

# **Attachment C**

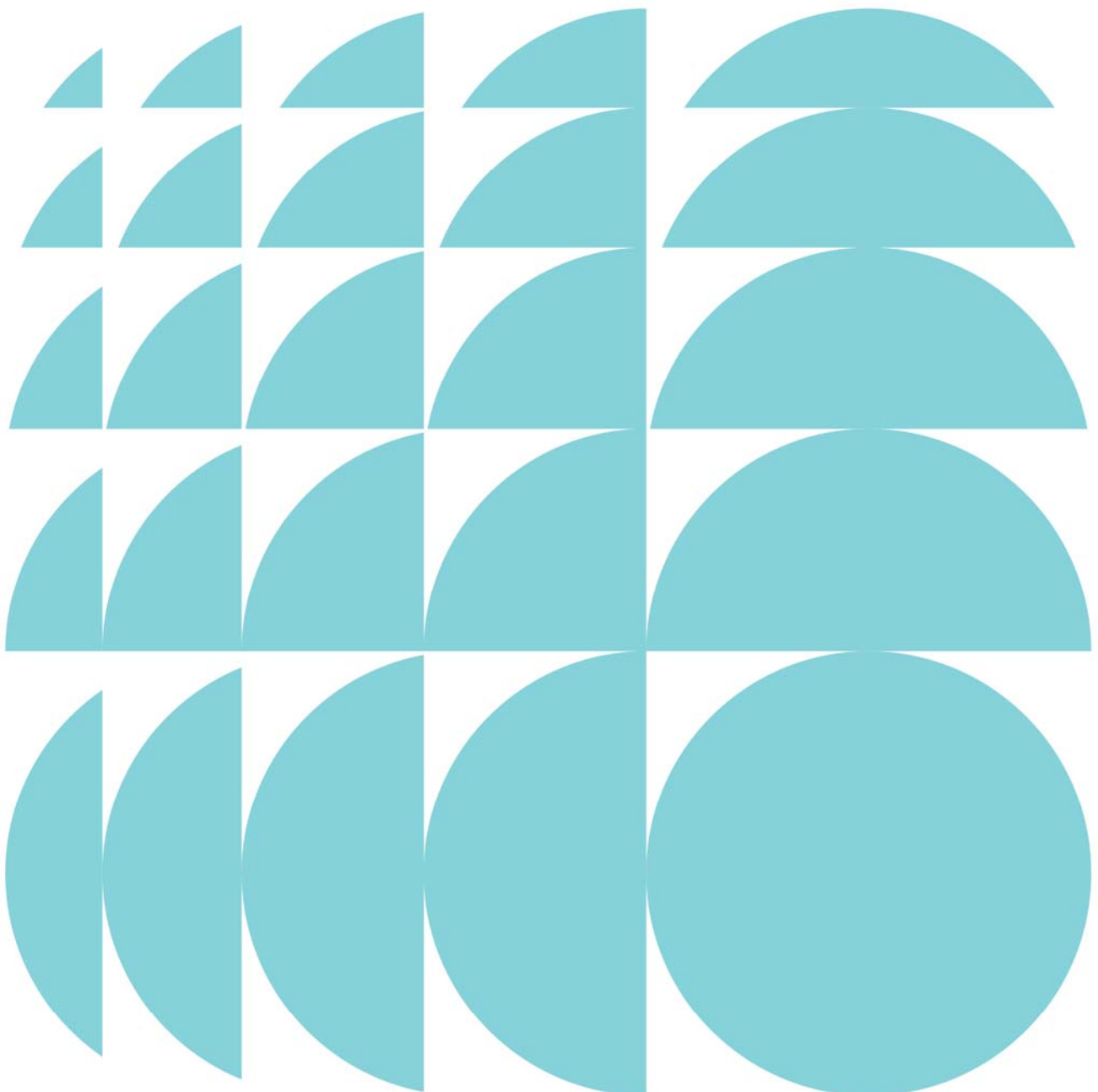
**Clause 4.6 Variation Request**

**Clause 4.6 Variation - Building  
Height Variation**

44-48 O'Dea Avenue, Waterloo  
Stage 2 DA - Building B (Lot 9)

