



Sydney Metro City & South West

Victoria Cross Over Station

Development:

Clause 4.6 Variation Request – Height

Applicable to:	Sydney Metro City & Southwest
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1. Introduction

This report supports a concept State Significant Development Application (concept SSD Application or concept proposal) submitted to the Department of Planning and Environment (DP&E) pursuant to Part 4 of the *Environmental Planning and Assessment Act 1979* (EP&A Act). The concept SSD Application is made under Section 4.22 of the EP&A Act.

Sydney Metro is seeking to secure concept approval for a building envelope above the Victoria Cross Station, otherwise known as over station development (OSD). The concept SSD Application seeks consent for a maximum building envelope, commercial uses, maximum gross floor area, the future subdivision of parts of the OSD footprint (if required), pedestrian and vehicular access, circulation arrangements, car parking, and the strategies and design parameters for the future detailed design.

This report has been prepared to request a variation to clause 4.3 of *North Sydney Local Environmental Plan 2013* (NSLEP 2013) as it applies to the concept proposal. The request responds to the Secretary's Environmental Assessment Requirements (SEARs) issued for the concept SSD Application on 30 November 2017, which states that the Environmental Impact Statement (EIS) must include a clause 4.6 written request (if required). This report has been prepared to respond to the current version of NSLEP 2013 gazetted on 26 October 2018 incorporating those amendments previously proposed in the *North Sydney Centre Planning Proposal* (as amended).

2. Clause 4.6 Exceptions to development standards

Clause 4.6 of NSLEP 2013 enables an exception to the height standard subject to consideration of a written request from the applicant justifying the contravention.

Relevant extracts of Clause 4.6 of NSLEP 2013 read as follows:

Clause 4.6 Exceptions to development standards

(1) The objectives of this clause are as follows:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted 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 circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) 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 in which the development is proposed to be carried out, and

(b) the concurrence of the Director-General has been obtained.

(5) In deciding whether to grant concurrence, the Director-General must 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 Director-General before granting concurrence.

3. Development standard to be varied

The development standard to be varied is clause 4.3 (Height of buildings) in NSLEP 2013. As identified on the NSLEP 2013 Height of Buildings Map at Figure 1 below, the site is subject to maximum building heights of RL 135, 193, 201 and 230.

