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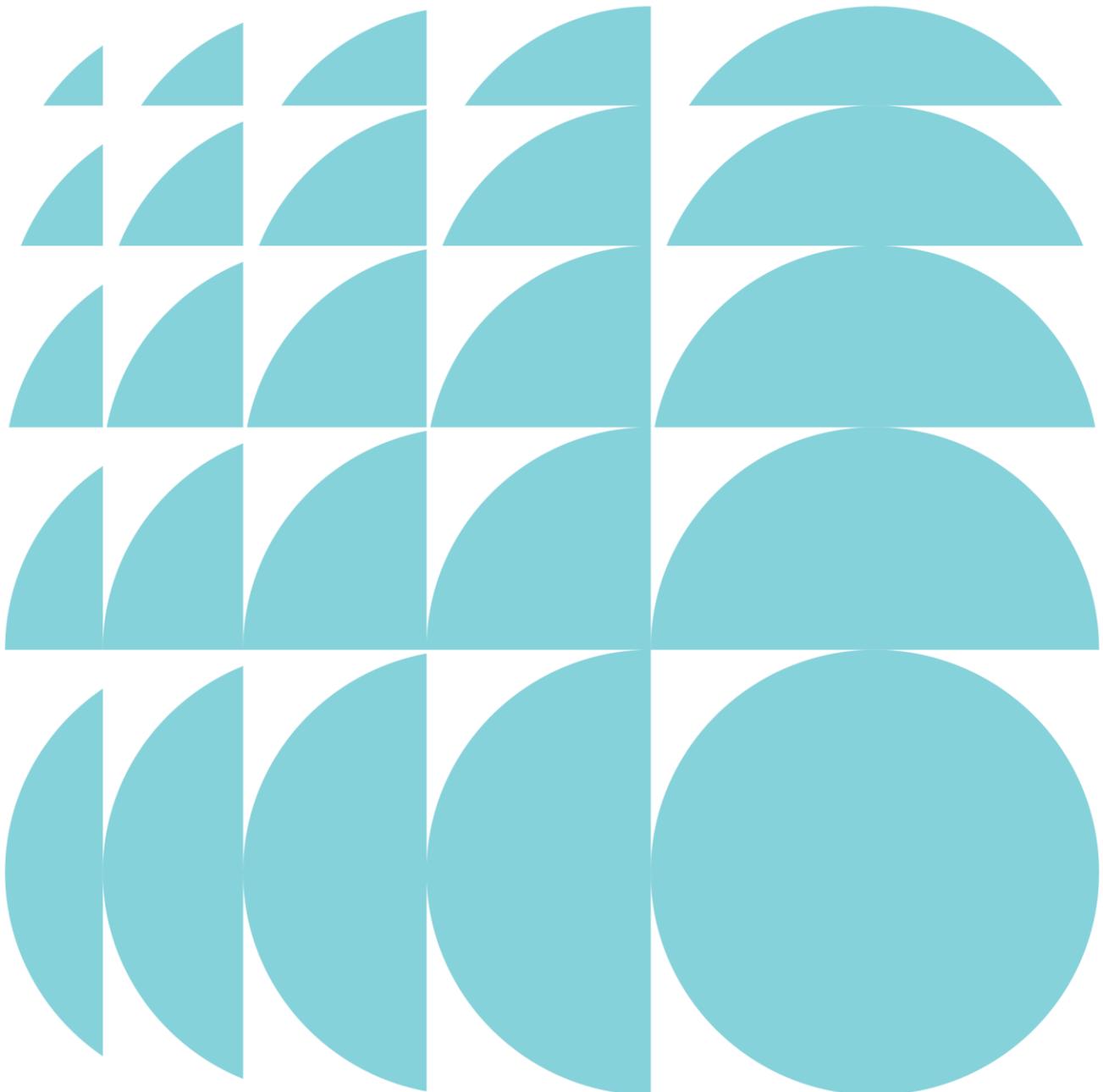
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| Clause 4.6 Variation Request |
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Clause 4.6 Variation: Height of Building

54-56 Riley Street and 1 Crown Lane,
Darlinghurst
Mixed use retail, commercial and residential
development.

