Attachment D

Clause 4.6 Variation Request – Ceiling Heights
CLAUSE 4.6 VARIATION REQUEST

CEILING HEIGHT: SEPP 65 / APARTMENT DESIGN GUIDE

SITES 7 & 17 GREEN SQUARE TOWN CENTRE
1. **INTRODUCTION**

This clause 4.6 variation request has been prepared by Urbis on behalf of Mirvac Green Square Pty Ltd, the applicants for a development application comprising two new mixed use buildings linked by a shared basement (subject to a separate application) at Sites 7 and 17 Green Square Town Centre (960A Bourke Street, Zetland).

The request seeks to vary the **recommended minimum ceiling heights** specified in Part 4C of the Apartment Design Guide – deemed a development standard by Clause 30 of **State Environmental Planning Policy 65 – Design Quality of Residential Apartment Development (SEPP 65)**.

The variation request is made pursuant to clause 4.6 of the **Sydney Local Environmental Plan (Green Square Town Centre) 2013 (SLEP GSTC)**.
2. ASSESSMENT FRAMEWORK

2.1. CLAUSE 4.6 OF SYDNEY LEP (GSTC) 2013

Clause 4.6 of SLEP GSTC 2013 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 are:

- to provide an appropriate degree of flexibility in applying certain development standards to particular development,
- to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a development application that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, Clause 4.6 requires that the consent authority consider a written request from the applicant, which demonstrates that:

a) Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

b) There are sufficient environmental planning grounds to justify contravening the development standard.

Furthermore, the consent authority must be satisfied 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, and the concurrence of the Secretary has been obtained.

In deciding whether to grant concurrence, subclause (5) requires that the Secretary 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.

[Note: Concurrence is assumed pursuant to Planning Circular No. PS 18-003 Variations to Development Standards dated 21 February 2018.]

This document forms a clause 4.6 written request to justify the contravention of the recommended minimum ceiling heights specified in Part 4C of the Apartment Design Guide. The assessment of the proposed variation has been undertaken in accordance with the requirements of the SLEP GSTC, Clause 4.6 Exceptions to Development Standards.

2.2. NSW LAND AND ENVIRONMENT COURT: CASE LAW

Several key New South Wales Land and Environment Court (NSW LEC) planning principles and judgements have refined the manner in which variations to development standards are required to be approached.

The correct approach to preparing and dealing with a request under clause 4.6 is neatly summarised by Preston CJ in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118:

[13]The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.
[14] The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see Woolworths Ltd v Pallas Newco Pty Ltd (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135; [2000] HCA 5 at [28]; Winten Property Group Limited v North Sydney Council (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].

[15] The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant’s written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.

[16] As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in Wehbe v Pittwater Council at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.

[17] The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].

[18] A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].

[19] A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].

[20] A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council’s own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

[21] A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

[22] These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary: they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

[23] As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty.
Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

[24] The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

[25] The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant’s written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). As I observed in Randwick City Council v Micaul Holdings Pty Ltd at [39], the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant’s written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant’s written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction: see Wehbe v Pittwater Council at [38].

[26] The second opinion of satisfaction, in cl 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant’s written request has adequately addressed the matter in cl 4.6(4)(a)(ii).

[27] The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development’s consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).

[28] The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary’s concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

[29] On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: Fast Buck$ v Byron Shire Council (1999) 103 LGERA 94 at 100; Wehbe v Pittwater Council at [41].
3. SITE AND LOCALITY

3.1. SITE ANALYSIS

The subject site is known as 960A Bourke Street, Zetland and is legally described as Lot 6 DP 1199427. The subject site is an irregular shaped allotment with an area of 5127 m². An aerial photograph of the site is included at Figure 1.

