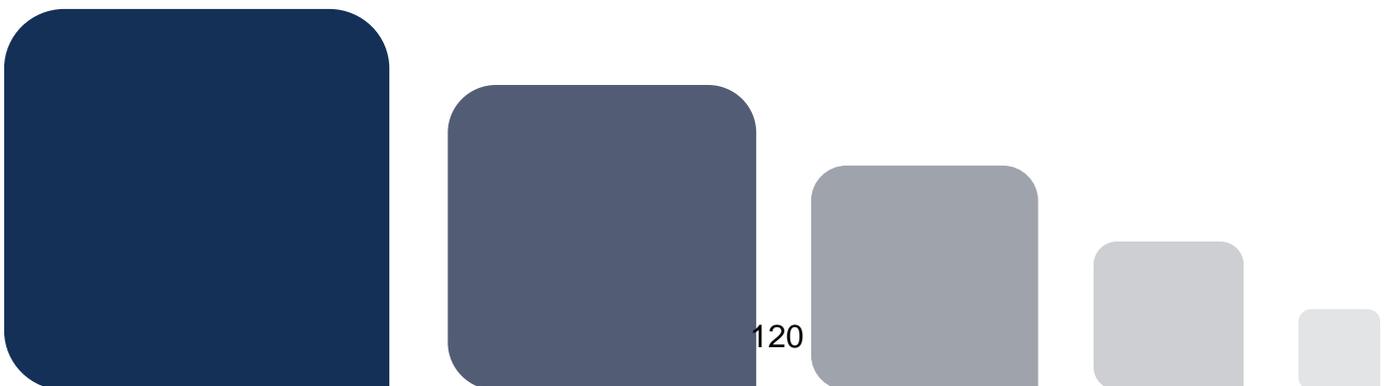


# **Attachment B**

**Clause 4.6 Variation Request**

## Annexure A

### Clause 4.6 Variation Building Height



## Clause 4.6 Variation Statement – maximum height (clause 4.3)

### 1.0 Introduction

This Clause 4.6 Exceptions to Development Standards request has been prepared by Bernard Moroz & Associates Pty Ltd – (hereafter referred to as BMA Urban) on behalf of MKD architects to accompany a development application for a sixteen (16) storey building over single level basement proposed to be used for visitor and tourist accommodation (backpackers) for up to 311 guests.

The purpose of this report is to seek a variation to the development standard at Clause 4.3 of the LEP, relating to height of buildings and is to be considered in conjunction with the Statement of Environmental Effects (SEE) accompanying the development application for the proposed development. The Clause 4.6 Exceptions to Development Standards request relates to the height of buildings principal development standard prescribed under subclause 4.3(2) of *Sydney Local Environmental Plan 2012*. Subclause 4.3(2) states:

*“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”.*

The Height of Buildings Map indicates a maximum building height of 50m applies to the site (refer to **Figure 45**).



Figure 45: Extract from the Height of Buildings Map  
Source: Sydney LEP 2012

The following definition under *Sydney Local Environmental Plan 2012* is important in considering the proposed variation:





Figure 47: Extent of non-compliance (Section 2)  
Source: MKD Architects

## 2.0 The Effect of Clause 4.6 Exception to Development Standards

Clause 4.6 of *Sydney Local Environmental Plan 2012* states (in part):

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

(a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*

(b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

(2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

(3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*

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

*(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

*(4) Development consent must not be granted for development that contravenes a development standard unless:*

*(a) the consent authority is satisfied that:*

*(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

*(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

*(b) the concurrence of the Director-General has been obtained.*

*(5) In deciding whether to grant concurrence, the Director-General must consider:*

*(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*

*(b) the public benefit of maintaining the development standard, and*

*(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.*

*(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:*

*(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*

*(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note.

When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.

*(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

- (a) a development standard for complying development,
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
- (c) clause 5.4,
- (ca) clause 6.6.”

The development standards in clause 4.3 are not “expressly excluded” from the operation of clause 4.6.

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of Subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of Subclauses 4.6(3) & (4). In this regard, the extent of the discretion afforded by Subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, Subclause 4.6(6).