Submitted to City of Sydney Council
On behalf of Milina Investments Pty Ltd & Scarlis
Projects Pty Ltd

18 September 2018 | 17287



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Attachment

A Architectural Drawings

PTI Architecture

1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of Milina Investments Pty Ltd & Scarlis Projects Pty Ltd. It is submitted to City of Sydney Council (the Council) in support of a development application (DA) for a mixed-use development at 54-56 Riley Street and 1 Crown Lane, Darlinghurst (D/2018/355).

This clause 4.6 variation request is made following consultation with Council staff to address the flood planning level issue. Ongoing consultation and collaboration has occurred with Council staff, including the review of various design options. The preferred option, which now proposed and involves a minor breach of the maximum height limit, is that considered most appropriate by Council staff.

Clause 4.6 of the *Sydney Local Environmental Plan 2012* (LEP) enables Council to grant consent for development even though the development contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

This clause 4.6 variation request relates to the development standard for height of buildings under clause 4.3 of LEP, and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban dated 11 April 2018.

This clause 4.6 variation request demonstrates that compliance with the height of buildings development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the standard.

This clause 4.6 variation request demonstrates that, notwithstanding the non-compliance with the height development standard, the proposed development:

- is consistent with the objectives of both height of buildings development standard and the B4 Mixed Use zone;
- has an appropriate built form response to the streetscape and surrounding context and results in little to no additional impact;
- will activate the ground floor retail/commercial use whilst achieving Council's flood planning level for the majority of the ground level;
- will contribute to the vitality of the surrounding area through the provision of ground floor retail premises as well as an additional residential population.
- delivers new residential apartments in a highly accessible location with proximity to public transport, in line with the directions and objectives contained in *A Metropolis of Three Cities* and the District Plan.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of LEP.

2.0 Development Standard to be Varied

This clause 4.6 variation request seeks to justify contravention of the development standard set out in clause 4.3 of LEP 2010. Clause 4.3 provides that "the height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map." Under the Sydney LEP 2012 the site is afforded a maximum building height of 22 metres. Clause 4.3 of the Sydney LEP 2012 states:

4.3 Height of buildings

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

- (a) *to ensure the height of development is appropriate to the condition of the site and its context,*
- (b) *to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,*
- (c) *to promote the sharing of views,*
- (d) *to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,*

- (e) in respect of Green Square: i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and
 - ii) to ensure the built form contributes to the physical definition of the street network and public spaces.
- (2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.
- (2A) Despite any other provision of this Plan, the maximum height of a building on land shown as Area 1 or Area 2 on the Height of Buildings Map is the height of the building on the land as at the commencement of this Plan.

The proposed development seeks consent for building envelopes with a maximum height of 22.3 metres which represents a marginal variation of 0.3 metres (0.01%) from the maximum building height development standard.

This marginal variation is a direct result of the increased ground floor finished level in addressing Council's flood planning level after consultation with Council staff. This option will permit part of the retail space to align with the street level to provide functional active ground floor use whilst achieving flood planning level in the rear portion of the retail, residential lobby, and service area thereby complying with Council's flood planning policy. **Figure 1** illustrates the building against the LEP height plane.

