

CLAUSE 4.6
VARIATION REQUEST
(BUILDING HEIGHT)

APPENDIX EE





Sydney Metro City & South West Victoria Cross Over Station Development: Clause 4.6 Variation Request – Height

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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.

Transport for NSW (TfNSW) 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 at the request of North Sydney City Council, who has advised that whilst variations to the height of buildings standard are permitted under clause 6.3(3) of NSLEP 2013, clause 4.6 variation requests are encouraged as a matter of practice.

This report addresses NSLEP 2013 whilst having regard to the *North Sydney Centre Planning Proposal*, which has received Gateway determination and has been publicly exhibited. Following exhibition, Council resolved on 19 February 2018 to forward the planning proposal, including a number of amendments resulting from exhibition, to Parliamentary Counsel with a request to make the new LEP. The planning proposal is therefore a draft environmental planning instrument which is certain and imminent in its making. It is anticipated that the new LEP will be made prior to determination of this concept SSD Application.

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 120 and RL 80.

The site is also affected by *North Sydney Centre Planning Proposal*, which proposes revised heights for the site ranging from RL 135 to RL 230 as identified in Figure 2 below.



Figure 1 – Existing Height of Buildings Map
Source: NSLEP 2013



Figure 2 – Proposed Height of Buildings Map
Source: North Sydney Centre Planning Proposal (amended post-exhibition)

4. Extent of variation

The proposed additional height varies from the current height of buildings standard by a large extent, but it varies from the amended standard under the *North Sydney Centre Planning Proposal* only by a small extent, as explained in detail below.