Submitted to City of Sydney  
On behalf of Crown W48 Pty Ltd

01 June 2018 | 17539



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**CONTACT**

Ben Craig Associate Director bcraig@ethosurban.com 9409 4953

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This document has been prepared by:



Daniel Howard 1 June 2018

This document has been reviewed by:



Ben Craig 1 June 2018

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VERSION NO.	DATE OF ISSUE	REVISION BY	APPROVED BY
1.0	1 June 2018	DH	BC

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Ethos Urban Pty Ltd  
ABN 13 615 087 931.  
www.ethosurban.com  
173 Sussex Street, Sydney  
NSW 2000 t 61 2 9956 6952

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# Contents

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1.0	Introduction	2
2.0	Development Standard to be Varied	2
2.1	Variation Sought	3

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3.0	Justification for Contravention of the Development Standard	6
3.1	Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case	6
3.2	Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard	8
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	8
3.4	Secretary Concurrence	9

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4.0	Conclusion	10
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## Figures

Figure 1	Extract of the LEP maximum building height (site indicated red)	3
Figure 2	Extract of Level 4 Floor Plan (extent of height exceedance shown highlighted in red)	4
Figure 3	Extract of the eastern elevation (extent of height exceedance shown highlighted in red)	4
Figure 4	Extract on the southern elevation (extent of height exceedance shown highlighted in red)	5

## Tables

Table 1	Assessment against the maximum building height objectives	7
Table 2	Consistency with the zone objectives	9

## 1.0 Introduction

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

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- That the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

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

1. *Wehbe v Pittwater Council* [2007] NSWLEC 827;
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
3. *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386; and
4. *Moskovich v Waverley Council* [2016] NSWLEC 1015.

In accordance with the above requirements, this written clause 4.6 request identifies the variations sought to the maximum building heights across the site and establishes that compliance with the development standard is unreasonable and unnecessary in the circumstances. It also demonstrates that there are sufficient environmental planning grounds to justify the contravention and provides an assessment of the matters the Secretary is required to consider before granting concurrence.

## 2.0 Development Standard to be Varied

The development standard that is sought to be varied as part of this application is clause 4.3 of the SLEP 2012, relating to the maximum building height. It should be noted that the Stage 1 DA (D/2016/1450) was approved with a building envelope and accompanying maximum heights in RL (m AHD). A separate Section 4.55 application will be submitted to Council to vary the approved building envelope and the proposed exceedance to maximum building height and to ensure consistency between the Stage 1 consent and the Stage 2 detailed proposal.

Clause 4.3 of the LEP is reproduced below in its entirety and an extract of the relevant Height of Buildings Map, to which that clause applies, is reproduced in **Figure 1**. The site is subject to three separate maximum heights. A height of RL 50.78m applies to the centre of the site and to the Reed Street frontage. A maximum height of RL 40.40m is afforded to the southern edge fronting Hatbox Place. A maximum height of RL 41.23m applies to the remaining areas western section and northern section fronting Archibald Avenue.

Maximum heights ranging between RL 26.0m and RL 41.23m surround the site.