As described at Section 2 of this written request, the proposal has a maximum building height of 52.2m. It is hereby requested that a variation to this development standard be granted pursuant to Clause 4.6 so as to permit a maximum numerical variation of 2.2m which equates to a percentage variation of 4.4%.

This request has been prepared having regard to the latest authority on Clause 4.6, contained in the following guideline judgements:

- • *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46
- • *Wehbe v Pittwater Council* [2007] NSWLEC 827
- • *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 ('Four2Five No 1')
- • *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 ('Four2Five No 2')
- • *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 ('Four2Five No 3')

In summary, the principles arising from the above matters are:

- (i) That the relevant objectives are those stated in the controls not unidentified underlying objectives at [57] in *Four2Five No. 1*;
- (ii) That the environmental planning grounds must be particular to the circumstances of the proposed development and/or the site at [60] in *Four2Five No. 1*; and
- (iii) The five methods of establishing that compliance is unreasonable or unnecessary identified by Preston J in *Wehbe* remain relevant. However, in order to satisfy the unreasonable and unnecessary test in Clause 4.6(3)(a), you need something more than way 1 in *Wehbe*, because that test is now encompassed in Clause 4.6(4)(a)(ii) where consistency with the objectives of the standard is a mandatory precondition.

In relation to (iii) above, Method 1 in *Wehbe* requires an applicant to demonstrate that the objectives of the relevant development standard will be achieved, despite the non-compliance with the numerical standard.

However, as a result of *Four2Five*, it is now necessary to demonstrate something *more* than simply achieving the objective of the standard. In this regard, a proposed development that contravenes the development standard, but as a result, achieves the objective of the development standard to a greater degree than a development that complied with the standard, would suffice.

### 3.0 Justification for Variation

#### ***What is the context of the variation?***

Development surrounding the site is representative of a mix of architectural styles, density, and land uses. Figure 48 below most clearly defines the range in built form and scales within both the immediate and broader context.