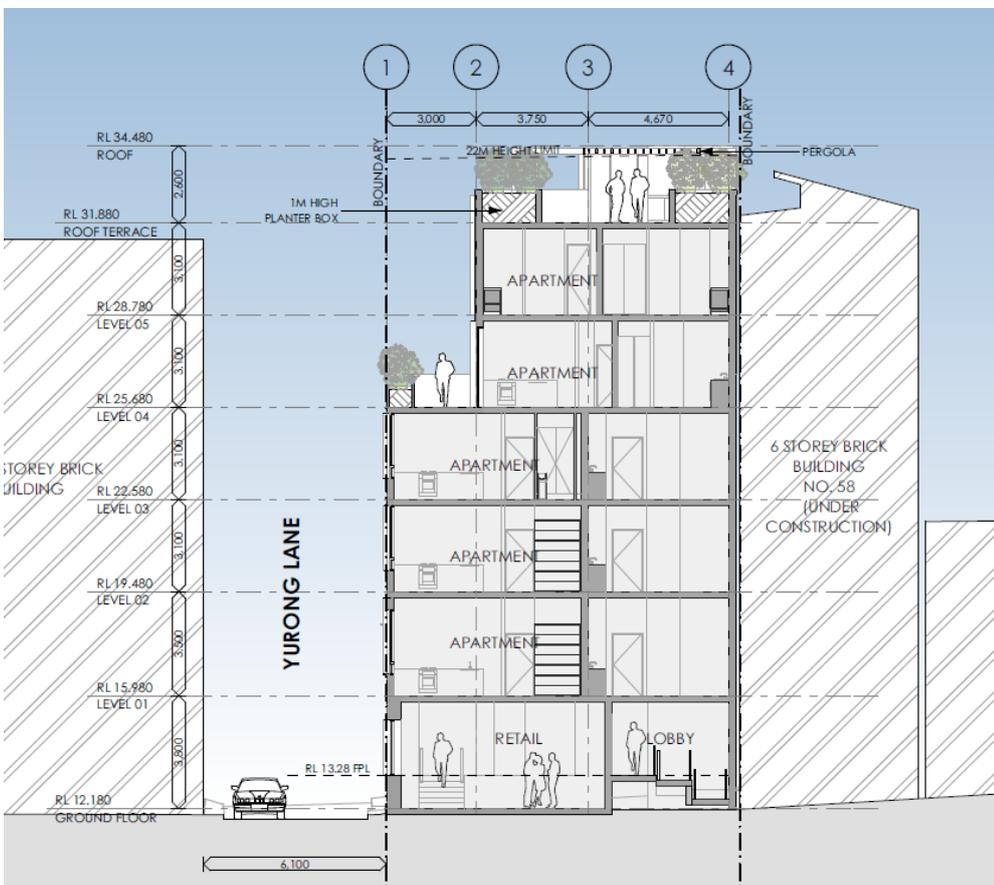


Figure 1 Section Plan with 22m height line

Source: PTI Architecture

3.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Sydney LEP provides that:

4.6 Exceptions to development standards

- (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.*

Further, clause 4.6(4)(a) of the Sydney LEP provides that:

- (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 Secretary has been obtained.*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827; and
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.

The relevant matters contained in clause 4.6 of the Sydney LEP, with respect to the height of buildings development standard, are each addressed below, including with regard to these decisions.

3.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the Sydney LEP is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request. The five methods outlined in *Wehbe* include:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).

- 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 (**Fourth Method**).
- The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Method**).

Of particular assistance in this matter is the First Method. This is addressed in **Section 3.1.1**.

3.1.1 The objectives of the standard are achieved notwithstanding non-compliance with the standard

The objectives of the development standard contained in clause 4.3 of the LEP are:

- (a) to ensure the height of development is appropriate to the condition of the site and its context,*
- (b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,*
- (c) to promote the sharing of views,*
- (d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,*
- (e) in respect of Green Square:*
 - i. to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and*
 - ii. to ensure the built form contributes to the physical definition of the street network and public spaces.*

Subclause 1(d) and (e) are not applicable in this instance as the Site is not located in the immediate proximity of Central Sydney or Green Square.

Despite the proposed variation to the maximum building height development standard, the proposed development will still result in a building envelope which achieves the objectives of the development standard. The proposal's consistency with the relevant objectives is discussed below.

Objective (a): to ensure the height of development is appropriate to the condition of the site and its context

The proposed height increase above the development standard by 0.3m is a direct response to the required flood planning level for the site, whilst ensuring an active ground floor use and appropriate urban design outcome is maintained. Importantly, the reconfiguration is in keeping with the existing mixed use character of Riley Street in Darlinghurst where surrounding streetscape built form is characterised as medium to high density, with ground floor commercial use and buildings ranging from the late nineteenth century to the present as shown in **Figure 2** and **3**.