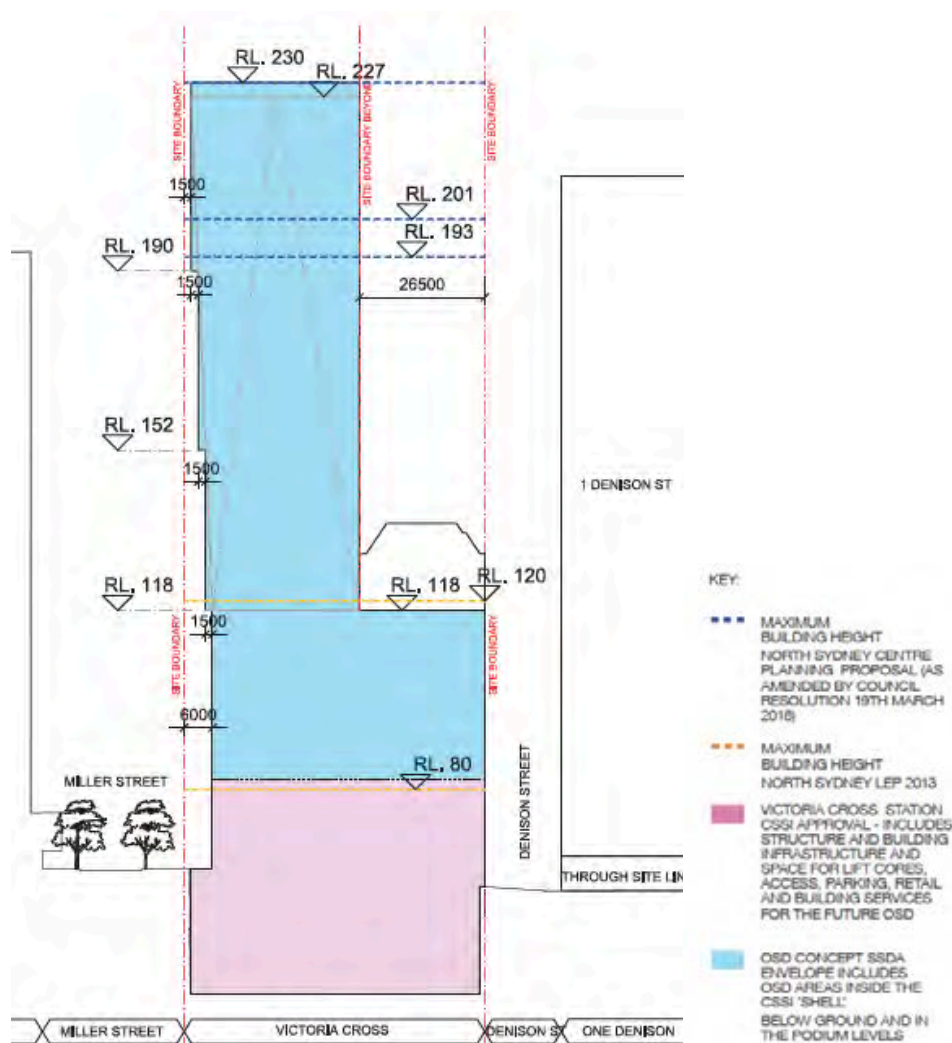


Figure 4 – Proposed building envelope: east-west section
Source: TfNSW

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. This clause prevails to the extent of any inconsistency with other provisions in NSLEP 2013. As such, compliance with clause 6.3(3) provisions would render compliance with the height standard unreasonable and unnecessary. The concept proposal is consistent with clause 6.3(3) (as explained under the 'environmental planning grounds' discussion below), and therefore compliance with clause 4.3 is unreasonable and unnecessary.

- The concept proposal varies by only a small extent from the heights proposed under the *North Sydney Centre Planning Proposal* (as discussed in Section 4.2 above), and this variation is explicitly permitted under the amended clause 6.3(3) (as explained in the 'environmental planning grounds' discussion below). Given this consistency with the amended clause 6.3(3) under the imminent and certain *North Sydney Centre Planning Proposal* provisions, compliance with the height standard is unreasonable and unnecessary.
- 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.

Overall, it is open to the consent authority to consider that compliance with the height of buildings standard is unreasonable and unnecessary in the circumstances of the concept proposal.

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 additional height is consistent with 6.3(3) of NSLEP 2013, which states:
 - (3) *Development consent for development on land to which this Division applies may be granted for development 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 is not likely to reduce the amenity of any dwelling located on land to which this Division does not apply [i.e. any dwelling outside North Sydney Centre].*

The concept proposal complies with these provisions as explained below:

- 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—between the hours of 2:30 pm and 3 pm at the winter solstice. The overshadowing would occur to the front (north) façade of nos. 1 to 7, to the west façade of no. 1, and to small portions of the rear yards of nos. 5 to 11.
- The overshadowing of the facades of nos. 1 to 7 would not reduce the dwellings' amenity because the affected facades would still receive at least two hours of sunlight in accordance with North Sydney Development Control Plan 2013 (NSDCP 2013) requirements.

- The overshadowing of the rear yards of nos. 5 to 11 would not reduce the dwellings' amenity because it would be very minor in extent and short in duration. The overshadowing would occur over a maximum area of 11 percent of the yard for no more than 30 minutes. Furthermore, the overshadowing would occur only to sections of the rear yards away from the houses which are not considered to be principal private open spaces. The principal private open spaces are assumed to be 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 already overshadowed by the dwellings themselves and existing surrounding development.

(The impacts identified above are demonstrated in visual form in the Shadow Study at Appendix L of the EIS. Further discussion on the concept proposal's consistency with the overshadowing provisions in NSDCP 2013 is provided at Chapter 8.3 of the EIS.)

The concept proposal is also consistent with the amended clause 6.3(3) of NSLEP 2013 under the *North Sydney Centre Planning Proposal*, which states:

- (3) *Development consent for development on land to which this Division applies may be granted for development 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 will not result in any dwelling located on land to which this Division does not apply [i.e., any dwelling outside North Sydney Centre]:*
 - (a) *receiving less than 2 hours of direct sunlight to any window of a habitable room or principle private open space; or*
 - (b) *where any window to a habitable room or principle private open space currently receives less than 2 hours of direct sunlight, the amount of direct sunlight access must not be further reduced .*

The concept proposal complies with these amended provisions as explained below:

- As discussed above, the proposed building envelope would result in minor additional overshadowing to six dwellings along Whaling Road, North Sydney. However, the affected habitable windows (on the north and west facades of the dwellings) would only be overshadowed between 2:30 pm and 3 pm. These windows would still receive 5.5 hours of sunlight between 9 am and 2:30 pm, well in excess of the two hours required under clause 6.3(3)(a). This is demonstrated in the Shadow Study at Appendix L of the EIS.
- In regards to the dwellings' principal private open spaces, these currently receive less than the required two hours of sunlight, being overshadowed by the dwellings themselves/surrounding development. The proposed building envelope would cause no further reduction in sunlight to these spaces in accordance with clause 6.3(3)(b). This is demonstrated in the Shadow Study at Appendix L of the EIS.

(The impacts identified above are demonstrated in visual form in the Shadow Study at Appendix L of the EIS.)

- The additional height would result in additional overshadowing to the Miller Street Special Area and Brett Whiteley Plaza (zoned RE1 Public Recreation), but this overshadowing is acceptable because it is minor in extent and short in duration and would not result in a net increase in overshadowing to these areas as required under clause 6.3(2) of NSLEP 2013. 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.*

The proposed building envelope, considered as part of the Integrated Station Development, which involved demolition and redevelopment of the previous development footprint, would result in no net increase in overshadowing to the Miller Street Special Area or Brett Whiteley Plaza.

In fact, considered as part of the Integrated Station Development, 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.

Also importantly, the overshadowing to Brett Whiteley Plaza would occur over an existing awning, which means there would be no amenity impacts or actual overshadowing to the ground. This is demonstrated in the Built Form and Urban Design Report at Appendix G of the EIS.

The additional height would result in no additional overshadowing to other surrounding Special Areas or Zone RE1 Public Recreation areas.

- The additional height would affect some views currently enjoyed by residents of the Beau Monde Apartment building, namely district views to the west at the upper levels of the building. However, the affected views are either partial or not significant as demonstrated in the View Impact Study and Visual Impact Assessment Report at Appendix Z and Appendix AA, respectively, of the EIS. The additional height would not affect important views to Sydney Harbour and the land-sky interface to the southwest due to its position

directly to the west of the Beau Monde Apartment building outside of important view lines.

- The additional height would have no unacceptable privacy impacts on residents of the Beau Monde Apartment building. Most of the additional height is separated from the Beau Monde by 40 metres, which is well above separation requirements for residential development under the Apartment Design Guide (ADG). The northern corner of the envelope at its Denison Street frontage is within 23 metres of the Beau Monde, which is one metre below the 24 metres required under the ADG; however, this view line is unlikely to be problematic because it is indirect (from a corner). Additionally, there is an intervening development at 65 Berry Street, which would block direct views between the concept proposal and the Beau Monde. Refer to further discussion in Chapter 8.4 of the EIS.
- The additional height would cause minor visual impacts on surrounding heritage items due to the additional height and scale. However, these impacts are considered acceptable subject to mitigation, namely design treatments at the detailed SSD Application stage. Refer to further discussion in Chapter 8.5 and Appendix O of the EIS.
- Compared to an envelope which builds up to the full extent of the heights across the site under the *North Sydney Centre Planning Proposal*, the proposed building envelope would result in negligible additional impact or even less impact in some cases. Specifically:
 - Compared to an envelope which builds up to the full extent of the heights across the site under the North Sydney Centre Planning Proposal, the proposed building envelope would result in no additional overshadowing to dwellings outside North Sydney Centre.
 - Compared to an envelope which builds up to the full extent of the heights across the site under the North Sydney Centre Planning Proposal, the proposed building envelope, when considered as part of the Integrated Station Development, which involved demolition and redevelopment of the previous development footprint, would result in no additional overshadowing to Special Areas or Zone RE1 Public Recreation areas. In fact, it would result in less overshadowing to the Miller Street Special Area.
 - Compared to an envelope which builds up to the full extent of the heights across the site under the North Sydney Centre Planning Proposal, the proposed building envelope would have less impact on views from the Beau Monde Apartment building due to its 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 Beau Monde to the southwest. This is demonstrated in the View Impact Study at Appendix Z of the EIS. Also, the additional height (i.e. the height in the middle of the site above the North Sydney Centre Planning Proposal height) occurs at RL 201 and above, which is greater than the height of the Beau Monde and therefore outside (above) view lines from the apartments.
 - Compared to an envelope which builds up to the full extent of the heights across the site under the North Sydney Centre Planning Proposal, the proposed building