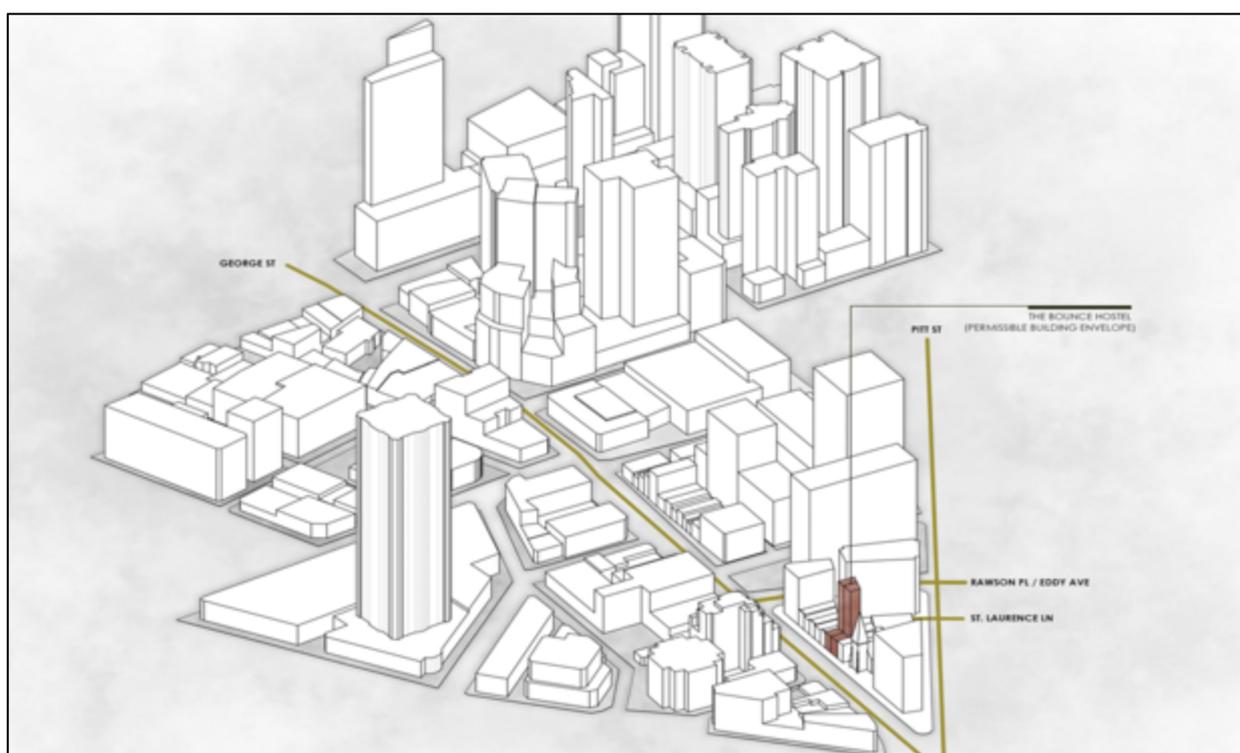


Figure 48: Permissible Building Envelope Isometric  
Source: MKD Architects

#### **Objectives of the Standard**

The objectives of the height of buildings principal development standard 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.*

It is considered that the proposed development achieves the objectives of the standard for the following reasons:

Objective (a) seeks to ensure that buildings are compatible with the condition of the site and its context.

The proposal is almost at compliance along the George Street frontage where the 410mm to 730mm extent of non-compliance would be unimpressible from both neighbouring buildings or the public domain. The proposed design seeks to provide a contemporary built form which will contribute to the immediate urban context of the neighbourhood and the desired future character of the locality. As outlined previously, the proposal has had regard for both the current and anticipated scale of development envisaged for this locality. The proposed development has been designed with consideration of the surrounding development, the unique constraints of the site, and the commercial requirements for this use.

Objective (b) seeks to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas. In order to address this objective, it is most appropriate to directly reference the development summary detailed within the Heritage Impact Statement prepared by NBR architecture.

*“The form and height of the tower have been developed in line with the existing building controls, and with an understanding of the issues around heritage items in the vicinity.*

*Those sensitivities include:*

- *Views of the spire of Christ Church St Lawrence; primarily along George, from Valentine Street and from the rear of the site in the general area of Central Station.*
- *Retention and conservation of the scale, form and character of the two and three storey historic buildings to the north of the site, as well as on the western side of George Street flanking Valentine Street;*
- *Retention of the character of the rear St Lawrence Lane; and*
- *The relationship of the tower form with the multistorey historic buildings on the block within which the site sites, and the broader urban context.*

*The façade has been designed ‘in the round’ using proportions and forms taken from the nearby historic multi storey buildings; this approach gives each of the facade’s equal prominence. In this way the building reads as a single element from all view points, and importantly creates a consistent visual element amongst the surrounding historic and more recent multi storey buildings in the immediate and further vicinity of the site. Most importantly, this approach to the design of the tower as a single design element does not alter how the adjacent spire of Christ Church St Lawrence is understood”.*

On this basis, the proposal is consistent with objective (b).

Objective (c) seeks to promote the sharing of views.

The extent of non-compliance does not result in any further impact to the views enjoyed across the site.

On this basis, the proposal is consistent with objective (c).

In relation to objective (d), this proposal seeks to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas.

The proposed building has been designed to be consistent with the envisaged scale of development for this precinct. In terms of materiality, height, setbacks and overall form and scale the proposal will

not adversely impact the locality while positively contributing to the diversity of architectural styles and densities provided within the area.

On this basis, the proposal is consistent with objective (d).

Given that the subject site is not located within the Green Square precinct, objective (e) is not relevant to this application.

The proposed development is therefore consistent with the objectives for maximum height, despite the numeric non-compliance.

### **Objectives of the Zone**

Clause 4.6(4) also requires consideration of the relevant zone objectives. The objectives of the *B8 – Centre Zone* as follows:

- *To recognise and provide for the pre-eminent role of business, office, retail, entertainment and tourist premises in Australia's participation in the global economy.*
- *To provide opportunities for an intensity of land uses commensurate with Sydney's global status.*
- *To permit a diversity of compatible land uses characteristic of Sydney's global status and that serve the workforce, visitors and wider community.*
- *To encourage the use of alternatives to private motor vehicles, such as public transport, walking or cycling.*
- *To promote uses with active street frontages on main streets and on streets in which buildings are used primarily (at street level) for the purposes of retail premises.*

The proposed development provides for visitor and tourist accommodation (backpackers) which is a permissible use within the zone and is compatible with the surrounding land uses. The location of the site includes an eclectic mixture of commercial, retail, entertainment and residential uses and the proposed use will add to this range by providing temporary and affordable accommodation for visitors who wish to make use of the surrounding facilities and businesses.