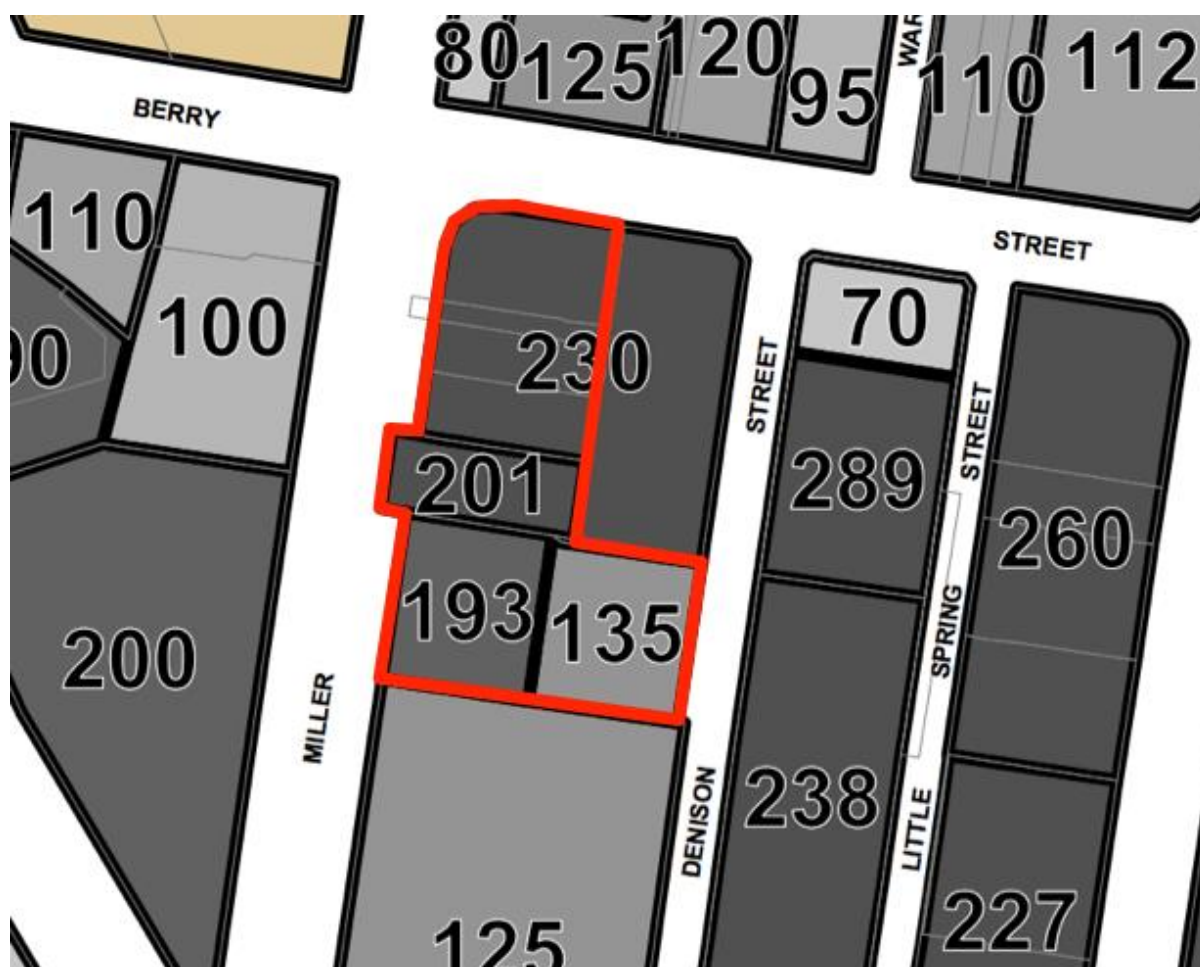


Figure 1 – Height of Buildings Map
Source: NSLEP 2013

4. Extent of variation

The proposed variation occurs only over the portion of the site identified with a maximum height of RL 201. That is, the proposed building envelope complies with the building heights shown on the Height of Buildings Map in respect to the RL 135, 193 and 230 portions.

Over the RL 201 portion, the proposed building envelope has a maximum height of RL 230, resulting in a maximum non-compliance of 29 metres (or 14%).

Refer to Figures 2 and 3 below for an elevation and section of the proposed envelope. These images show the maximum building height standard from NSLEP 2013 in a blue dashed line. The extent area of non-compliance is identified on Figure 2.

