the Warringah Freeway and Cahill Expressway.
- **West** – Miller Street abuts the site to the west along with various high-density commercial buildings. The Pacific Highway is located further to the west.

Existing surrounding buildings are shown in **Figure 6** below.

Figure 6 – Key Surrounding Developments



Picture 9 – MLC Building (immediately south)



Picture 10 – Genworth Building (to the south)



Picture 11 – Rag and Famish Hotel (to the north)



Picture 12 – Brett Whiteley Place (to the south)

The recent emergence of a high-density commercial built form typology within the North Sydney centre is strengthening a future high-rise commercial core character to which this proposal will positively contribute towards. Recently completed or currently under construction large scale office buildings are illustrated in **Figure 7**, with notable high-rise developments listed below:

- 1 Denison Street (RL. 213) – A-grade commercial tower DA approved and currently under construction (Bates Smart);
- 100 Mount Street (RL. 200) – A-grade commercial tower DA approved and currently under construction (SOM and Architectus);
- 177 Pacific Highway (RL. 195) – A-grade commercial tower completed 2016 (Bates Smart); and
- 77 Berry Street (RL. 180) – Alexander Apartments, an existing residential tower.

Figure 7 – Surrounding High Rise Built Form



Picture 13 – 1 Denison Street (left), 100 Mount Street (centre) and 177 Pacific Highway (right)

Source: Bates Smart

5. EXTENT OF CONTRAVENTION

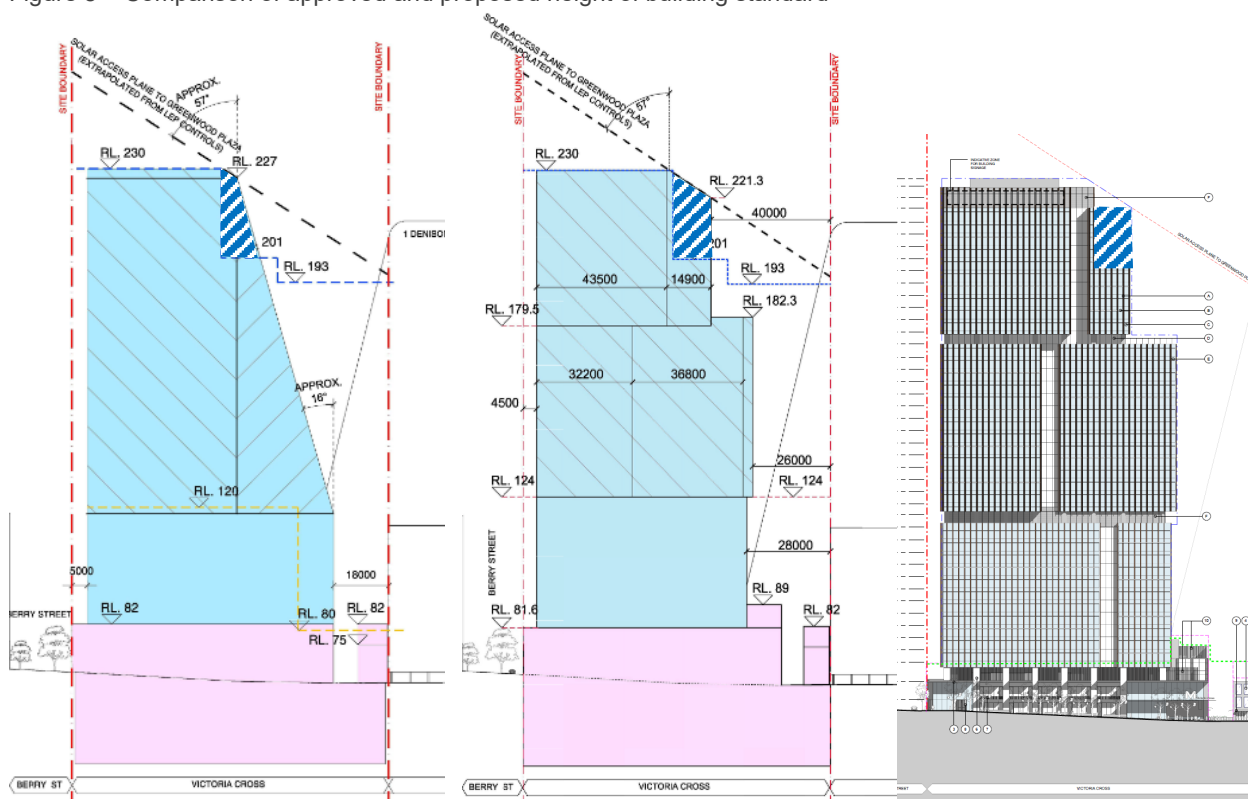
The site is subject to multiple height of building standards under NSLEP. As prescribed in clause 4.3 and as illustrated within the Height of Buildings Map (defined by the NSLEP) the site is affected by four maximum building height controls that are described in terms of maximum RL metres, stepping down from the Berry Street frontage to the Denison Street frontage and southern site boundary.