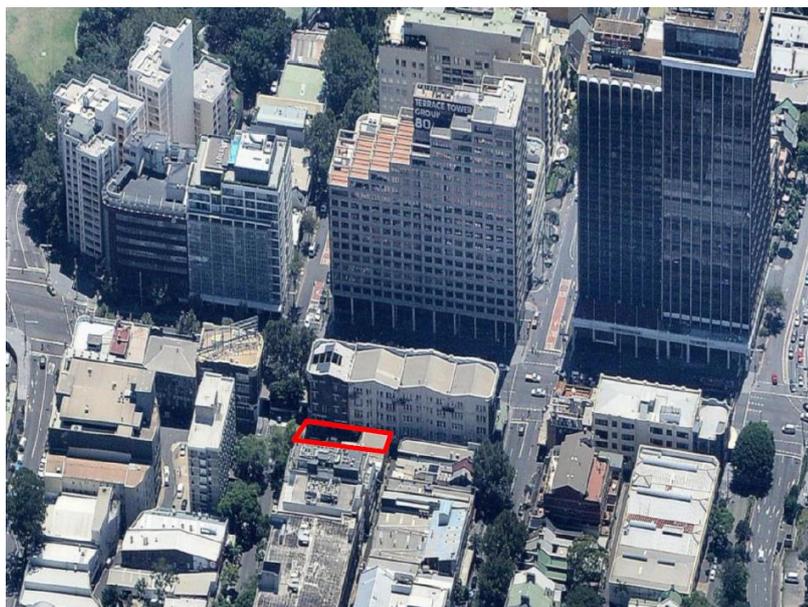


Figure 2 Site Context



Figure 3 Riley Street view

To allow active frontages, the revised design will provide the front part commercial floor aligned with the Riley street frontage and its immediate neighbour to ensure viable commercial outcomes. Meanwhile, the rear portion of the finished ground floor will be raised to meet Council’s flood planning level of RL13.28m ensuring that there is an appropriate flood refuge space should a flood event occur (refer to **Figure 4**). This option to marginally increase the building height, without compromising the ground floor functionality, is considered a better planning outcome and appropriate to the condition of the site by Council and is designed to address the site-specific constraints and its immediate context. We note that other alternative options with complying height that would require incorporating flood prevention gates and basement level were not supported by Council due to the small site size and the ongoing maintenance issues associated which would potentially occur with those options..

Furthermore, the proposed variation to the maximum height control enables the provision of landscaped area on the rooftop to provide more quality communal space for improved amenity and passive surveillance. The proposed green roof will offset any visual impact of the marginal height increase (0.01%) which will not be discernible from the public domain. The proposal is compliant with the 6 storey limit and the 4 storey street frontage height contained in the Sydney DCP.