envelope would cause no additional privacy impacts on the Beau Monde Apartment building. The additional height (i.e. the height in the middle of the site above the North Sydney Centre Planning Proposal height) occurs at RL 201 and above, which is greater than the height of the Beau Monde Apartment building and therefore outside (above) direct views from the Beau Monde. Overlooking from the additional height to the Beau Monde's balconies 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 small area of non-compliance with the *North Sydney Centre Planning Proposal* height would cause no notable additional impacts on the MLC Building or any other nearby heritage item. In fact, it is likely 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 Beau Monde Apartment 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 amended objectives of Part 6, Division 1 (North Sydney Centre) of NSLEP 2013 under the *North Sydney Centre Planning Proposal*. 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.
- The concept proposal is generally consistent with controls contained in NSDCP2013, 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:

- 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 *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,	The additional height would affect some views currently enjoyed by residents of the Beau Monde Apartment building, namely district views to the west at the upper levels of the building. However, these impacts are considered acceptable given Council’s commitment to increased heights in the area under the <i>North Sydney Centre Planning Proposal</i> . Also, the affected views are either partial or not significant. The more significant views are those to the southwest towards Sydney Harbour, and the proposed additional height is generally outside of these view lines. Also, as demonstrated in the Visual Impact Assessment at Appendix AA of the EIS, the proposed building envelope would result in less

Objective of height standard	Consistency
	<p><i>impact</i> on views compared to an envelope that complies with the heights in the <i>North Sydney Centre Planning Proposal</i>. The envelope achieves this reduced impact by limiting built form in the southern end of the site outside of view lines from the Beau Monde 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> <p>The additional height would cause no other notable impacts on the views of development in the area. The view sharing resulting from the development is considered appropriate to the CBD context.</p>
<p>(c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,</p>	<p>The proposed additional height would cause minor additional overshadowing to the Miller Street Special Area and to Brett Whiteley Plaza. However, these are considered acceptable because the overshadowing is minor and short in duration. Further, the building envelope, considered as part of the Integrated Station Development, which involved demolition and redevelopment of the previous development footprint, results in no net increase in overshadowing. See above for further details.</p> <p>The proposed additional height would cause minor additional overshadowing to six dwellings outside North Sydney Centre (i.e., nos. 1 to 11 Whaling Road, North Sydney). However, this overshadowing is negligible and would not materially reduce the amenity of these dwellings in accordance with clause 6.3(3) of NSLEP as discussed above.</p>
<p>(d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,</p>	<p>The proposed additional height would cause no unacceptable privacy impacts for residents of the neighbouring Beau Monde Apartment building. Specifically, the combination of large building separation distances, intervening development (65 Berry Street) and indirect view lines would work to maintain the privacy of residents of the Beau Monde.</p> <p>All other surrounding development (both existing and proposed) is commercial.</p>
<p>(e) to ensure compatibility between development, particularly at zone boundaries,</p>	<p>The proposed additional height is compatible with surrounding development, both existing and under construction, including the 1 Denison Street and 100 Mount Street developments.</p> <p>The concept proposal is not located at a zone boundary but is completely within zone B3 Commercial Core.</p>
<p>(f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.</p>	<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</p>

Objective of height standard	Consistency
	commercial floor space in a high-rise context directly above Victoria Cross Metro Station.

Overall, it is open to the consent authority to consider that the variation of clause 4.3 of the NSLEP2013 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. The table discusses both the current standard and the amended standard under the *North Sydney Centre Planning Proposal*.

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.	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. Bicycle parking and end-of-trip facilities would be provided within the basement levels of the future development for tenants of the building.
To prohibit further residential development in the core of the North Sydney Centre.	The concept proposal does not propose residential uses and is therefore consistent with this objective.
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.