

# **Attachment D**

<b>Clause 4.6 – Height of Buildings</b>
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## APPENDIX A – Clause 4.6 Exception to Clause 4.3 Height of Buildings

In accordance with Clause 4.6 of the Sydney LEP 2012, a request for an exception to Clause 4.3 Height of Buildings development standard is submitted in support of the application.

The objectives of Clause 4.6 are addressed as follows:

- 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.

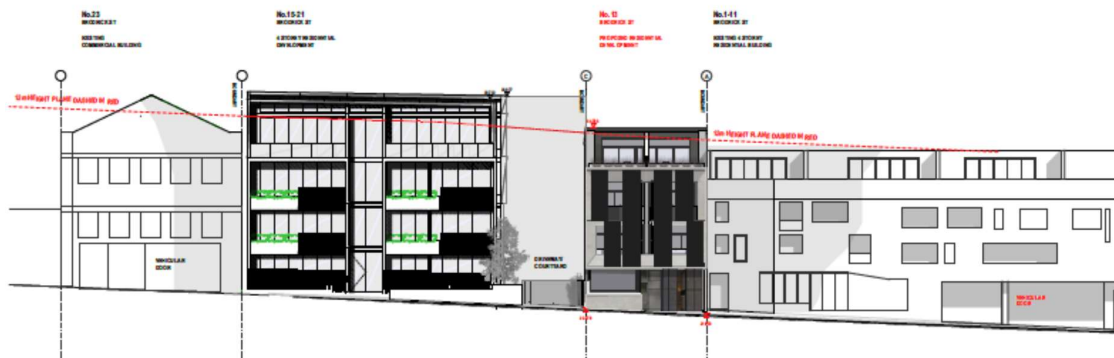
### Comment:

The site has a variance in ground level of 480mm from the north eastern to the north western corner. The variance in the natural ground level has created a step in the building height between 11 Brodrick St (western side) to 15 Brodrick St (eastern side).

Under Clause 4.3 of the Sydney LEP 2012, the Height standard is 12m which is equivalent to an RL of 33.91 on the north western corner and an RL of 34.39 on the north eastern corner.

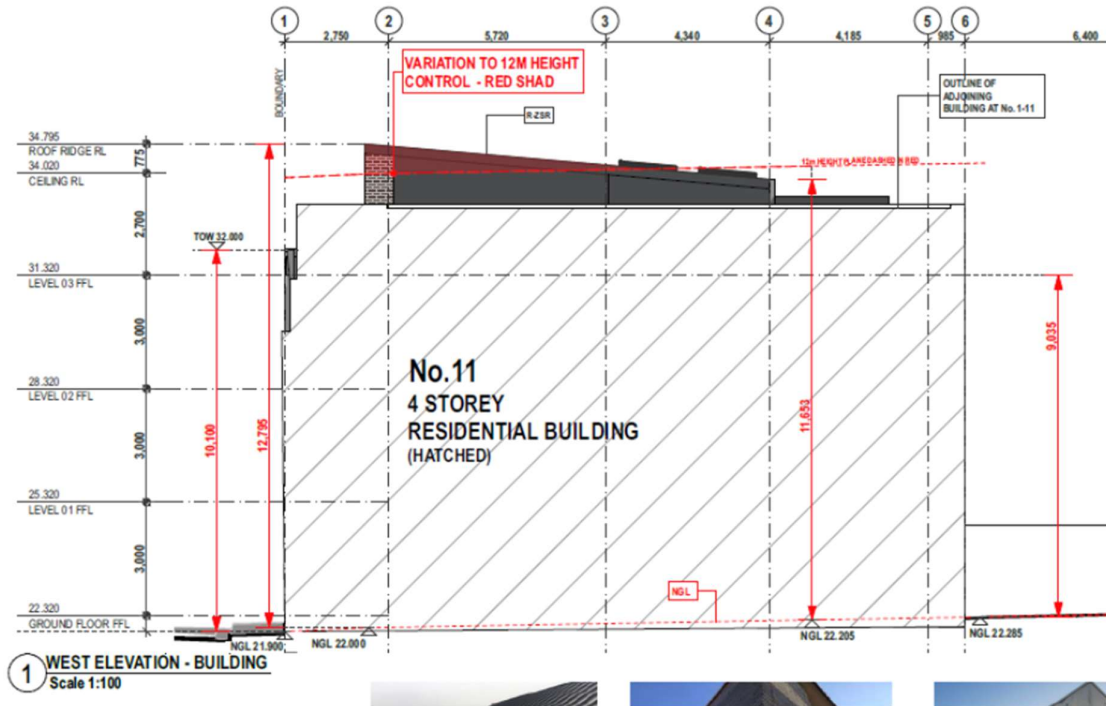
The 12m Height plane is shown in the following image:

Image 15: Height Plane



The proposal seeks a maximum building height of 12.79m. A small portion of the building protrudes the 12m height plane. See the area shaded in red below

Image 16: Height Variation



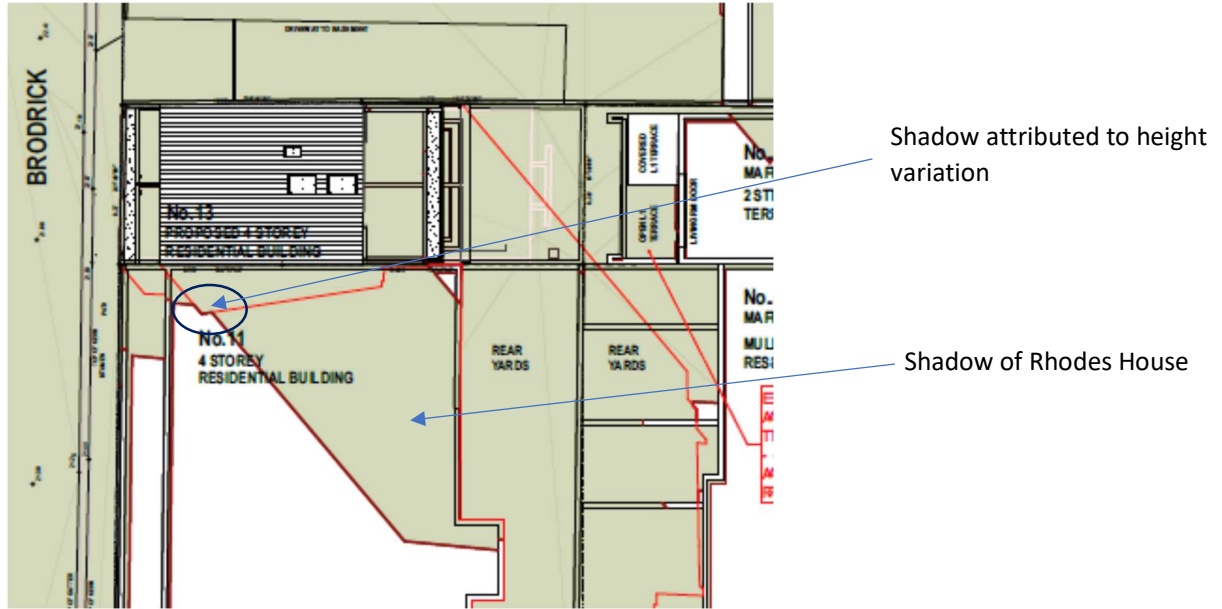
Please note the proposed building has a skillion roof which falls from the front to the rear. The Natural Ground Level falls from the rear boundary to the street. The rear roof line is all within the permissible height plane.

The variation to the height on the front righthand side of the building is 0.79m. The maximum infringement is consistent with the transition in height between 11 to 15 Brodrick St. The recent approval of 15 Brodrick St has established consent for a height greater than 12m. .

As the proposed variation is towards the front boundary, there are no adverse shadowing implications. Effectively, the shadowing to the south is cast by a 10.22m building (the of the rear portion of the proposed building), which is well below the maximum allowable building height. The proposed rear building lane has been kept in-line with adjoining developments to the East and West. It has been reduced significantly from the current improvements.