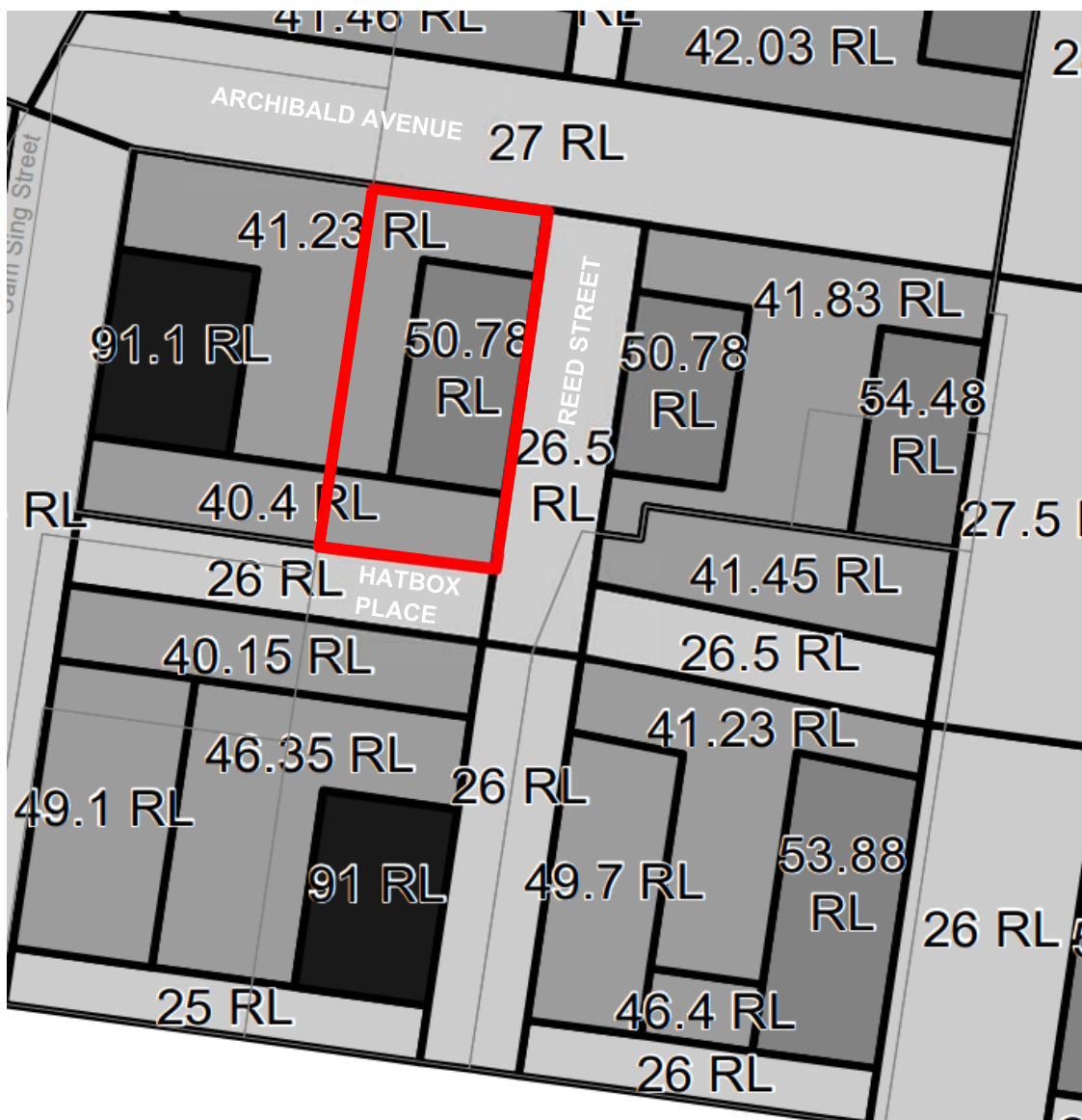
*“Clause 4.3 Height of buildings*

*(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.”