In determining the Concept SSD DA the Minister for Planning approved a variation to the height of building standard prescribed in clause 4.3 of NSLEP. The approved building envelope included an encroachment of the RL 201 height of building control, whereas it complied with the maximum height of building control that applies to the site, being RL 230.

The proposed development complies with the maximum RL that applies to the site being RL 230, however it encroaches on the height of building standard as it steps down from RL 230 to RL 201 in the central portion of the site. The proposal also complies with the lower building height controls of RL 193 and RL 135 at the south eastern corner of the site. The Detailed SSD DA seeks consent for the erection of a building contained wholly within the Concept Approval (as proposed to be modified). The proposed building does not fill the amended concept building envelope in the location of the height of building encroachment; therefore the extent of the variation to the height control is less than the full extent approved under the Concept Approval and as sought under the Concept Approval (as modified). It does however retain a minor encroachment at RL 201.

A comparison of the approved variation to the height of building standard, the revised building envelope, and the detailed design of the building is illustrated at **Figure 8** (variation to control shown hatched).

Figure 8 – Comparison of approved and proposed height of building standard



Picture 14 – Extent of approved building height control contravention (Concept Approval building envelope)

Picture 15 – Extent of proposed building height control contravention (Concept Approval as modified building envelope)

Picture 16 – Approx. extent of proposed building height control contravention (detailed design)

The clause 4.6 variation submitted with the Concept SSD DA was considered well founded by the NSW Department of Planning, Industry and Environment (**NSW DPIE**) and the Minister for Planning. The proposed contravention of the RL 201 height of building standard proposed in the detailed SSD DA can similarly be considered well founded in that it will also facilitate a tapered built form that:

- improves daylight access to the station through-site link;
- increases building separation to the heritage-listed MLC Building; and
- reduces view impacts to the Alexander Apartments to the east.

6. CLAUSE 4.6 VARIATION REQUEST: HEIGHT OF BUILDINGS

The following sections of the report provide an assessment of the request to vary the height of building development standard in accordance with clause 4.6 of NSLEP.

6.1. CLAUSE 4.3 HEIGHT OF BUILDINGS

The objectives of clause 4.3 as set out in clause 4.3(1) of the NSLEP are:

- (a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,
- (b) to promote the retention and, if appropriate, sharing of existing views,
- (c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,
- (d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,
- (e) to ensure compatibility between development, particularly at zone boundaries,
- (f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.

The four maximum building height controls that are described in terms of maximum RL metres are illustrated within **Figure 9** below.

Figure 9 – Varying Height of Buildings development standards



Source: NSLEP 2013

6.2. KEY QUESTIONS

Is the Planning Control a Development Standard?

The height of buildings control prescribed under clause 4.3 of the NSLEP is a numeric development standard capable of being varied under clause 4.6 of NSLEP.