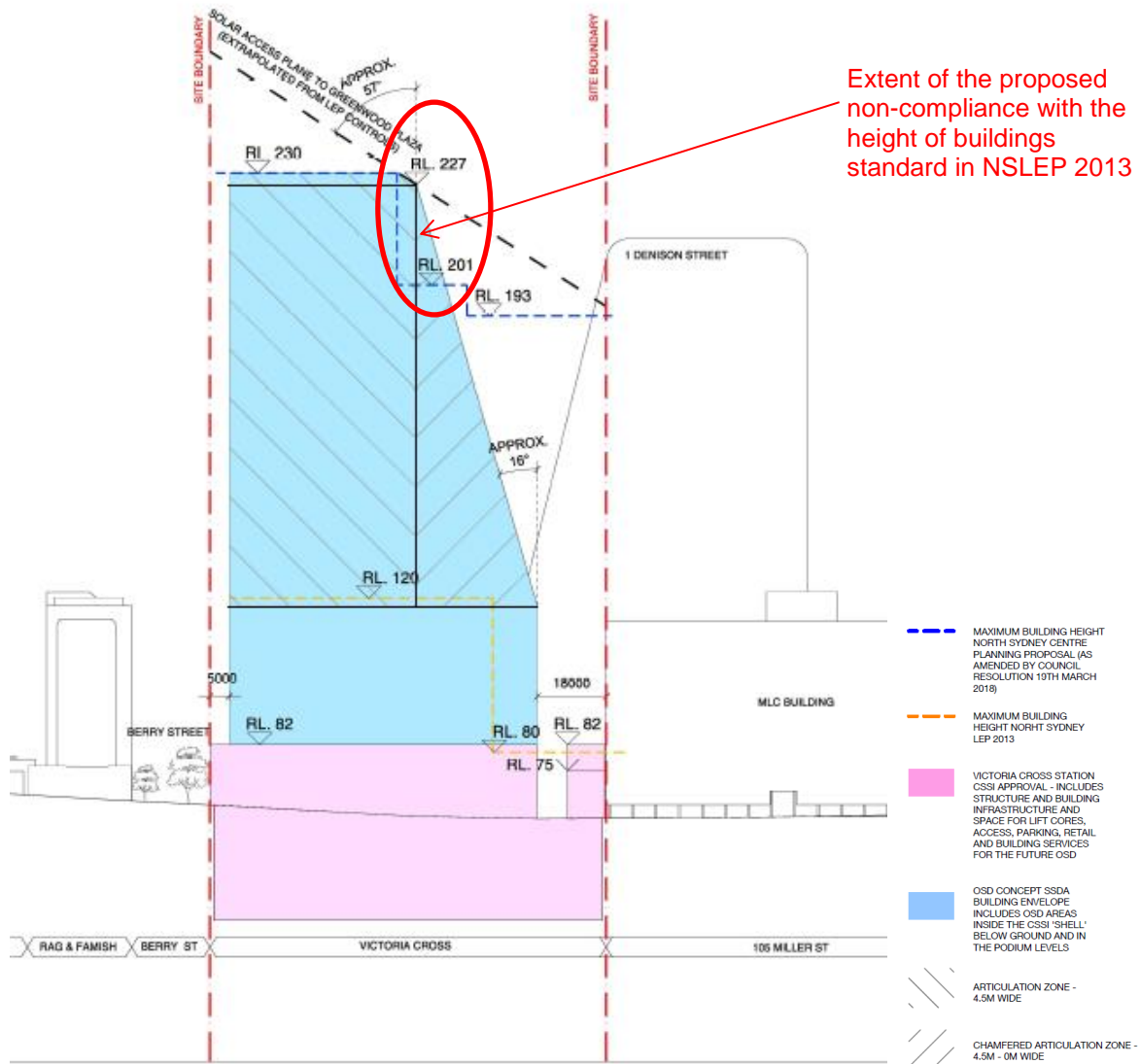


Figure 2 – Proposed building envelope: Miller Street elevation
Source: Sydney Metro