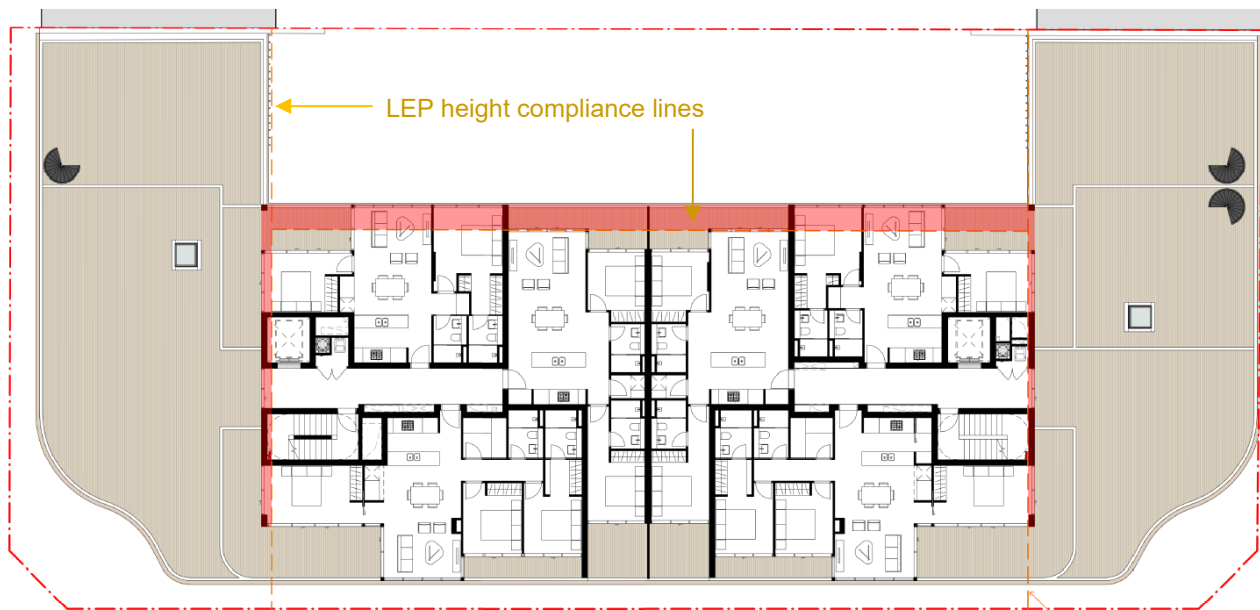
**Figure 1** Extract of the LEP maximum building height (site indicated red)

Source: SLEP 2012

## 2.1 Variation Sought

The proposed Stage 2 detailed design marginally increases the building depth footprint of the taller central component of Building B to extend outside of the RL50.78m zone. As a result, minor sections of the central portion upper levels (Level 4, 5 and the Roof Level) sit within zones afforded a maximum height of RL 41.23m and RL 40.4m (refer to **Figure 1**). Accordingly, portions of the northern, western and southern sections of the taller central component sit above the maximum prescribed height under SLEP 2012.

Extracts of the architectural plans showing the location and extent of the proposed height variation sought are provided at **Figures 2, 3 and 4.**