Is the Development Standard Excluded from the Operation of Clause 4.6?

The development standard is not excluded from the operation of clause 4.6 as it is not listed within clause 4.6(6) or clause 4.6(8) of NSLEP.

Clause 4.6(8) of the NSLEP precludes development consent to be granted to development that would contravene clause 6.3(2)(a) and 6.3(2)(b) of the NSLEP. Clause 6.3(2)(a) prescribes the sun access plane to ensure that the erection of a building does not result in a net increase in overshadowing between 12pm and 2pm from the March equinox to the September equinox (inclusive) on land within the RE1 Public Recreation zone or land identified as a “Special Area” on the North Sydney Centre Map. Clause 6.3(2)(b) relates to overshadowing of the Don Bank Museum which is not impacted by the proposed development. The proposed development does not contravene the maximum building height that can be approved on the site under clause 6.3 of the NSLEP.

What is the Underlying Object or Purpose of the Standard?

The objectives of the standard are clearly established in the NSLEP as set out in **Section 6.1** of this report.

6.3. CONSIDERATION

6.3.1. Clause 4.6(3)(a) – Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are listed within the ‘five-part test’ outlined in *Wehbe v Pittwater [2007] NSWLEC 827*. These tests are outlined in Section 2.2 of this request (paragraphs [17]-[21]).

An applicant does not need to satisfy each of the tests or ‘ways’.

The development is justified against one of the Wehbe tests as set out below.

Test 1: The objectives of the development standard are achieved notwithstanding non-compliance with the standard

The proposed development achieves the objective of the height of buildings development standard (clause 4.3) as described in **Table 1** notwithstanding the non-compliance with the building height standard.

Table 1 – Assessment of consistency with the objectives of the standard

Objective	Compliance
<i>(a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,</i>	The proposed development responds to the existing topography of the site by delivering a stepped building form with the greatest height at the northern portion of the site, with the lowest building height towards the south. Notwithstanding the proposed variation to the RL 201 control, this stepping down of form is still achieved within the development in the direction of the fall in the natural gradient. The steps do not precisely follow the locations in the building height control, being less in some parts of the building and substantially more in other parts where the building steps down to RL 182 and RL 89 on that part of the site where the maximum height permitted is RL 193.
<i>(b) to promote the retention and, if appropriate, sharing of existing views,</i>	The proposal promotes the retention and sharing of existing views from surrounding buildings, including those from the Alexander Apartment building. The built form complies with the height of building standards at the southern portion of the site, which enables view

Objective	Compliance
	<p>corridors towards the Sydney Harbour tributaries from the Alexander Apartments looking south west. The proposal, including the non-compliant upper levels at RL 201 will therefore have acceptable view impacts.</p> <p>The upper levels at RL 201 where the variation to the control is proposed allow for the retention of existing views except for a portion of views to the west from Rooftop Level 37. These are acceptable however insofar as this rooftop level does not provide useable or habitable space for residents of the Alexander Apartments building. Further the impacts are not any more extensive than the Concept Approval (as modified) and provide for retention of extensive views of the harbour to the south west with no loss of iconic views.</p>
<p><i>(c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,</i></p>	<p>The proposed development maintains solar access to nearby existing dwellings, public reserves, and streets. Relevantly these include dwellings on Whaling Road, the Alexander Apartments building, Greenwood Plaza, Miller Street Special Area, and Brett Whiteley Plaza. The proposed ground and podium level setbacks (which are designed to comply with the Miller Street setback) and the upper level recesses preserve the integrity of the Miller Street streetscape.</p> <p>The proposed development does not result in any additional overshadowing to the Greenwood Plaza Special Area which is consistent with the Concept SSD DA modified building envelope.</p> <p>The development maintains solar access to Brett Whiteley Plaza for the reason that there is no net increase in overshadowing of the Plaza from the March equinox to the September equinox (inclusive). The only additional shadow cast to the awning above the Plaza does not result in any adverse impacts above what was previously considered and approved under the Concept Approval OSD envelope.</p> <p>The proposed development has minimal overshadowing impact on land in Zone R2 Low Density Residential to the south-east of the site.</p> <p>The proposed development does not compromise or inhibit the ability of surrounding land to achieve solar access as part of future development proposals.</p> <p>Furthermore the development complies with the provisions of clause 6.3 of NSLEP and has no adverse solar impact on land in the RE1 Public Recreation zone, or to land identified as a “Special Area” in the North Sydney Centre insofar as there is no net increase in overshadowing between 12pm and 2pm from the March equinox to the September equinox (inclusive) on such land compared to buildings prior to demolition occurring on the site.</p>
<p><i>(d) to maintain privacy for residents of existing dwellings and</i></p>	<p>The proposed variation to the height of building control relates to a portion of the development significantly separated from nearby</p>