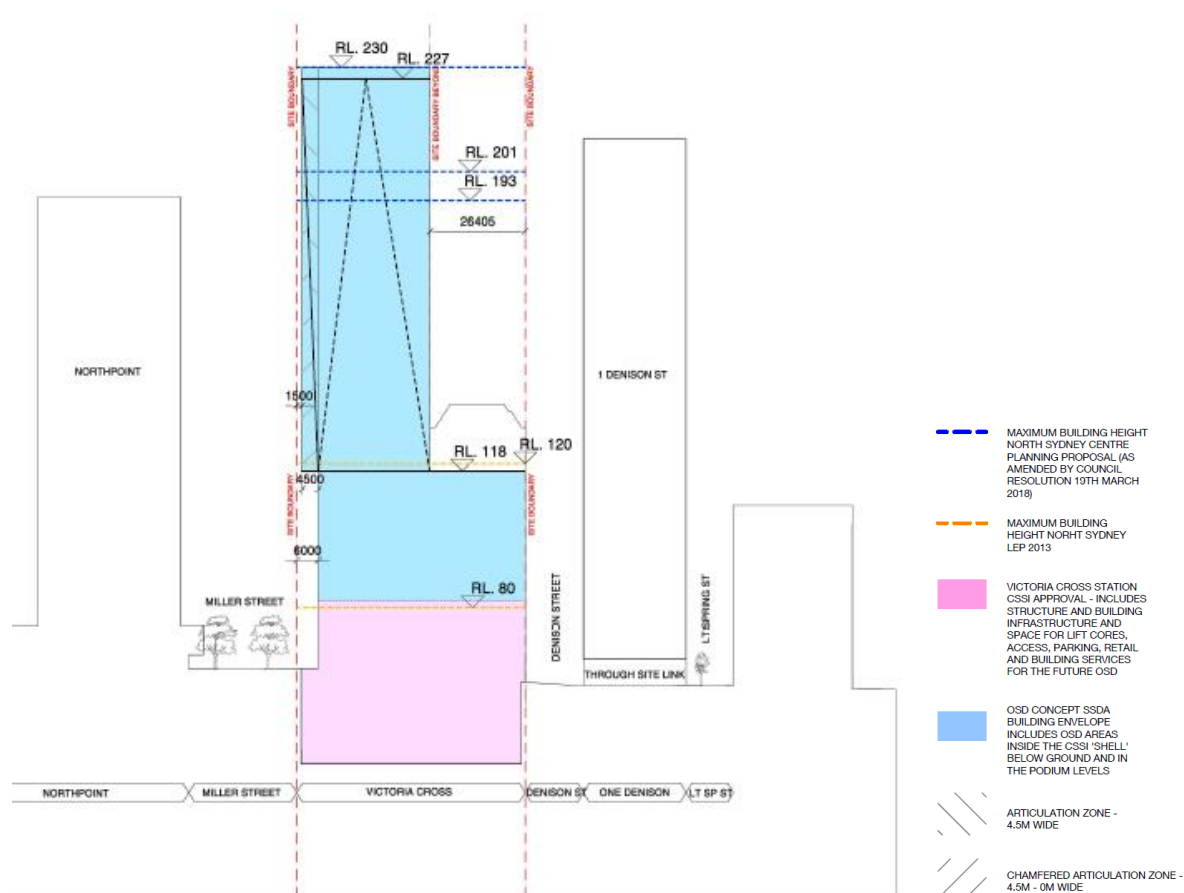


Figure 3 – Proposed building envelope: east-west section
Source: Sydney Metro

5. Assessment

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

Compliance with the height of buildings standard is unreasonable and unnecessary for the following reasons:

- The proposed building envelope complies with clause 6.3(3) of NSLEP 2013, which explicitly permits variations to the height of buildings standard subject to certain overshadowing provisions. Given that the proposed building envelope complies with the overshadowing provisions in clause 6.3(3), it is considered that compliance with the standard is unreasonable and unnecessary. Refer to the 'environmental planning grounds' discussion below for further detail regarding clause 6.3(3).
- Despite the variation, the proposed building envelope is consistent with the objectives of the height of buildings standard and the B3 Commercial Core zone (see further discussion below).
- The contravention of the height standard does not raise any matter of State or regional planning significance.

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

The concept proposal demonstrates sufficient environmental planning grounds for the following reasons:

- The additional height is consistent with the objectives of clause 4.3 (Height of buildings) and Zone B3 Commercial Core (refer to Table 1 and Table 2, respectively).
- The proposed building envelope complies with 6.3(3) of NSLEP 2013, which explicitly allows for height in excess of that shown on the Height of Buildings Map, subject to overshadowing provisions related to dwellings outside North Sydney Centre. This clause states:

- (3) *The consent authority may grant development consent to development on land in the North Sydney Centre that would exceed the maximum height of buildings shown for the land on the Height of Buildings Map if the consent authority is satisfied that any increase in overshadowing between 9 am and 3 pm from the March equinox to the September equinox (inclusive) will not result in any private open space, or window to a habitable room, located outside the North Sydney Centre receiving:*
- (a) *if it received 2 hours or more of direct sunlight immediately before the commencement of North Sydney Local Environmental Plan 2013 (Amendment No 23)—less than 2 hours of direct sunlight, or*
 - (b) *if it received less than 2 hours of direct sunlight immediately before the commencement of North Sydney Local Environmental Plan 2013 (Amendment No 23)—less direct sunlight than it did immediately before that commencement.*

The proposed building envelope results in minor additional overshadowing to six dwellings outside North Sydney Centre—nos. 1, 3, 5, 7, 9 and 11 Whaling Road, North Sydney. Specifically:

- Overshadowing between 2:30 pm and 3 pm at the winter solstice to the habitable windows on the front (north) elevation of nos. 1, 3, 5 and 7 and the side (west) elevation of no. 1.
- Overshadowing between 2:30 pm and 3 pm at the winter solstice to small portions of the rear private open space areas of nos. 5, 7, 9 and 11.