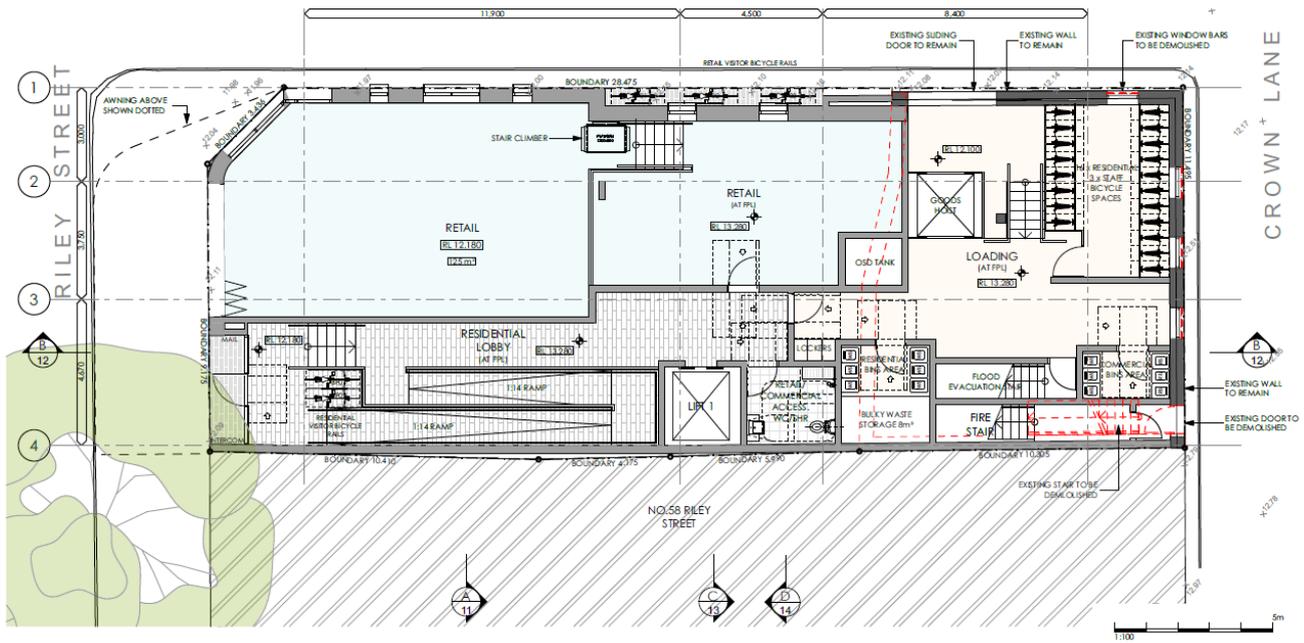


Figure 4 Ground floor layout

Source: PTI Architecture

Objective (b): to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas

The site is not a listed heritage item or located in close proximity to any heritage listed items. It is located in a heritage conservation area. The proposal has given specific consideration to the character of the area and will allow for the conservation of the existing facade of the warehouse building, maintaining the character and aesthetic qualities of the streetscape.

The proposed building envelope provides an appropriate transition between the intensified high rise building to the north and medium density development to the south, as shown in **Figure 2**.

Objective (c): to promote the sharing of views

As demonstrated in the submitted SEE, the proposed development will not adversely impact any public views given the surrounding context as shown in **Figure 5** below. The proposed height which is generally consistent with the buildings to the south and the proposed variation of 0.01% is not discernible from the public domain and will not impact on any significant or iconic view corridors. The western neighbours who currently overlook the at-grade carpark will have an improved outlook towards the site. In light of the above, despite the proposed non-compliance with the numerical height control, the objectives are still achieved.

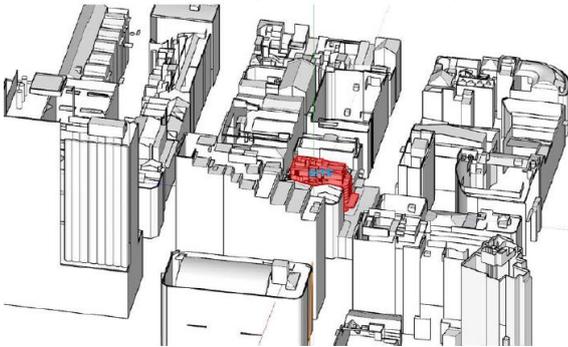


Figure 5 Geolocated detailed model

Source: Steve King

3.1.2 Conclusion on clause 4.6(3)(a)

Clause 4.6(3)(a) of the Sydney LEP 2012 requires the departure from the development standard to be justified by demonstrating:

that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

In the decision of Wehbe, the Chief Justice expressed the view that there are five different ways in which an objection to a development standard might be shown as unreasonable or unnecessary and is therefore well founded. Of particular relevance in this instance is the first way, as follows:

1. The objectives of the standard are achieved notwithstanding noncompliance with the standard.

The objectives of the maximum building height standard predominantly set out to ensure that proposed developments have a bulk and scale that is compatible with the surrounding character, to ensure development does not cause unreasonable amenity impacts on surrounding properties and to protect public and private views.

These objectives are satisfied by the proposal (as discussed above) despite the minor numerical non-compliance with the building height standard. The proposed development, including the proposed building elements of the proposed envelopes exceeding the height limit by 0.3m (0.01%) will continue to achieve the objectives of the development standard for the following reasons:

- The numeric height limit exceedance will have no impact on the streetscape of transition of the built form.
- The minor additional height will not have any visual privacy impacts on neighbouring developments.

- The additional height sought will facilitate a better planning and urban design outcome at the ground level/street frontage whilst achieving the flood planning level to minimise flood risk.
- The additional height will not result in overshadowing impacts or adverse amenity impacts on neighbouring sites given the development to the south and east are predominantly commercial buildings.
- No significant views are impacted and an appropriate transition is achieved between the high density area to heritage conservation area.
- The proposed building remains compliant with the FSR control and DCP height control.