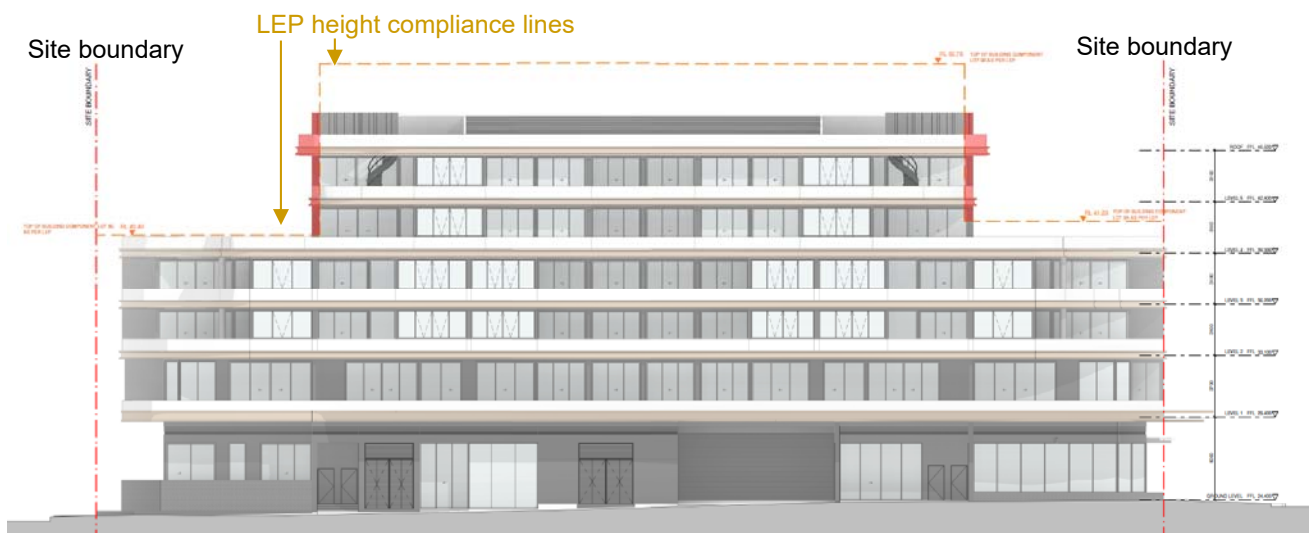


**Figure 2** Extract of Level 4 Floor Plan (extent of height exceedance shown highlighted in red)

Source: Koichi Takada Architects

Towards the south, the floor plate and architectural detailing exceeds the maximum building height (RL 40.40m) by approximately 0.73m (in depth) for a continuous height of 7.2m along the southern elevation of the central portion of the proposed building. Further, it is noted a minor architectural detailing element at the roof level with a depth of 1.53m provides a further encroachment into the RL40.4m zone (visible within **Figure 3** below).

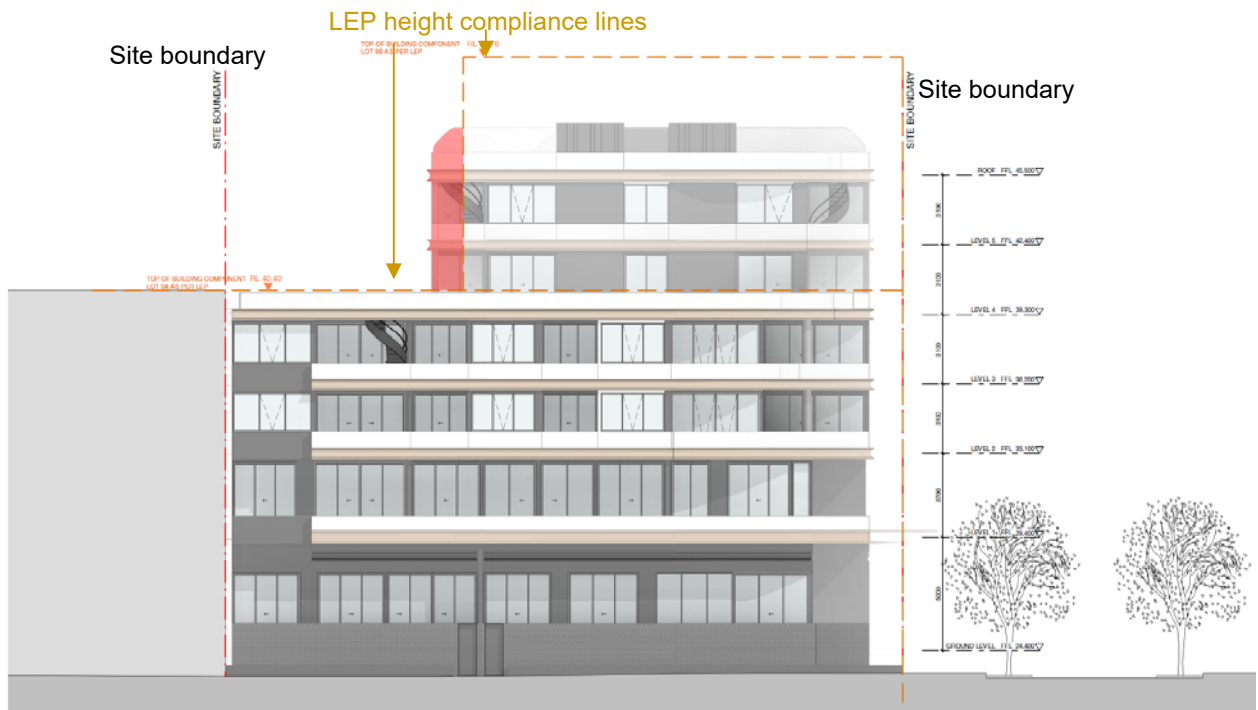
Towards the north, the floor plate and architectural detailing exceeds the maximum building height (RL 41.23m) by approximately 0.55m (in depth) for a continuous height of 6.6m along the northern elevation of the central portion of the proposed building. Further, it is noted a minor architectural detailing element at the roof level with a depth of 1.33m provides a further encroachment into the RL41.23m zone (visible within **Figure 3** below).