Objective	Compliance
<i>to promote privacy for residents of new buildings,</i>	<p>residential buildings including the Alexander Apartments building and the three terrace dwellings on Whaling Road. Direct sight lines are not available from the area of the proposed variation to the RL 201 height control to the façade of the Alexander Apartments building or the terrace dwellings on Whaling Road.</p> <p>Retention of visual privacy to these existing dwellings is otherwise achieved from the development through the use of blank walls adjacent to the low-rise levels of the eastern façade.</p>
<i>(e) to ensure compatibility between development, particularly at zone boundaries,</i>	<p>The height of the proposal is compatible with the existing and emerging character of development within the surrounding B3 Commercial Core zone..</p> <p>Further, it is noted that the site is not located at a zone boundary.</p>
<i>(f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.</i>	<p>The proposal comprises an appropriate scale and density for the site, in accordance with the Concept Approval and Concept Approval (as modified) building envelopes. The character of the area as supported through the development standards of the NSLEP in addition to local standards including the Sydney Metro Victoria Cross Station Design Guidelines, is maintained through the provision of active ground level frontages, a through-site link with increased daylight access compared to a compliant scheme, and appropriate building separation to adjacent heritage items.</p> <p>The existing surrounding context is characterised by a mix of mid to high density commercial developments and one isolated high rise residential building (the Alexander Apartments building). The scale and density of the proposed development is consistent with the scale and density of high density commercial land uses to the north (beyond Berry Street) and the east (towards the Warringah Freeway and Cahill Expressway). To the south, higher density buildings extend beyond the MLC commercial office building towards North Sydney Station and Greenwood Plaza. To the west, the site abuts Miller Street which accommodates various high-density commercial buildings.</p> <p>A high density, high-rise commercial built form typology is emerging across the North Sydney Centre. Recently completed or currently under construction high density commercial developments in the surrounding locality include 1 Denison Street, 100 Mount Street, 177 Pacific Highway, and 77 Berry Street. In this regard, the scale and density of the proposed development is appropriate in the context of the existing and emerging character of the North Sydney centre.</p>

In summary, achieving compliance with the standard is unreasonable and unnecessary (clause 4.6(3)(a)) as notwithstanding the non-compliance, the development is consistent with the objectives of the standard (clause 4.6(4)(a)(ii)).

Test 2: The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary

Not relied upon.

Test 3: The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable

Not relied upon.

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

Not relied upon.

Test 5: The zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary

Not relied upon.