Having regard to the above, in our view it would be unreasonable and unnecessary to enforce compliance with the maximum building height development standard contained within Clause 4.3 of the Sydney LEP 2012.

3.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

3.2.1 Ground 1: Compliance with flood planning level

As discussed above, this clause 4.6 variation request is made following consultation with Council staff to address the site-specific flood planning level. Ongoing consultation and collaboration with Council staff has informed the design option to achieve the flood planning level of RL13.28m in majority of the ground level area while ensuring a consistent urban design outcome at the Riley Street frontage. This option is considered a better planning outcome and more appropriate by Council staff than the original proposal which complied with the height limit and address flooding issues by way of flood gates.

3.2.2 Ground 2: Compliance with the height limit would result in poorer amenity

The additional height is a direct result of the raised ground level from RL12.18m to RL13.28m. As discussed in Section 3.1.1, alternative options with complying height were not supported by Council. Furthermore, strict compliance with the height limit would result in poorer built form and residential amenity such as removing the rooftop communal space.

3.2.3 Ground 3: Height non-compliance results in little to no additional impact

The site's location and context mean that the minor additional height results in little to no additional impact on the surrounding area:

- Site isolation: The site is located at the northern end of the block, and is bounded by three street frontages. The adjoining site to the south has been redeveloped for a new commercial development with similar height. Thereby the proposal does not isolate or otherwise affect the development potential of adjoining properties.
- Views: No significant views are impacted and an appropriate transition is achieved between the high density area to heritage conservation area as discussed in Section 3.1.1.
- Overshadowing: Minor additional overshadowing predominantly falls on the roof of the commercial properties to the south. As none of these properties are residential, the overshadowing impacts are considered insignificant and acceptable.

It is also noted that the proposal remains compliant with the FSR control and DCP height control.

3.2.4 Conclusion on clause 4.6(3)(b)

It is considered that there are sufficient environmental planning grounds to justify contravention of the development standard, in the basis that:

- the marginal variation to the height limit (0.01%) is needed to accommodate the floor planning level required by City of Sydney Council;
- Reducing the height would result in poorer outcomes such as removing the roof top communal space, both in terms of residential amenity and built form; and

- the additional height results in little to no additional impact to surrounding areas, in terms of overshadowing, site isolation or view loss and is imperceptible from the public domain.

3.3 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

3.3.1 Consistency with objectives of the development standard

The proposed development is consistent with the objectives of the height of buildings development standard, for the reasons discussed in section 3.1.2 of this report.

3.3.2 Consistency with objectives of the zone

The proposed development is consistent with the objectives of the B4 Mixed Use Zone, as demonstrated below.

Objective (a): To provide a mixture of compatible land uses.

The proposed mix of uses including active ground floor retail space will contribute to the mixture of compatible land uses commensurate with the existing character of Riley Street in Darlinghurst.

Objective (b): To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.

The proposal will integrate land uses including retail, office and residential uses with public transport. It is located within an area of high public transport accessibility, and encourages cycling and walking and public transport patronage as no onsite parking is proposed.

Objective (c): To ensure uses support the viability of centres

The proposal will contribute to the viability of the surrounding area through the provision of ground floor retail premises as well as an additional residential population. The proposal will not undermine the viability of nearby centres given the limited retail and commercial space proposed.

3.3.3 Overall public interest

The proposed development has been assessed against the objectives for the B4 - Mixed use zone, and against the objectives of the building height development standard. Despite the proposed non-compliance with the maximum building height development standard, the proposal is considered to be in the public interest as it nevertheless satisfies the objectives of the zone and the objectives of the development standard as discussed in **Section 3.1.1** and **Section 3.3.2**.

3.3.4 Conclusion on clause 4.5(4)(a)(ii)

The proposed development is in the public interest, as it:

- is consistent with the objectives of the height of buildings development standard, as discussed in **Section 3.1.1**;
- is consistent with the objectives of the B4 Mixed Use zone, as the development will contribute to the mixture of compatible land uses commensurate with the existing character of Darlinghurst;
- provide new housing stock and contribute to the provision of highly sought after and well-designed apartments within the City of Sydney LGA; and
- will retain employment opportunities on the site.