The Green Square Town Centre DCP (DCP) identifies that the subject site is to consist of three development sites (Site 7, Site 17 and Site 18) divided by internal roads (to be provided via a DA). The site is bound by Tweed Place to the north, Ebsworth Street to the east, Barker Street to the south, and the Green Square Plaza to the west. Fellmonger Place will divide Site 7 and Site 17, and a continuation of Barker Street will divide Site 17 and Site 18.

The site contains a slight slope which descends approximately 3 metres from south to north and is devoid of any trees or vegetation.

Figure 1 – Aerial Photograph of the Subject Site

3.2. SURROUNDING CONTEXT

The Green Square Town Centre (GSTC) covers an area of 13.74ha and is located within the Green Square Urban Renewal Area, approximately 4.5km south of Central Sydney and north of Sydney Airport. The GSTC is one of the largest urban redevelopment projects in Australia and will be the residential, commercial, retail and cultural centre of the Green Square Urban Renewal Area. When it is complete, it will have the potential to accommodate approximately 5,850 residents and 9,300 workers, creating a new village hub including a range of open spaces including parks, plaza areas and community buildings.
GSTC will be a highly accessible place, providing good access to and from the centre, through the integration of built form and open space. Additionally, Green Square is well connected to the Greater Metropolitan Area of Sydney due to close proximity to Green Square Railway Station and Green Square Bus Interchange.

The location of the site is indicated at **Figure 2**.

**Figure 2 – Site Location Plan**

Source: *Urbis*

### 3.3. PLANNING CONTEXT

A detailed description of the site planning context is provided in the Statement of Environmental Effects prepared by Urbis, accompanying the development application for the development of Site 7 and Site 17.

The subject site is zoned B4 Mixed Use (**Figure 4**), is subject to a base FSR of 5.47:1 and has multiple height limits (**Figure 5**).

Site 7 is subject to three height limit controls:

- The portion of the site closest to Green Square Civic Plaza (the plaza) is subject to a 50m limit;
- the middle portion is subject to a 64m limit; and
- the portion of the site adjoining Ebsworth Street is subject to a 75m limit.

Site 17 is subject to two height limit controls:

- the portion of the site closest to the plaza is subject to a 50m limit; and
- the portion of the site adjoining Ebsworth Street is subject to a 62.5m limit.
Two development applications are currently under assessment by the City of Sydney over the subject lot:

- D/2017/503 proposes one mixed use tower on Site 18, remediation, bulk earthworks and provision of an integrated basement to service Site 7, Site 17 and Site 18; and
- D/2017/564 proposes two mixed use towers one on Site 7 and one on Site 17.

This clause 4.6 variation request accompanies a resubmission of the application D/2017/564.

Figure 3 – Extract from SLEP GSTC 2013 Zoning Map

Figure 4 – Extract from SLEP GSTC Height of Buildings Map

Source: SLEP GSTC 2013
4. THE PROPOSED DEVELOPMENT

4.1. DEVELOPMENT OVERVIEW

This clause 4.6 variation request accompanies a DA seeking consent for a mixed use development on Site 7 and Site 17 of GSTC comprised of:

- **Site 7**: An 18 storey building (plus additional plant room on uppermost level) with an 8 equivalent storey podium, comprising ground floor retail, an entertainment facility (cinema) and commercial tenancy within the podium facing the plaza, along with residential apartments both within the upper podium and tower.

- **Site 17**: A 13 storey building (plus additional plant room on uppermost level) with a 4 equivalent storey podium, comprising ground floor retail, commercial offices within the podium facing the plaza and residential apartments both within the podium facing Ebsworth Street and tower.

- The provision of 194 apartments consisting of 61 one-bedroom, 103 two-bedroom, 29 three-bedroom and 1 four-bedroom dwelling/s.

- Podium level landscaped communal open space on both sites (level 7 and 9 on Site 7 and level 6 on Site 17).

- A loading dock, back of house and end of trip facilities on Ground Level; and

- Shared use of a three level basement associated with the adjoining mixed-use development at Site 18. Construction of the basement is subject to a separate development application for Site 18, which also utilises the basement for car parking and access from Tweed Place.