The site is well served by a range of public transport options including Central railway station which is located approximately 350 metres to the south east of the site and a new light rail stop located on Rawson Place 150m to the north of the site. Accordingly, the proposal seeks to provide backpackers accommodation in a location which will maximise public transport patronage and the increased tourists and visitors in the locality. Furthermore, the proposal will serve to support the viability of nearby business and retail uses.

### ***Strict Compliance is unreasonable or unnecessary in the circumstance of the case***

As described earlier, the topmost building parapet breaches the 50m height limit by up to 2.2m representing a maximum variation of 4.4% to the building height standard. It is worth noting that this breach is most evident within the south-eastern corner of building where the drop off in land levels are most pronounced. Figure 49 below provides a clearer appreciation of the extent of non-compliance across the building. As can be evidenced, the height breach is far less appreciable along the George Street frontage where it ranges from 410mm-730mm above the 50m height standards equating to a maximum percentage variation of 1.4%.

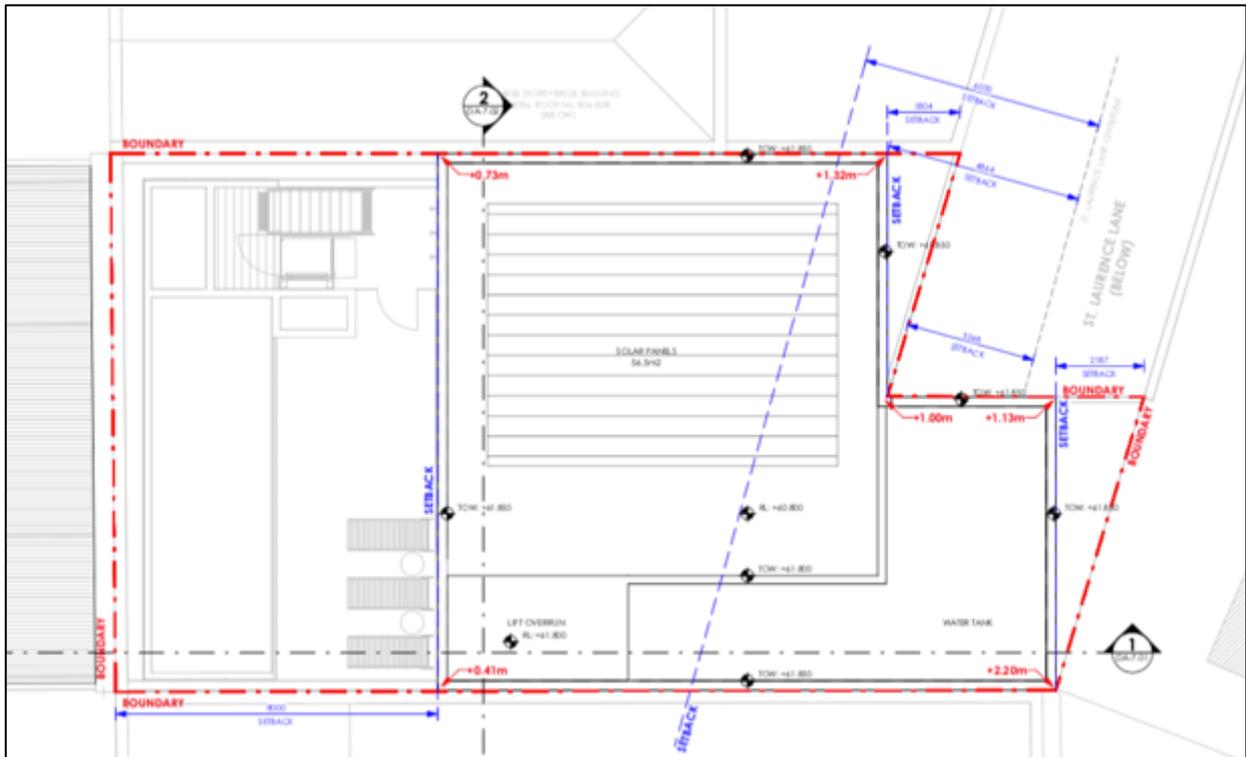


Figure 49: Roof plan indication extent of height breach  
Source: MKD Architects

In consideration of the above, Council’s attention is also drawn to the Department of Planning and Environment’s publication “*Varying development standards: A Guide*” (August 2011), which outlines the matters that must be considered when varying a development standard.