6.3.2. Clause 4.6(3)(b) – Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard?

There are sufficient environmental planning grounds to justify the proposed variation to the development standard, including the following:

- The development is consistent with the objects of the *Environmental Planning and Assessment Act 1979* by promoting the orderly and economic use and development of the land and promoting and delivering good design and amenity of the built environment. This is achieved through the delivery of an A-grade office tower that will support significant new employment within North Sydney CBD and leverage from the significant NSW Government investment into the Sydney Metro, specifically the new Victoria Cross Station. The proposal positively contributes to the site and its surrounds, achieving its vision to transform North Sydney CBD by creating a landmark development that acts as a 'new public heart' around the Sydney Metro Victoria Cross Station.
- The proposed development achieves the objectives of the development standard prescribed in clause 4.3 of the NSLEP as described through **Section 6.3.1** and achieves the objectives of the B3 Commercial Core zone as described within the EIS.
- The proposed variation to the RL 201 height of building control contributes to the achievement of the building's design excellence as established through the endorsed Design Excellence Process. The proposed development contributes to the skyline with a stepped building form that reduces the scale of the development as viewed from the southern portion of the site, the through-site link, and the primary Sydney Metro entrance on Miller Street. This building form is achieved by redistributing built form on the site in a way which does not take full advantage of the RL 193 building height control area but that involves a small variation to the RL 201 building height control area.
- The proposed building height will have negligible material impacts compared to a compliant scheme in terms of built form, overshadowing, view or heritage impacts as:
 - The proposed setback would cause no unreasonable heritage impacts. The exceedance of the RL 201 height control allows for additional built form separation and setback to the MLC Building to the south, allowing the lower levels of the tower to reference the building scale and height of the MLC Building. Further the proposed setback opens up views of the MLC Building.
 - The proposed development maintains solar access to nearby existing dwellings, public reserves, and streets. Relevantly these include dwellings on Whaling Road, the Alexander Apartments building, Greenwood Plaza, Miller Street Special Area, and Brett Whiteley Plaza. The proposed ground and podium level setbacks (which are designed to comply with the Miller Street setback) and the upper level recesses preserve the integrity of the Miller Street streetscape. The development would cause no net additional overshadowing to surrounding Special Areas, Zone RE1 Public Recreation Land or any other sensitive area. On the contrary, it will result in less overshadowing to the Miller Street Special Area than development on the site prior to the demolition of buildings on the site in accordance with the CSSI Approval and less overshadowing than a building which filled the RL 193 height envelope permitted under the NSLEP.

- The proposal promotes the retention and sharing of existing views from surrounding buildings, including those from the Alexander Apartment buildings. The built form complies with the height of building standards at the southern portion of the site, which enables view corridors towards the Sydney Harbour tributaries from the south west looking Alexander Apartments looking south west.
- Given its relatively minor extent, the proposed variation to the RL 201 height control would not cause a significant reduction in sky views viewed from the public domain. The decision to reduce height at the RL 193 part of the site and set the tower form back from the MLC Building allows for a more significant increase in sky views from the public domain.

In conclusion, there are sufficient environmental planning grounds to justify contravening the development standard.

6.3.3. Clause 4.6(4)(a)(ii) – Will the Proposed Development be in the Public Interest Because it is Consistent with the Objectives of the Particular Standard and Objectives for Development within the Zone in Which the Development is Proposed to be Carried Out?

The proposed development is consistent with the objectives of the development standard as outlined within **Section 6.3.1** of this Request.

The proposal is also consistent with the land use objective that applies to the site under NSLEP as demonstrated within **Table 2** below. The site is located within the B3 Commercial Core zone.

Table 2 – Assessment of Compliance with Land Use Zone Objectives

Objective	Compliance
<i>To provide a wide range of retail, business, office, entertainment, community and other suitable land uses that serve the needs of the local and wider community.</i>	The proposed development serves the needs of the local and wider community by providing an increase in commercial floor space including retail premises and office premises within the commercial core of the North Sydney Centre.
<i>To encourage appropriate employment opportunities in accessible locations.</i>	<p>The proposed development encourages employment in a highly accessible location as it is positioned immediately above the approved Metro station and within proximity to North Sydney Station, bus routes, taxis and active transport networks for walking and cycling.</p> <p>The variation to the height of building standard allows for the delivery of large high-rise commercial office floor plates to meet anticipated tenant demand that encourages additional employment opportunities on the site compared to a compliant scheme.</p>
<i>To maximise public transport patronage and encourage walking and cycling.</i>	<p>The proposed development promotes public transport use and encourages active transport use through minimising private car parking provision on site and enabling users of the OSD to efficiently access the new Metro station and surrounding public transport and active transport options.</p> <p>As described in the Concept SSD DA modification application, the amended building envelope and Detailed SSD DA design delivers highly accessible and visible Metro Station entrances, notwithstanding the proposed variation to the height of building standard.</p>