The proposed development is detailed in the Architectural drawings prepared by Tzannes and accompanying reports.

4.2. MASSING AND BUILT FORM

The site’s immediate surrounds consist of mixed-use developments with ground level retail located to the north-west, north-east and south-west of the site.

An established hierarchy of scale in the context can be seen whereby the developments on the south side of Ebsworth Street (adjoining Sites 7 and 17) are 20 storeys high (21 storeys including roof plant), and the developments on the north side are predominantly 10 storeys high (11 storeys including plant). Beyond Ebsworth Street to the north-east is a neighbourhood containing predominantly 1-2 storey single dwellings (as shown in Figure 5)

Figure 5 – Surrounding Built-form Context

![Figure 5](source: Tzannes)
Ground Floor

The built form on the ground plane is defined by retail tenancies setback under a podium creating an expansive pedestrian orientated public domain on all frontages of the proposal. Along the plaza there is a sense of a civic colonnade as retail glazing is set back behind concrete columns (Figure 6). Chamfered corners encourage pedestrian movement from Ebsworth Street down into the plaza and cinema via the pedestrian oriented thoroughfares of Fellmonger Place and Barker Street.

Along Ebsworth Street continuous glazed awnings provide weather protection to retail tenancies either side of the well-defined and set back residential entries. Embellishment of the public domains of Fellmonger Place and Barker Street will be subject to separate future approval.

Figure 6 - Artist impression of proposed development viewed from within Green Square Civic Plaza

Podium

Site 7 has an eight storey equivalent podium containing the cinema and a commercial tenancy. The candy bar, cinema lobby and commercial tenancies are each located within a double-height void overlooking the plaza below. Site 17 has a four storey equivalent podium which contains three commercial floors, with outlook primarily oriented towards the plaza. The active uses within the podium facing the plaza provide upper floor activation to the plaza edge and passive surveillance of the public domain.

The Ebsworth Street frontage of the Site 7 lower podium (levels one to five) is articulated by a full-height glazed window which disguises the solid façade of the cinemas and highlights a dramatic double height entrance to the residential tower.

The upper podium of Site 7 contains three levels (levels six to eight) of residential dwellings and above ground storage set back from the plaza edge, with the exception of the north-western corner which extends out to the boundary to align with the cinema podium below. This is an urban design response to the curved built form of the adjoining Infinity development.

Communal open space areas have been incorporated into the podium roof tops (level 7 and 9 on Site 7 and level 6 on Site 17).
Tower

The residential towers on both sites are aligned to Ebsworth St and well set back from the podium. The tower and podium facades facing the plaza transition around the corners to Barker Street, Fellmonger Place and Tweed Place before assuming a modified expression on Ebsworth Street. Along Ebsworth Street full-length perimeter balconies feature predominantly on the upper floors to reduce bulk and scale. Curved corners help to soften the bulk and scale of the tower.

The uppermost floor of both towers contains screened mechanical plant.

4.3. URBAN DESIGN AND AMENITY

The built form has been designed within the parameters of the planning controls that apply to the site and therefore accords with the built form vision for the site. The built form outcomes for Site 7 and Site 17 are designed to:

- protect the amenity of the adjacent public domain;
- achieve maximum solar compliance for apartments within the development; and
- address the surrounding street frontages consistent with the emerging development.

The podium massing steps down between Site 7 and Site 17 in response to the plaza context which slopes to the south. The provision of significant secondary setbacks and a lower podium frontage height fronting Green Square Plaza has allowed for a reduction in shadowing impacts on this important public open space.

The proposal has been designed and sited with due consideration to the privacy of adjoining and future incoming residents. The proposed buildings are bound by roads to the north, east and west, and Green Square Plaza to the south. The proposed built form is compliant with SLEP GSTC 2013 setbacks along the affected streets indicating appropriate separation to surrounding buildings has been provided.