In regards to the habitable windows, these currently receive 5.5 hours of sunlight between 9 am and 2:30 pm. Therefore, the additional overshadowing between 2:30 pm and 3 pm would not cause the dwellings to receive less than two hours of sunlight in accordance with clause 6.3(3)(a). This is demonstrated in the Shadow Study at Appendix L of the EIS.

In regards to the rear private open space areas, the southern portions of these areas receive more than two hours of direct sunlight between 12 pm and 2:30 pm, as demonstrated in the detailed shadow study at Chapter 8.3 of the Built Form and Urban Design Report at Appendix G of the EIS. Therefore, the additional overshadowing between 2:30 pm and 3 pm would not cause the private open space areas to receive less than two hours of sunlight in accordance with clause 6.3(3)(a).

It is also important to note that the proposed building envelope would cause no additional overshadowing to the dwellings' *principal* private open space areas, which are assumed to comprise a discrete area within the rear yard of each dwelling comprising 40 square metres (as per NSDCP 2013 requirements for dwellings of this type) directly behind the house. These principal areas are outlined in the detailed shadow study at Chapter 8.3 of the Built Form and Urban Design Report at Appendix G of the EIS.

- The proposed building envelope complies with clause 6.3(2) of NSLEP 2013, which relates to overshadowing of Special Areas and Zone RE1 Public Recreation land. This clause states:
 - (2) *Development consent must not be granted for the erection of a building on land to which this Division applies if:*
 - (a) *the development would result in a net increase in overshadowing between 12 pm and 2 pm on land to which this Division applies that is within Zone RE1 Public Recreation or that is identified as “Special Area” on the North Sydney Centre Map, or*
 - (b) *the development would result in a net increase in overshadowing between 10 am and 2 pm of the Don Bank Museum, or*
 - (c) *the site area of the development is less than 1,000 square metres.*

When considered as part of the Integrated Station Development (which involved demolition and redevelopment of the previous development footprint), the proposed building envelope would result in a *net gain* in sunlight to surrounding Special Areas and Zone RE1 land. Specifically:

- A net gain in sunlight of 60.2 square metres between 12 pm and 2 pm on 21 March. This is demonstrated in the Built Form and Urban Design Report at Appendix G of the EIS.
- A net gain in sunlight of 158.4 square metres between 12 pm and 2 pm on 21 June. This is demonstrated in the Built Form and Urban Design Report at Appendix G of the EIS.
- The additional height would cause no impacts on views from the Alexander Apartments building (formerly the Beau Monde Apartment building). This is as a result of the additional height occurring at RL 201 and above, which is above the height of the Alexander Apartments building and therefore, above the view lines from these apartments. Also, compared to a scheme that builds up to the full extent of the height limits across the site, the proposed building envelope would result in *less impact* on views from the Alexander Apartment building due to the envelope's 18-metre south setback, tapered southern elevation and low-rise form fronting Denison Street, all of which serve to remove built form from important view lines from the Alexander Apartments building to the southwest. This is demonstrated in the View Impact Study at Appendix Z of the EIS.
- The additional height would cause no privacy impacts on the Alexander Apartment building. This is as a result of the additional height occurring at RL 201 and above, which is above the height of the Alexander Apartments and therefore, outside the line of direct views from these apartments. Overlooking from the additional height to the balconies of the Alexander Apartments building would not be an issue because the balconies are set back behind the façade. Regardless of height, sufficient privacy would be achieved through a combination of large separation distance, intervening development (65 Berry Street) and indirect view lines.
- The additional height would result in no adverse heritage impacts on the MLC Building or other nearby heritage item. In fact, it is likely that, compared to a scheme that builds up to the full extent of the height limits across the site, the proposed building envelope would have *less impact* on the MLC Building due its low-rise form fronting Denison Street, 18-metre southern setback and tapered southern elevation, which serve to open up views to and provide 'breathing room' for the MLC Building.
- Clause 6.3(5) of NSLEP 2013 outlines matters for consideration by the consent authority related to built form and massing when assessing a proposed development in North Sydney Centre. The concept proposal is consistent with this clause for the following reasons:
 - It would be compatible with the scale, form and massing of the existing and future high-rise development in the locality.
 - It would have no unacceptable impacts on the natural environment.
 - It would have no impact on any significant view line or vistas identified in Council's planning documents and promotes an appropriate sharing of views with the Alexander Apartments building as outlined above.

