

**CLAUSE 4.6
VARIATION REQUEST
(MILLER STREET SETBACK)**

APPENDIX FF





Sydney Metro City & South West

Victoria Cross Over Station

Development:

Clause 4.6 Variation Request – Miller Street Setback

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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 6.4 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).

2. Clause 4.6 Exceptions to development standards

Clause 4.6 of NSLEP 2013 enables contravention of the Miller Street setback 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 6.4 (Miller Street setback) in NSLEP 2013, which reads as follows:

6.4 Miller Street setback

(1) *The objective of this clause is to maintain the established setback and landscaped setting on the eastern side of Miller Street between McLaren and Mount Street.*

(2) *Development consent must not be granted for the erection of a building on land identified as "Miller Street Setback" on the North Sydney Centre Map unless:*

(a) the building height will be less than 1.5 metres, and

(b) the part of the building that will be on that land is used only for access to the building or landscaping purposes.

As shown in the North Sydney Centre Map extract at Figure 1, the site is required to achieve a setback of generally six metres from Miller Street, with an 11.5-metre setback required at the small, irregular extension in the middle portion of the frontage.

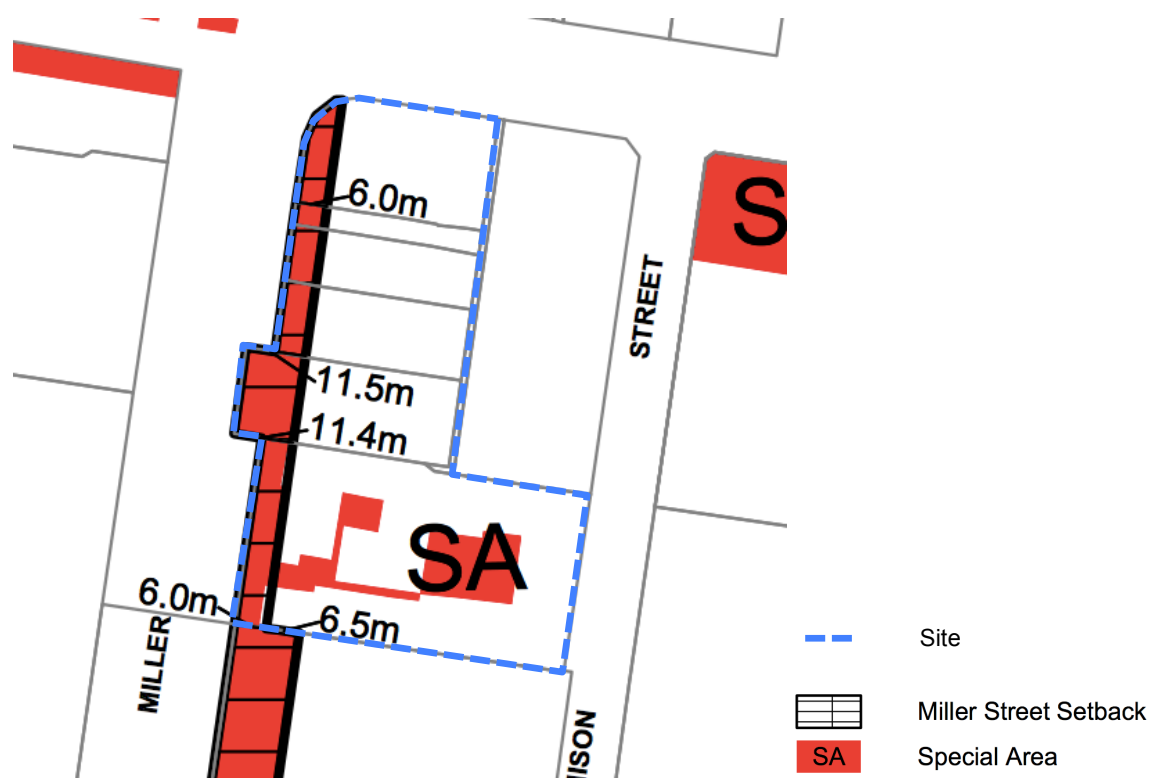


Figure 1 – North Sydney Centre Map
Source: NSLEP 2013

4. Extent of variation

Up to a height of RL 118, the proposed building envelope is set back in accordance with the setback shown on the North Sydney Centre Map. At RL 118 and above, the envelope includes a reduced setback, which has been incorporated in order to facilitate an innovative and visually interesting building design. The setback reduces (or step towards the street) in 1.5-metre increments at three heights (RL 118, RL 152 and RL 190), with a minimum setback of 1.5 metres at the top section of the envelope. The effect is to split the envelope into four subtly separate volumes. Refer to the south elevation of the envelope at Figure 3 below.