Where apartment across slots do not meet the separation distance of the Apartment Design Guidelines (ADG) smaller, narrower window openings have been incorporated into the design to minimise privacy impacts. The provision of these windows allows additional light and ventilation into apartments that initially would have a single aspect.

Along Ebsworth Street, bedroom spaces have been recessed behind balconies to provide an increased privacy buffer between surrounding development and these more private spaces to mediate overlooking from the street below and the opposite residential building due to a minor noncompliance with the ADG separation distances.

There will be no significant privacy impacts due to these minor non-compliances and overall the proposal provides a superior outcome when compared to a complaint DCP envelope with particular regard to overshadowing of the public plaza, solar access to apartments and the urban design response to adjacent development. The built form maximises the amenity achieved for both the public domain and the apartments within the building.
5. **EXTENT OF CONTRAVENTION**

5.1. **VARIATION TO CEILING HEIGHT**

This clause 4.6 variation request accompanies a DA seeking consent for the development of Site 7 and Site 17 of GSTC comprising two mixed use buildings serviced by a three level basement shared between Site 7, Site 17 and Site 18 and subject to a separate development application.

The proposal seeks a variation to the recommended minimum ceiling heights specified in Part 4C of the Apartment Design Guide – deemed a development standard by Clause 30 of SEPP 65.

5.1.1. **Residential - Levels 2 – 18**

The Apartment Design Guide recommends that habitable rooms are provided with a 2.7m high ceiling to achieve sufficient natural ventilation and daylight access. A minimum floor to ceiling height of 2.7m is provided to all living and sleeping areas.

The units are served by a water-cooled package units which has an overall height of 415mm and are generally larger than a split system. A 2.4m high ceiling is provided above the kitchen area in order to accommodate the AC unit, thereby negating the need for additional bulkheads in living spaces.

Whilst this does not comply with the 2.7m high ceiling as set out in the ADG, it exceeds the minimum height required for kitchens by the NCC (2.1m high). Further, all kitchens are located directly adjacent to an open plan living and dining layouts, thus benefiting from daylight and ventilation access.

The typical layout and ceiling heights are illustrated in **Figure 7** below.

Figure 7 – Typical kitchen section

[Diagram of typical kitchen section]

Source: Tzannes
5.1.2. Residential and Commercial – Levels 1 and 2

The Apartment Design Guide recommends that developments located in a mixed use area provide a minimum ceiling of 3.3m for ground and first floor levels to promote future flexibility of use. The proposed development generally achieves the recommended floor to ceiling heights, with the following exceptions:

Site 7:

• First Floor cinema provides a floor to ceiling height of 3.5m, with the exception of the candy bar area which provides a floor to ceiling height of 2.6m. This is required to accommodate the plant above.

Site 17:

• Ground Floor retail tenancies 17.1 and 17.2 fronting Ebsworth Street do not comply with the minimum 3.3m floor to ceiling height. Tenancy 17.1 provides a floor to ceiling height of 3.09m – 3.3m and tenancy 17.2 provides a floor to ceiling height of 2.59m – 3.19m. The reduced ceiling heights in this location are required to accommodate services above and address the change in level.

• First Floor residential units fronting Ebsworth Street do not comply with the minimum 3.3m floor to ceiling height. The apartments have an internal floor to ceiling height of 2.7m and 3.26m at the external balcony.

• First Floor commercial provides a floor to ceiling height of 3.48m, with the exception of a small area at the façade line fronting the Plaza. This is required to accommodate a structural concrete beam above.

The minor technical non-compliances described above are required to accommodate services, plant and structure, whilst also dealing with changes in level across the site.

The intention of this design criteria is to promote flexibility to allow potential conversion from residential to commercial / retail at lower levels of buildings within mixed use areas. In this case, commercial / retail uses are proposed at Level 1 and Level 2 and the minor technical non-compliances with the recommended floor to ceiling heights do not inhibit commercial / retail development within these levels now or in the future. The reduced floor to ceiling height does not compromise the natural ventilation or solar access of the commercial / retail tenancies or circulation spaces.
6. **CLAUSE 4.6 VARIATION REQUEST: HEIGHT**

The following sections of the report provide an assessment of the request to vary the development standard relating to the recommended minimum ceiling heights specified in Part 4C of the Apartment Design Guide – in accordance with clause 4.6 of SLEP GSTC 2013.