Objective	Compliance
<i>To prohibit further residential development in the core of the North Sydney Centre.</i>	The proposal does not include any residential development on the site.
<i>To minimise the adverse effects of development on residents and occupiers of existing and new development.</i>	<p>The proposed development minimises adverse effects on residents of existing development in relation to overshadowing, privacy and visual impacts. Specifically, the proposed variation to the height of building standard at the central portion of the site does not adversely impact the amenity of existing residents or occupiers of existing or approved surrounding residential development. Any impact on views from Rooftop Level 37 of the Alexander Apartments building has been minimised by the proposed building form. Further the overall building envelope has been reduced compared to that envisaged by the height controls and permitted by the Concept Approval building envelope.</p> <p>Views and visual impacts are also further addressed within Section 8.1.4 of the Detailed SSD DA EIS, which demonstrates that the proposed variation to the height of building standard does not unreasonably impact views from the public domain or surrounding residential properties.</p>

The proposal is considered to be in the public interest as the development is consistent with the objectives of the development standard, and the land use objectives of the zone.

6.3.4. Clause 4.6(5)(a) – Would Non-Compliance Raise any Matter of Significance for State or Regional Planning?

The proposed non-compliance with the height of building development standard will not raise any matter of significance for State or regional environmental planning.

6.3.5. Clause 4.6(5)(b) – Is There a Public Benefit of Maintaining the Planning Control Standard?

The proposed development achieves the objectives of the height of building development standard and the land use zoning objectives despite the non-compliance, and the contravention has been demonstrated to be appropriate and supportable in the circumstances of the case.

As such, there is no public benefit in maintaining the development standard in the circumstances of this case.

6.3.6. Clause 4.6(5)(c) – Are there any other matters required to be taken into consideration by the Secretary before granting concurrence?

The Planning Circular PS 18-003, issued on 21 February 2018, outlines that consent authorities for SSD may assume the Secretary's concurrence where development standards will be contravened.

Nevertheless, there are no known additional matters that need to be considered within the assessment of the clause 4.6 request and prior to granting concurrence, should it be required.

7. CONCLUSION

This variation request is made pursuant to clause 4.6 of the NSLEP. For a request to meet the requirements of clause 4.6(3) of NSLEP, it must:

- adequately demonstrate that compliance with the Miller Street setback standard is unreasonable or unnecessary in the circumstances of the project on the site; and
- adequately demonstrate that there are sufficient environmental planning grounds to justify contravening the Miller Street setback standard.

This request contains justified reasoning supporting conclusions in respect of the above two matters, specifically that:

- Objectives of the development standard, in relation to development on sloping land, view sharing, solar access to existing dwellings, public reserves, and streets, privacy to existing dwellings, compatibility between development, and scale and density of development, are achieved by the proposed development notwithstanding the exceedance of the RL 201 building height standard, and in doing so establishes that compliance with the standard is unreasonable or unnecessary).
- There are sufficient environmental planning grounds to support the proposed development, in that the proposal does not result in any non-complying overshadowing to public space, and does not have any unacceptable heritage impacts or unacceptable impacts to the views and privacy of the Alexander Apartments building.

In view of the above, we submit that the proposal is in the public interest and that the proposed clause 4.6 variation request to vary the RL 201 height of building development standard prescribed by clause 4.3 of NSLEP be supported.

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