The Guide has essentially adopted the 5 point test for consideration set out by the Land & Environment Court in *Wehbe v Pittwater Council (2001) NSW LEC 827*, specifically that there are five different ways in which compliance with a development standard can be considered unreasonable or unnecessary, namely:

- *the objectives of the standard are achieved notwithstanding non-compliance with the standard;*

*Comment:* As discussed above, the proposal is considered to be consistent with the objectives of the building height standard, notwithstanding the numerical variation.

- *the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

*Comment:* The objectives of the building height standard remain relevant and the proposal is consistent with, or at least is not antipathetic to the objectives of the building height standard, notwithstanding the numerical variation.

- *the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

*Comment:* The proposal is consistent with the objectives of the building height standard, notwithstanding the numerical variation, and it would not defeat the purpose of the standard.

- *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;*

*Comment:* The building height standard has not been abandoned by Council through its actions in granting consent for other buildings in the vicinity that depart from the standard.

- *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.*

*Comment:* "Backpackers Accommodation" is a permissible land use and the zoning of the site is considered to be appropriate in this location and in context of the surrounding land uses and built form.

In light of the above, it has been demonstrated that the first test under the Wehbe method has been met, such that the requirement to strictly adhere to the numerical development standard for building height is considered to be unreasonable and unnecessary in this instance.

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

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, as discussed above it is considered that there is an absence of significant impacts of the proposed non-compliance on the amenity of future building occupants, on area character and on neighbouring properties. The assessment of this numerical non-compliance is guided by the decision of the *NSW LEC Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* whereby Justice Pain ratified the decision of Commissioner Pearson.

On "**planning grounds**" and in order to satisfy that the proposal meets objective 1(b) of Clause 4.6 in that allowing flexibility in the particular circumstances of this development will achieve "a better outcome for and from development", it is considered that the current proposal will facilitate greater amenity for future residents on a site that is highly suited for such purposes and in a configuration that will not detract from the existing approved developments or future anticipated development on neighbouring properties.

In this regard, the perimeter building parapets conceal the core service elements of the building being the lift over run, solar panels and water tank located on the roof of the development. Furthermore, the uppermost level of the building (level 15) consists of a building communal area containing dining, kitchen, terrace and cool room facilities.

There are sufficient environmental planning grounds to justify the variation of the height control, particularly given that:

- strict compliance with the building height standard would result in no material built form benefits and subsequent loss of building amenity;
- the proposed height non-compliance relates to parts of the building that will be imperceptible to the casual observer when viewed from public and private domains;
- The non-compliant parts of the building do not appreciably contribute to overshadowing or loss of privacy and;

- Strict compliance with the permissible height of buildings standard would hinder the provision of the communal area to the uppermost building level that would compromise on the ability to offer higher levels of building amenity, including equitable building access to this level. In this regard, the proposal is considered to provide a better environmental planning outcome than if such elements were not provided.
- The proposal represents the orderly and economic use and development of the land.

The desire to achieve additional levels of communal amenity on the uppermost level provides clear amenity benefits to the future visitors of this development, but not to detriment of the amenity of adjoining buildings or to area character. If Council was to insist on strict compliance in this instance, it would require removal or considerable reconfiguration of the uppermost building level resulting in an unreasonable burden on the development that is to be balanced with the impacts, or lack thereof, resulting from the non-compliance.