6.1. **PART 4C CEILING HEIGHTS**

The recommended minimum ceiling heights specified in Part 4C of the Apartment Design Guide are shown at Figure 8. The objectives of Part 4C of the Apartment Design Guide are as follows:

- **Objective 4C-1** Ceiling height achieves sufficient natural ventilation and daylight access.
- **Objective 4C-2** Ceiling height increases the sense of space in apartments and provides for well-proportioned rooms.
- **Objective 4C-3** Ceiling heights contribute to the flexibility of building use over the life of the building.

Figure 8 – Part 4C recommended minimum ceiling heights

<table>
<thead>
<tr>
<th>Design criteria</th>
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<tbody>
<tr>
<td>1. Measured from finished floor level to finished ceiling level, minimum ceiling heights are:</td>
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<tr>
<td>Minimum ceiling height for apartment and mixed use buildings</td>
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<tr>
<td>Habitual rooms</td>
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<tr>
<td>Non-habitual</td>
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<tr>
<td>For 2 storey apartments</td>
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<tr>
<td></td>
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<tr>
<td>Attic spaces</td>
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<tr>
<td>If located in mixed used areas</td>
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These minimums do not preclude higher ceilings if desired

Source: Apartment Design Guide

6.2. **KEY QUESTIONS**

Is the Planning Control a Development Standard?

Clause 30 of SEPP 65 identifies “Standards that cannot be used as grounds to refuse development consent or modification of development consent” relating to the recommended minimum amount of car parking, internal area for the relevant apartment type, and ceiling heights specified in various sections of the Apartment Design Guide. The City of Sydney have advised the applicant that:

“The use of ‘standards’ here is inferred to mean development standards. Hence, the three matters outlined under parts (a)-(c) of that clause are development standards that if complied with, Council cannot refuse an application on those grounds. However, if they are breached, subclause 30(3) (b) of SEPP 65 indicates that Clause 4.15 (3) of the Act is triggered and consequently, a Clause 4.6 variation under SLEP 2012 is required.”

"The use of 'standards' here is inferred to mean development standards. Hence, the three matters outlined under parts (a)-(c) of that clause are development standards that if complied with, Council cannot refuse an application on those grounds. However, if they are breached, subclause 30(3) (b) of SEPP 65 indicates that Clause 4.15 (3) of the Act is triggered and consequently, a Clause 4.6 variation under SLEP 2012 is required."
It is therefore understood that the recommended minimum ceiling heights specified in Part 4C of the Apartment Design Guide are development standards capable of being varied under clause 4.6 of SLEP GSTC 2013.

**Is the Development Standard Excluded from the Operation of Clause 4.6?**

The development standard is not excluded from the operation of clause 4.6 as it does not listed within clause 4.6(6) or clause 4.6(8) of SLEP GSTC 2013.

**What is the Underlying Object or Purpose of the Standard?**

The objectives of Part 4C of the Apartment Design Guide are set out in Section 6.1 of this report.

The underlying object or purpose of the recommended minimum ceiling heights is to ensure apartments achieve sufficient natural ventilation and daylight access, increase the sense of space, provide for well-proportioned rooms, and contribute to the flexibility of use over the life of the building.

### 6.3. CONSIDERATION

**6.3.1. Clause 4.6(3)(a) – Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case**

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are listed within the ‘five-part test’ outlined in *Wehbe v Pittwater [2007]* NSWLEC 827. These tests are outlined in Section 2.2 of this letter (paragraphs [17]-[21]).