**Figure 3** Extract of the eastern elevation (extent of height exceedance shown highlighted in red)

Source: Koichi Takada Architects

Towards the west, the floor plate and architectural detailing exceeds the maximum building height (RL 41.23m) by approximately 1.50m (in depth) for a continuous height of 6.6m along the northern elevation of the central portion of the proposed building (visible within **Figure 3** below).



**Figure 4** Extract on the southern elevation (extent of height exceedance shown highlighted in red)  
Source: Koichi Takada Architects



### 3.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the SLEP 2012 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 SLEP 2012 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 and the NSW Court of Appeal 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 SLEP 2012, with respect to the maximum building height 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 SLEP 2012 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:

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

4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (**Fourth Method**).
5. 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**).

The 'First Way' is of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary. The following section addresses the matters in clause 4.6(3)(a), in particular how the objectives of the maximum height development standard are achieved notwithstanding the non-compliance with the numerical control.

### 3.1.1 The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way)

The objectives of the building height development standard (under clause 4.3 of the SLEP 2012) and an explanation as to how the objectives are met notwithstanding non-compliance with the standard is provided in **Table 1**.

**Table 1 Assessment against the maximum building height objectives**

Objective	Compliance
(a) to ensure the height of development is appropriate to the condition of the site and its context,	<p>The proposal seeks a minor variation to the maximum height development standard to accommodate a functional and high quality floorplate design to the central upper portion of the site. These detailed elements were not readily considered at the time of the Stage 1 consent.</p> <p>The height of the development is appropriate to the site context as the predominant massing is consistent with the other mid-rise and high-rise developments observed within the locality. Importantly, the proposed variation will not result in additional height in storeys, is consistent with the overall maximum height of RL50.78m afforded to the site and will not exceed the maximum GFA allocated to the site under the SLEP 2012 and the Stage 1 DA.</p> <p>The proposed exceedances are well distributed throughout the proposed design, are located away from street frontages, and will not be readily apparent at street level or from the surrounding public domain.</p>
(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,	Not applicable.
(c) to promote the sharing of views,	The proposed variations to the maximum height will not cause any adverse view impacts to surrounding neighbours. Variation to the height presents as a marginal increase in depth to the rear and sides of a taller central building component. The taller building is below the maximum SLEP 2012 height afforded to the site. The additional depth is well distributed away from the public realm and is not of a scale that is capable of impeding significant views. Further, no significant views are located within this section of the site.
(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,	The height variation sought is nominal relative to the context of Green Square Town Centre and Central Sydney and is not of a scale that can alter the height transition between these two centres.
(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	Much of the additional bulk is carefully distributed towards the rear and upper levels of the building. As such, the additional area as a result of the height exceedance will not impact the amenity of the surrounding precinct.

Objective	Compliance
(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.	The additional height does not change the street wall height or the presentation of the building at street interface level.

Source: Sydney Local Environmental Plan 2012

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

There are sufficient environmental planning grounds to justify a flexible approach to the application of the building height control as it applies to the site. The strategic planning process in developing the development standards for the wider Lachlan Precinct and the subsequent concept design process to inform the Stage 1 Development Application for site were not carried out in sufficient detail to determine optimal floorplate and unit layout to create an efficient and viable development, whilst balancing the spatial amenity considerations under the ADG. It is noted that the LEP heights for the precinct are very specific in their extents, which offer little to no flexibility for detailed building design.