### **Non-Compliance does not hinder the attainment of the Objects of the Environmental Planning and Assessment Act 1979**

The Wehbe decision identifies that in assessing a variation to a development standard, consideration must be given to Objects (a)(i) and (a)(ii) in Section 5 of the *Environmental Planning and Assessment Act 1979* is necessary. These are:

*(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,*

*(ii) the promotion and co-ordination of the orderly and economic use and development of land.*

The proposed variation to the building height standard will not contravene either of these objects. The proper management of the existing urban environment in order to achieve better social and community outcomes, as well as the orderly and economic use and development of land, will be realised through the provision of high quality tourist and visitor accommodation in the form of “*backpackers accommodation*” in a location with good access to public transport options and in proximity to shops, services and recreational facilities and educational establishments.

### **Director General**

Clause 4.6(4)(b) requires the concurrence of the Director-General to be obtained prior to granting consent to a development that contravenes a development standard. However, as advised in Planning Circular PS 18-003, The Secretary’s concurrence may not be assumed by a delegate of council if:

- the development contravenes a numerical standard by greater than 10%; or
- the variation is to a non-numerical standard.

This restriction does not apply to decisions made by the Local Planning Panels, who exercise consent authority functions on behalf of councils, but are not legally delegates of the council. In this case, the Local Planning Panel will have the ability to assume concurrence and determine this application.

Notwithstanding, provided below is a discussion on the matters under subclause 4.6(5) that the Director- General must consider in deciding whether to grant concurrence:

***Whether contravention of the development standard raises any matter of significance for State or regional environmental planning.***

The variation to the height of buildings principal development standard under *Sydney Local Environmental Plan 2012* will not give rise to any environmental planning matter which could be deemed to have either State or Regional significance. The variation to the development standard being sought will not have any effects outside the immediate area of the site.

***The public benefit of maintaining the development standard.***

No substantive public benefit would be realised by maintaining the development standard. Reducing the height of the building to strictly comply with the 50m height limit would not alter the outcome for the site and would not realise a significant improvement to the relationship between the site, the adjoining buildings and the surrounding area.

***Any other matters required to be taken into consideration by the Director-General before granting concurrence.***

Despite exceeding the statutory maximum building height, the proposed redevelopment of the site will facilitate the orderly and economic redevelopment of the site positively contributing to the achievement of the objectives of *Sydney Local Environmental Plan 2012*.

## **5.0 Conclusion**

Based on the discussion provided above, it can be concluded that:

Strict compliance with the height of buildings principal development standard under *Sydney Local Environmental Plan 2012* is unreasonable or unnecessary in the circumstances of the case where:

- the extent of the non-compliance is relatively minor and will not result in any perceivable increase in impacts on the adjoining land uses with respect to overshadowing, loss of privacy, inappropriate scale etc.
- the proposed design solution is considered to represent an appropriate development outcome for the site, displaying a high-quality design, whilst ensuring that a high standard of amenity for tourists/visitors will be achieved.
- there are sufficient environmental planning grounds having regard to the Court matters *Four2Five v Ashfield Council* and *Wehbe v Pittwater Council* to justify the contravention to the development standard as the objectives of the building height standard are still met, despite the non-compliance;
- the non-compliance does not directly result in any adverse environmental impacts in terms of the building being out of context with the anticipated future bulk and scale of development in the locality;
- the proposal will provide additional high quality “backpackers accommodation” in response to Sydney’s *Sustainable Sydney 2030 Strategic Plan, Economic Development Strategy and Tourism Action Plan*
- the scale and nature of the non-compliance does not give rise to any matter of State or Regional significance, nor does it adversely affect the public interest.

Having regard to the circumstances of this case where:

- the overall style, scale and built form of the building is commensurate with the likely future 'built environment' and desired character of the area;
- the proposal is consistent with the aims and objectives of *Sydney Local Environmental Plan 2012*; and
- the proposal is generally consistent with the objects of the *Environmental Planning & Assessment Act 1979*, in particular, the orderly and economic use and development of land and ecologically sustainable development,

It is submitted that this Clause 4.6 Exceptions to Development Standards request is well founded. As such, strict compliance with the height of buildings principal development standard prescribed in Clause 4.3 of *Sydney Local Environmental Plan 2012* is unreasonable and unnecessary having regard to the circumstances of the case. Accordingly, having regard to the assessment and justification contained in this Clause 4.6 Exceptions to Development Standards submission, it is requested that Council support the proposed variation and the development in its proposed form.