An applicant does not need to establish all of the tests or ‘ways’. **It may be sufficient to establish only one way**, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

The development is justified against the first of the Wehbe tests as set out below.

**Test 1: The objectives of the development standard are achieved notwithstanding non-compliance with the standard**

The proposed development achieves the objective of Part 4C-1 of the Apartment Design Guide as detailed in Table 1 below.

<p>| Table 1 – Demonstrated achievement of the objective of Part 4C-1 of the Apartment Design Guide |
|---------------------------------|--------------------------------------------------------------------------------------------------|
| <strong>Objective</strong>                   | <strong>Development Response</strong>                                                                           |
| Ceiling height achieves         | Despite the minor non-compliance (30cm) with the recommended ceiling heights within the kitchen area, each apartment achieves sufficient natural ventilation and daylight access. Specifically: |
| sufficient natural ventilation  | • As detailed in the Natural Ventilation Assessment prepared by Windtech, a total of 60.4% (55 out of 91) of the apartments within the first nine storeys meet the deemed to satisfy requirements of SEPP65 for natural cross ventilation with openings on orthogonal or opposite aspects. |
| and daylight access.            | • As detailed in the Solar Access Study prepared by Windtech, 72% of the apartments (140 out of 194) achieve at least 2 hours of direct solar access to the window(s) of the Living Area and 70% of the apartments (136 out of 194) achieve at least 2 hours of direct solar access to the Private Open Space. |
| Objective 4C-2 Ceiling height    | • The ceiling height provided in the kitchen area exceeds the minimum height required for kitchens by the NCC (2.1m). |
| increases the sense of space in  | • All kitchens are located directly adjacent to an open plan living and dining layout, thus benefiting from borrowed daylight, ventilation and outlook. |
| apartments and provides for      |                                                                                                   |
| well-proportioned rooms.        |                                                                                                   |</p>
<table>
<thead>
<tr>
<th>Objective</th>
<th>Development Response</th>
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<tbody>
<tr>
<td>• Apartment depths are limited to maximise ventilation and airflow. Kitchens are located no more than 8.1m from a window.</td>
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<tr>
<td>• All apartments meet the minimum internal areas recommended by the ADG. Further, minimum room dimensions are generally achieved and furniture placements demonstrate the functional use of spaces.</td>
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Objective 4C-3 Ceiling heights contribute to the flexibility of building use over the life of the building.

The intention of this design criteria is to promote flexibility to allow potential conversion from residential to commercial / retail at lower levels of buildings within mixed use areas. In this case, commercial / retail uses are proposed at Level 1 and Level 2 and the minor technical non-compliances with the recommended floor to ceiling heights do not inhibit commercial / retail development within these levels now or in the future. The reduced ceilings heights are required to accommodate services, plant and structure, whilst also dealing with changes in level across the site. They do not compromise the natural ventilation or solar access of the commercial / retail tenancies or circulation spaces.

In summary, the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

**Test 2:** The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary

Not relied upon.

**Test 3:** The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable

Not relied upon.

**Test 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

Not relied upon.

**Test 5:** The zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary

Not relied upon.

6.3.2. **Clause 4.6(3)(b) - Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard?**

There are sufficient environmental planning grounds to justify the proposed variations to the development standard, including the following:

- Despite the minor non-compliance (30cm) with the recommended ceiling heights within the kitchen area, each apartment achieves sufficient natural ventilation and daylight access. Specifically:
  - As detailed in the Natural Ventilation Assessment prepared by Windtech, a total of 60.4% (55 out of 91) of the apartments within the first nine storeys meet the deemed to satisfy requirements of SEPP65 for natural cross ventilation with openings on orthogonal or opposite aspects.
  - As detailed in the Solar Access Study prepared by Windtech, 72% of the apartments (140 out of 194) achieve at least 2 hours of direct solar access to the window(s) of the Living Area and 70% of the apartments (136 out of 194) achieve at least 2 hours of direct solar access to the Private Open Space.
• The ceiling height provided in the kitchen area exceeds the minimum height required for kitchens by the NCC (2.1m).