The stepping setback results in the following non-compliances with the Miller Street setback standard:

- Between RL 118 and RL 152, the maximum non-compliance is 1.5 metres (or 13 percent at the irregular extension of the frontage and 25 percent at the remainder of the frontage).
- Between RL 152 and RL 190, the maximum non-compliance 3 metres (or 25 percent at the irregular extension of the frontage and 50 percent at the remainder of the frontage).
- At RL 190 and above, the maximum non-compliance is 4.5 metres (or 39 percent at the irregular extension of the frontage and 75 percent at the remainder of the frontage).

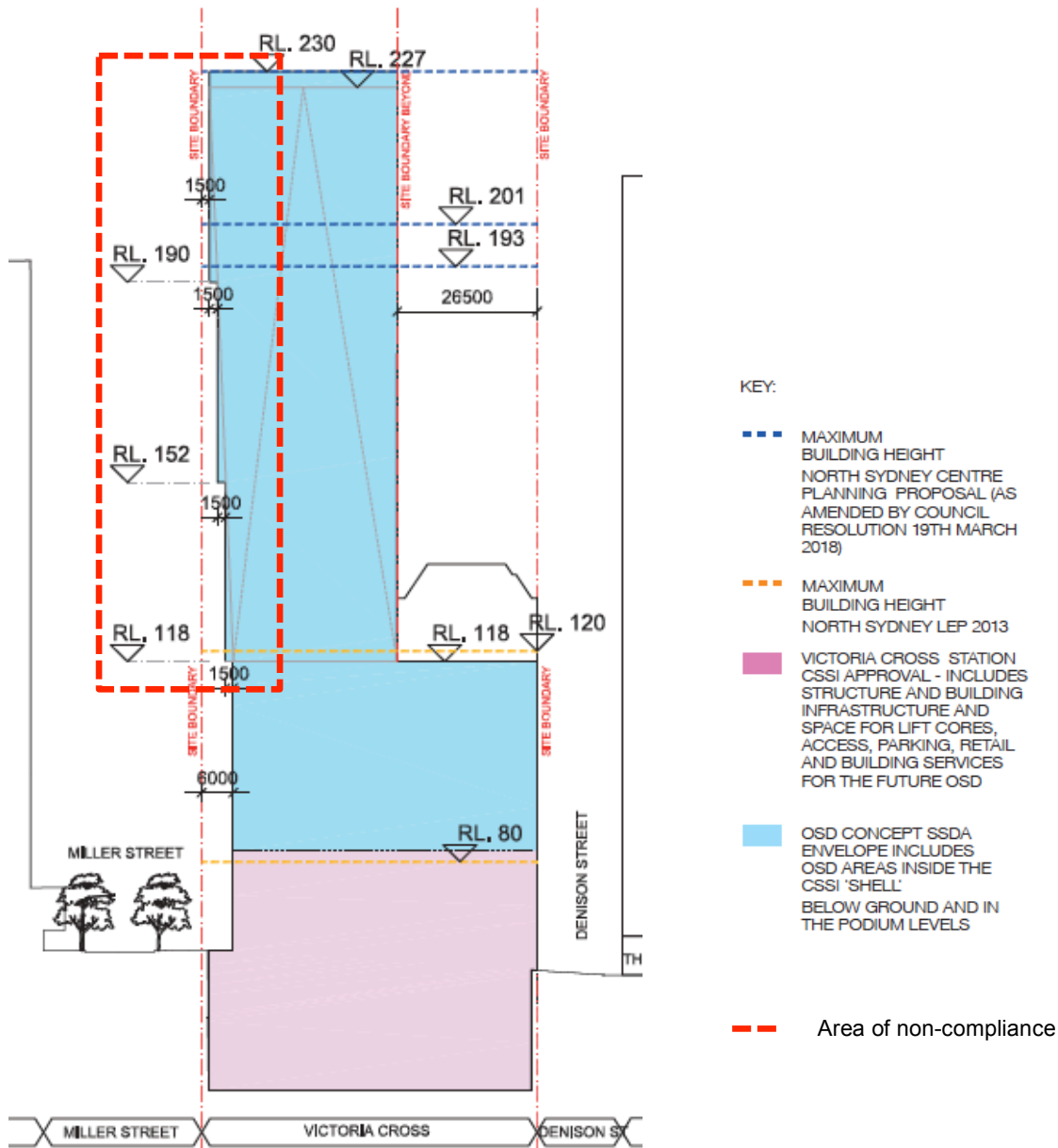


Figure 2 – Proposed building envelope: east-west section
Source: TfNSW

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 Miller Street setback standard is unreasonable and unnecessary for the following reasons:

- The reduced setback begins at a height of RL 118 or approximately 13 storeys above ground. The clear objective of the Miller Street setback standard is to manage impacts at street level (refer further discussion in Table 1). Given that the reduced setback occurs

well above street level, technical compliance with the standard would not help to achieve the objective of the standard. Therefore, compliance with the standard is unreasonable and unnecessary in the circumstances of the case.