- It would form part of an Integrated Station Development that would enhance the streetscape in relation to scale, materials and external treatments (with details to be confirmed at the detailed SSD Application stage).
- The concept proposal is consistent with the objectives of Part 6, Division 1 (North Sydney Centre) of NSLEP 2013. Specifically, the proposal:
 - Maximises commercial floor space capacity within the constraints of the context, notably heritage and overshadowing constraints, promoting the status of North Sydney Centre as a major commercial centre.
 - Allows for large commercial floor plates above 1,000 square metres, commensurate with A-grade office development.
 - Prevents a net increase in overshadowing during winter months of land in Zone RE1 Public Recreation and land identified as 'Special Area' (when considered as part of the Integrated Station Development).
 - Ensures that surrounding residential land is afforded a reasonable amount of solar access.
 - Does not reduce existing setbacks or landscaped areas or reduce the amenity of those areas.
- The concept proposal is generally consistent with controls contained in NSDCP 2013, with sufficient justification for any non-compliance. Refer to the DCP Compliance Table at Appendix GG of the EIS.
- The concept proposal seeks to achieve a fully integrated transport and land use development.
- The development is consistent with the principles of orderly and economic development by facilitating redevelopment of an urban site in a prime location close to public transport.

Overall, it is open to the consent authority to consider that the concept proposal does not result in any significant environmental impacts that could be avoided through a compliant form.

Clause 4.6(4)(a)(ii) - Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out?

In the court case *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Commissioner Pearson stipulates that the consent authority is to be satisfied the proposed development will be in the public interest because it is consistent with:

- a) *the objectives of the particular standard, and*
- b) *the objectives for development within the zone in which the development is proposed to be carried out.*

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, the Chief Judge observed in his judgement at [39] that 4.6(4) of the Standard instrument does not require the consent authority to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly be satisfied that the applicant's written request has adequately addressed those matters.

The particular development standard is clause 4.3 of the NSLEP 2013. The relevant objectives are addressed in Table 1 below.

Table 1 – Consistency with objectives of height of building standard

Objective of height standard	Consistency
(a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,	The additional height is positioned to reflect the land's natural gradient, which falls from north to south. The greatest building height is positioned in the northern portion of the site, where the existing ground level is highest, while the lowest building height is positioned in the southern section of the site, where the existing ground level is lowest.
(b) to promote the retention and, if appropriate, sharing of existing views,	<p>The proposed additional height would cause no unacceptable view impacts on residents of the Alexander Apartments building, as the additional height is outside (above) the residents' view lines.</p> <p>Also, as demonstrated in the Visual Impact Assessment at Appendix AA of the EIS, the proposed building envelope would result in <i>less impact</i> on views from the Alexander Apartments building compared to an envelope that builds up to the full extent of the height limit across the site. The envelope achieves this reduced impact by limiting built form in the southern end of the site outside of view lines from the Alexander Apartments building to the southwest. Specifically, the envelope features an 18-metre setback from the boundary, a sloping southern elevation and a low-rise form fronting Denison Street.</p>
(c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,	<p>The proposed building envelope retains sunlight to dwellings outside North Sydney Centre in accordance with clause 6.3(3) of NSLEP 2013.</p> <p>When considered as part of the Integrated Station Development, which involved demolition and redevelopment of the previous development footprint, the proposed building envelope would result in no net increase in overshadowing to surrounding Special Areas and RE1 Public Recreation land.</p>
(d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,	<p>The proposed additional height would cause no privacy impacts on residents of the neighbouring Alexander Apartments building, as the additional height is well above the height of the Alexander Apartments building.</p> <p>Furthermore, the large building separation distances, intervening development (65 Berry Street) and indirect view lines would work to maintain the privacy of residents of the Alexander Apartments building.</p> <p>All other surrounding development (both existing and proposed) is commercial.</p>
(e) to ensure compatibility between development, particularly at zone	The proposed additional height is compatible with surrounding development, both existing and under construction, including the 1