• All kitchens are located directly adjacent to an open plan living and dining layout, thus benefiting from borrowed daylight, ventilation and outlook.

• Apartment depths are limited to maximise ventilation and airflow. Kitchens are located no more than 8.1m from a window.

• All apartments meet the minimum internal areas recommended by the ADG. Further, minimum room dimensions are generally achieved and furniture placements demonstrate the functional use of spaces.

• Despite the minor non-compliances with the recommended ceiling heights at the Ground and First floors, the future use of these spaces for retail, commercial and cinema is not inhibited. The reduced ceilings heights are required to accommodate services, plant and structure, whilst also dealing with changes in level across the site. They do not compromise the natural ventilation or solar access of the commercial / retail tenancies or circulation spaces.

In conclusion, there are sufficient environmental planning grounds to justify convening the development standard.

6.3.3. Clause 4.6(4)(a)(ii) – Will the Proposed Development be in the Public Interest Because it is Consistent with the Objectives of the Particular Standard and Objectives for Development within the Zone in Which the Development is Proposed to be Carried Out?

The proposed development is consistent with the objective of Part 4C-1 of the Apartment Design Guide as detailed in Table 1 above.

The proposal is also consistent with the land use objectives that apply to the site under SLEP GSTC 2013. The site is located within B4 Mixed Use Zone as outlined within Table 2.

Table 2 – Assessment of Compliance with Land Use Zone Objectives

<table>
<thead>
<tr>
<th>Objective</th>
<th>Compliance Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>To provide a mixture of compatible land uses</td>
<td>The proposed development comprises retail and commercial tenancies, a cinema and residential units. These uses will contribute to the viability of the GSTC and are compatible with the desire future land use outcomes for the precinct.</td>
</tr>
<tr>
<td>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.</td>
<td>The site is located in close proximity to Green Square Railway Station and Green Square Bus Interchange. It is well connected to the greater Sydney metropolitan area. The multiple uses will result in an increase in employment and housing opportunities in a highly accessible location. The provision of bicycle parking will encourage cycling and the limited vehicular parking will encourage public transport patronage.</td>
</tr>
<tr>
<td>To ensure the uses support the viability of centres.</td>
<td>The development contributes to a diverse mix of commercial uses. The cinema will ensure that the Green Square Town Centre is successful with residents and visitors, while retail and commercial units are proposed will which support the viability of the centre.</td>
</tr>
</tbody>
</table>

The proposal is considered to be in the public interest as the development is consistent with the objective of the development standard, and the land use objectives of the zone.
6.3.4. Clause 4.6(5)(a) - Would Non-Compliance Raise any Matter of Significance for State or Regional Planning?

The proposed non-compliance with the recommended minimum ceiling heights specified in Part 4C of the Apartment Design Guide will not raise any matter of significance for State or Regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

6.3.5. Clause 4.6(5)(b) - Is There a Public Benefit of Maintaining the Planning Control Standard?

The proposed development achieves the objective of the development standard, as well as the land use zoning objectives despite the minor non-compliance. The strict application of the recommended minimum ceiling heights would result in reduced amenity for the future residents of the development, as the non-compliance directly relates to the inclusion of an AC unit and negates the need for additional bulkheads in the living space.

It is noted that the ‘development standard’ in question relates to “recommended” ceiling heights provided in the Apartment Design Guide. The proposed non-compliance is extremely minor in nature, achieves the objectives of Part 4C of the ADG, and is a direct result of trying to improve the amenity for future occupants of the development. Therefore, there is no public benefit of maintaining the planning control standard in the circumstances.

6.3.6. Clause 4.6(5)(c) – Are there any other matters required to be taken into consideration by the Secretary before granting concurrence?

Concurrence can be assumed. Nevertheless, there are no known additional matters that need to be considered within the assessment of the clause 4.6 request and prior to granting concurrence, should it be required.
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