- The reduced setback would have negligible material impacts compared to a compliant scheme in terms of built form, public domain, landscaping, overshadowing, view or heritage impacts. Specific impacts are discussed in the 'environmental planning grounds' section below. Given the impacts are negligible, compliance with the standard would not serve to achieve a better material outcome. Therefore, compliance with the standard is unreasonable and unnecessary in the circumstances of the case.
- Despite the variation, the proposed building envelope achieves the objectives of the Miller Street setback standard and Zone B3 Commercial Core (refer to Table 1 and 2, respectively).
- The variation 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 Miller Street Setback 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 as follows:

- The reduced setback is consistent with the objectives of clause 6.4 (Miller Street setback) and Zone B3 Commercial Core (refer to Table 1 and Table 2, respectively).
- The reduced setback would cause no additional unreasonable heritage impacts. The proposed building envelope overall would cause minor visual impact to surrounding heritage items due to the increased height and scale, but the reduced setback in particular would not measurably increase the impact. The reduced setback begins at RL 118, above the height of the adjoining MLC Building and nearby Rag & Famish Hotel, which means that direct views to these items along Miller Street would not be obstructed. Heritage impacts are discussed in further detail at Chapter 8.5 and Appendix O of the EIS.
- Compared to a building form which complies with the Miller Street setback and which builds up to the full extent of the heights across the site under the *North Sydney Centre Planning Proposal* (which is currently being finalised), the proposed building envelope would cause no additional overshadowing to surrounding Special Areas, Zone RE1 Public Recreation Land or any other sensitive area. In fact, it would cause *less* overshadowing to the Miller Street Special Area. The concept proposal's consistency with overshadowing controls is discussed in Chapter 8.3 and Appendices H to L of the EIS.
- The station and the OSD up to a height of RL 118 comply with the required setback. As such, the established setback along Miller Street would be maintained by this lower portion of the overall Integrated Station Development.

- The incremental stepping of the reduced setback means that the non-compliance would be distributed across the height of the façade, which would help to minimise potential visual impacts. The maximum non-compliance would occur only at the very top section of the development. The apparent discrepancy in setbacks between the top section and the complying bottom section would be mitigated by the intervening setback steps.
- The reduced setback facilitates a unique building form appropriate to the project’s status as a transformational development for North Sydney.

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 6.4 (Miller Street setback) of NSLEP 2013. The relevant objectives are addressed in Table 1 below.

Table 1 – Consistency with the objective of the Miller Street setback standard

Objective of standard	Consistency
<p>The objective of this clause is to maintain the established setback and landscaped setting on the eastern side of Miller Street between McLaren and Mount Street.</p>	<p>Despite the reduced setback, the proposed building envelope would maintain the established setback and landscaped setting along Miller Street. The reduced setback begins at a height of RL 118 or approximately 13 storeys above the street, which means that the ground level landscaping and public domain would not be affected. The clear intention of the control is to maintain a building setback at street level, which is being provided as part of the station (and OSD up to RL 118 or 13 storeys).</p> <p>It is considered that the reduced setback at RL 118 and above would not detract from the established setback due to its incremental nature. Each 1.5-metre increment would not cause any sharp contrast with the established setback at street level.</p>

Overall, it is open to the consent authority to consider that the variation of clause 6.4 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 considers 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 would provide 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.	<p>The concept proposal would provide for significant employment opportunities 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.</p> <p>The non-compliant setback would allow for additional gross floor area and therefore further would enhance and encourage A-grade commercial employment opportunities.</p>
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.
To minimise the adverse effects of development on residents and occupiers of existing and new development.	The concept proposal would minimise adverse effects on residents and occupiers of existing and new development, such as view, privacy and overshadowing effects. These are discussed throughout Chapter 8 of the EIS.

It is open to the consent authority to consider that the variation to clause 6.4 of 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 contravention of the Miller Street setback standard does 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 Miller Street setback 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 clause 6.4 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 significant public benefits in maintaining the setback standard in this case.

It is therefore open to the consent authority to vary clause 6.4 of the NSLEP 2013 as it applies to the concept proposal.