Objective of height standard	Consistency
boundaries,	Denison Street and 100 Mount Street developments. The concept proposal is not located at a zone boundary but is completely within zone B3 Commercial Core.
(f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.	<p>The proposed additional height accords with the desired future character of the North Sydney CBD as expressed in NSDCP 2013, including the following relevant extracts:</p> <p><i>P1 High rise and medium density, commercial and mixed use development.</i></p> <p><i>P4 The commercial focus of the CBD is to be enhanced by preventing any further residential development from occurring in its core (i.e. the B3- Commercial Core zone).</i></p> <p><i>P5 Development above the Victoria Cross metro station will provide significant commercial floorspace, as well as retail, dining and community uses that will contribute to the overall amenity and vitality of the CBD.</i></p> <p>The proposed additional height would accommodate additional commercial floor space in a high-rise context directly above Victoria Cross Metro Station.</p>

Overall, it is open to the consent authority to consider that the variation of clause 4.3 of the NSLEP 2013 is in the public interest because it is consistent with the objectives of the development standard.

The concept proposal's consistency with the Zone B3 Commercial Core objectives is outlined in Table 2 below.

Table 2 – Consistency with objectives of Zone B3 Commercial Core

Zone objective	Consistency
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.	The concept proposal provides for up to 60,000 square metres of commercial floor space (office premises and ground level retail) that would serve the needs of North Sydney Centre.
To encourage appropriate employment opportunities in accessible locations.	The concept proposal provides for up to 60,000 square metres of commercial floor space (office premises and ground level retail) in a highly accessible location directly above, and integrated with, the future Victoria Cross Station. This quantity of floor space is expected to accommodate an estimated 4,200 jobs.
To maximise public transport patronage and encourage walking and cycling.	<p>The concept proposal would place additional workers directly above the future Victoria Cross Station, which would help drive Sydney Metro patronage and thereby encourage walking and cycling.</p> <p>Bicycle parking and end-of-trip facilities would be provided within the basement levels of the future development for tenants of the building.</p>
To prohibit further residential development in the core of the North	The concept proposal does not propose residential uses and is therefore consistent with this objective.

Zone objective	Consistency
Sydney Centre.	
To minimise the adverse effects of development on residents and occupiers of existing and new development.	The proposed additional height has no unacceptable adverse effects on occupiers of existing and new development, such as view, privacy and overshadowing effects.

It is open to the consent authority to consider that the variation of clause 4.3 of the NSLEP 2013 is in the public interest because it is consistent with the objectives of the Zone B3 Commercial Core.

6. Matters of significance for State or regional environmental planning

The contraventions of the height standard do not raise any matter of State or regional planning significance.

7. Conclusion

This clause 4.6 variation request is well founded as it demonstrates, as required under clause 4.6 of the NSLEP 2013, that the proposal provides a better planning outcome with no significant adverse environmental impacts. In summary, the variation is justified because:

- Compliance with the height standard is unreasonable and unnecessary in the circumstances of the proposed development.
- There are sufficient environmental planning grounds to justify the contravention, which results in a better planning outcome than a strictly compliant development in the circumstances of this particular case.
- The concept proposal is consistent with the objectives of the clause 4.3 height of buildings standard and Zone B3 Commercial Core.
- The concept proposal is in the public interest.
- There are no matters of State or regional planning significance and no notable public benefits in maintaining the height standard in this case.

It is therefore open to the consent authority to vary clause 4.3 of the NSLEP 2013 as it applies to the concept proposal.