3.4 Other Matters for Consideration

Under clause 4.6(5), in deciding whether to grant concurrence, the Director-General must consider the following matters:

- (5) *In deciding whether to grant concurrence, the Secretary 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 Secretary before granting concurrence.*

These matters are addressed in detail below.

3.4.1 Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation of the height of buildings development standard does not raise any matter of significance for State or regional planning.

The site is within the Eastern City District which is home to the Harbour CBD, one of the three metropolitan centres identified in the Greater Sydney Region Plan (*A Metropolis of Three Cities*). The site is located approximately 550m to the east of the Sydney CBD, within an area of high public transport accessibility, and encourages cycling and walking and public transport patronage. The site is also located approximately 800 metres east of both St James and Museum Stations. Google Maps estimates the walk from the stations to be approximately 10 minutes from the site.

The Eastern City District Plan identifies the following planning priorities for the Eastern City.

- Planning Priority E10 of the Eastern City District Plan is:
Delivering integrated land use and transport planning and a 30-minute city.
- Planning Priority E5 of the Eastern City District Plan is:
Providing housing supply, choice and affordability with access to jobs, services and public transport
- Planning Priority E20 of the Eastern City District Plan is:
Adapting to the impacts of urban and natural hazards and climate change

The proposal is fully consistent with these planning priorities given the location of the site and the main cause of the Clause 4.6 variation to address and mitigate the flood risk.

As a subset to these Planning Priorities, the District Plan provides locational criteria for urban renewal. The development's consistency with these criteria is discussed in **Table 1**.

Table 1 Locational criteria for urban renewal

| Criteria | Proposal |
|---|---|
| accessibility to jobs, noting that over half of Greater Sydney's jobs are generated in metropolitan and strategic centres | Satisfied The proposed development is within 30 minutes of the Sydney CBD. |
| accessibility to regional transport, noting that high-frequency transport services | Satisfied |
| catchment areas within walking distance (10 minutes) of centres with rail, light rail or regional bus transport | Satisfied The site is located 800 metres from two Railway Stations, 10 minutes walking distance from the stations according to Google Maps. |

Based on the above, the site has excellent access to services, transport and jobs, and is demonstrably suitable for high-density development, in line with the directions and objectives contained in *A Metropolis of Three Cities* and the District Plan in that it:

- provides housing and job opportunities to meet the needs of the local population by integrating land use with public transport;
- allows for the use of the site to continue to provide local employment opportunities;
- is well located to public transport connections;

- will allow to adaptively reuse the heritage warehouse on site; and
- will manage natural hazards such as flooding.

3.4.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard

As discussed above, there is no public benefit in maintaining the development standard in this instance, as:

- The marginal height increase (0.01%) has little to no impact on surrounding properties; therefore there would be little to no reduction in impact if the development standard were maintained;
- as discussed in **Section 3.2.2**, compliance with the height limit would result in poorer residential amenity outcomes (e.g. removal of the rooftop communal space); and
- any reduction in overall height would result in non-compliance floor to ceiling height or flood prone ground level.

3.4.3 Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Director-General before granting concurrence.

Nil.

4.0 Conclusion

The assessment above demonstrates that compliance with the height of buildings development standard, contained in clause 4.3 of Sydney LEP 2012, is unreasonable and unnecessary in the circumstances of the specific case, and that the justification is well-founded. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner which enables active ground floor use, whilst also allows for a better outcome in planning terms.

This clause 4.6 variation demonstrates that, notwithstanding the non-compliance with the height of buildings development standard, the proposed development:

- is consistent with the objectives of both height of buildings development standard and the B4 Mixed Use zone;
- has an appropriate built form response to the streetscape and surrounding development and results in little to no additional impact;
- will activate the ground floor retail/commercial use whilst achieving Council's flood planning level in the majority area of the ground level;
- will contribute to the viability of the surrounding area through the provision of ground floor retail premises as well as an additional residential population.
- delivers new residential apartments in a highly accessible location with proximity to railway stations, in line with the directions and objectives contained in *A Metropolis of Three Cities* and the District Plan.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of Sydney LEP.