There are strong planning merits behind the proposed variation and it is considered that the proposal results in a better planning outcome. The additional depth of the floorplate of the upper levels does not in turn compromise building separation distances to adjoining buildings (including maintaining a minimum 9m setback to the rear boundary within the approved Stage 1 layout), internal apartment amenity or unit depth. In contrast, the minor additional building depth presents opportunities for deeper balconies and even secondary balconies for certain units, thereby facilitating improved amenity for future occupants.

Further, the proposed variation accommodates two lift and circulation cores, building services within the proposed design while providing well sized apartment units and an efficient location of the cores through to the ground and basement levels. The minor additional building depth is well distributed away from the public domain and as such will not result in apparent visual bulk. The additional depth is sleeved around the edges of the central tower component at upper levels and predominately towards the rear of the building.

The detailed design process has ensured that there will be no additional adverse urban design, shadow or view impacts as a result of exceeding the LEP height control. The proposed design offers increased amenity to apartments and provides for an efficient layout. Accordingly, the variation to the height development standard is appropriately justified.

#### 3.2.1 Conclusion on clause 4.6(3)(b)

In light of the above it is considered that there are no environmental planning grounds that warrant maintaining and/or enforcing the numerical building height standards across the affected portion of the site. Rather, there are clear and justifiable environmental planning merits which justify the application of flexibility allowed by clause 4.6.

### 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 maximum building height development standard, for the reasons discussed in section 3.1.1 of this report.

#### 3.3.2 Consistency with objectives of the zone

The proposed development exceeds the applicable maximum height standard in the B4 Mixed Use zone and as such, the objectives of the zone are required to be considered in determining whether the variation to exceed the applicable height standards is supportable. A summary of the proposals consistency with the land use zone is provided at **Table 2** over the page.

**Table 2 Consistency with the zone objectives**

Objective	Compliance
To provide a mixture of compatible land uses.	The proposed development meets the objectives of the B4 Mixed Use zone as it seeks to develop the site for a mixture of retail/commercial residential uses.
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.	
To ensure uses support the viability of centres	The development will facilitate urban renewal within an identified precinct and provide new housing in a developing area.

Source: Sydney LEP 2012

Despite variation to the numerical maximum building height control, it is considered, and has been demonstrated, that the proposed building height is consistent with the objectives of the B4 Mixed Use zone of SLEP 2012.

### 3.4 Secretary Concurrence

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

- (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 maximum building height development standard does not raise any matter of significance for State or regional planning. The proposal is consistent with the most recent metropolitan plan for Greater Sydney Region Plan in that it:

- provides accommodation to meet the needs of the local population, both at the present time and in the future as Sydney's population grows and ages;
- is well located for public transport connections, open space and services;
- is designed to a high standard and offers a unique architectural design within the Lachlan Precinct, which is a key urban renewal precinct in the inner Sydney area; and
- achieves well designed residential units that meet the design objectives and design criteria under Part 3 and Part 4 of the Apartment Design Guide.

Further, the exceedance of the RL height proposed does not result in any significant adverse impact on the surrounding area and enables a more appropriate design in response to the opportunities presented by the site.

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

There is no public benefit in maintaining the numerical building height development standard in this instance. As outlined in Section 3.2 above, there are a number of planning and urban design outcomes that warrant the proposed variation to the development standard and it is therefore considered to be in the public interest for the variation to be supported in this case.

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

None.

## 4.0 Conclusion

Compliance with the maximum building height development standard contained in clause 4.3 of the Sydney LEP 2012 is unreasonable and unnecessary in the circumstances of the case, and the justification is well founded.

It is considered that the variation allows for a better urban design and planning outcome with a building floorplate that can accommodate well sized units, two separate circulations core, architectural detailing to the building facade and additional space afforded to primary and secondary residential balconies. Notwithstanding the height variation, the proposal results in enhanced residential amenity which would otherwise be not achieved with strict adherence to the control.

In particular, the variation proposed to building height will result in a better planning outcome when compared to a compliant scheme on the site as it will allow the achievement of a viable mixed-use development of the site, which is in the public interest for the reasons outlined through this report.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the Sydney LEP 2012.