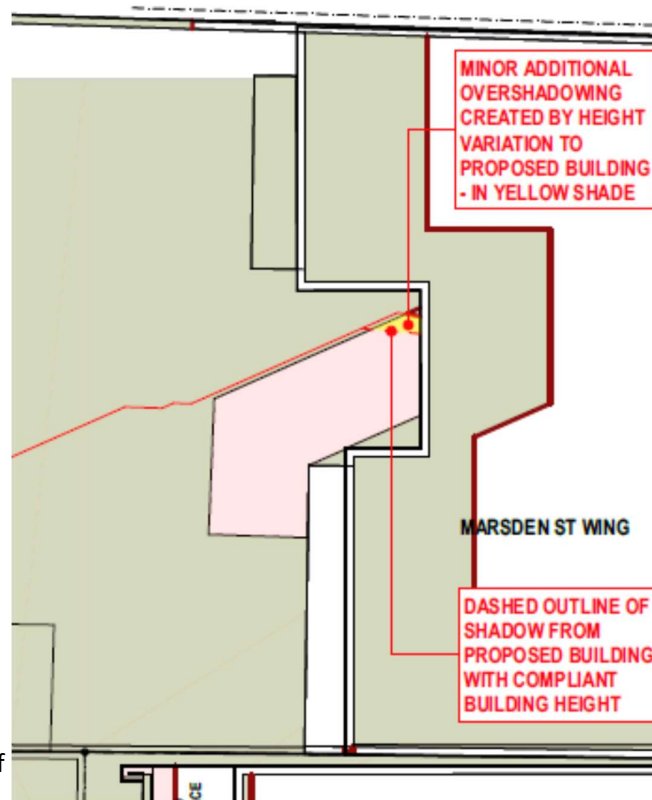
The small variation in height would generally impact the western property (11 Brodrick St) from 10am to 11am in mid winter, however there are no east facing windows to this building (built to boundary) and the roof is already in the shadow cast by Rhodes House (1 Missenden Rd). See image below;

Image 17: 10am mid winter shadow



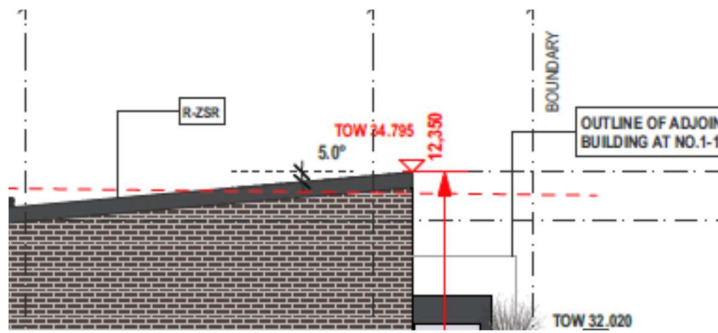
The variation to the shadow on the eastern side is exaggerated 3pm midwinter mid winter;

Image 18: 3pm mid winter shadow



The eastern side of

Image 19: Eastern elevation extract



As depicted in image 18, the effect of the height protrusion to the shadowing implications is negligible. Overall, the varying height of the east and west roof lines provide a smaller shadow than a 12m tall box for the full building width would.

This Clause 4.6 establishes that in the circumstances of this case, the departure can be supported as the application satisfies the five principles of the 'Wehbe' test and additionally, satisfies the test established under *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009, in that there are environmental planning grounds that are particular to the circumstances of the proposed development.

The proposed Height seeks to rationalise the increase in FSR and provides a better relationship between the height and FSR standard. This results in a contextually appropriate height with adjoining (current & future) development. It is submitted that there is an inconsistent relationship or a disconnect between the FSR of 2:1 and the building height of 12 metres.

This Clause 4.6 Exception establishes that while the proposal departs from the numerical Height standard, there are sufficient environmental planning grounds to justify the variation in addition to there being grounds that are particular to the circumstances of the proposed development, and therefore establishes that there is planning merit in permitting the numerical departure.

As such, there is merit in applying a degree of flexibility to the Height standard, given it will achieve a better urban outcome for the site, and the outcome for the site would be the same or better than a development that would strictly comply with the numerical Height standard.

- 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.

Comment:

The applicable Height control for the site is 12m. The proposal results in a maximum Height of 12.79m , representing a departure of 0.79m.

Accordingly, the proposal does not comply the numerical Height standard, however by virtue of this clause, consent can be granted to such a numerical departure.

- 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.

Comment

Assessment under Clause 4.6(3)(a)

The proposed variation to the Height standard is assessed with consideration to the principles established by the Land and Environment Court in *Wehbe V Pittwater Council* [2007] NSW LEC 82. His Honour Preston CJ set out 5 ways of establishing that compliance with the standard is unreasonable or unnecessary. The 5 parameters were further tested in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 where Justice Pain upholding a decision of Pearson C held that the principles in *Wehbe* remained relevant to the provisions of Clause 4.6(3)(a).

The findings of *Four2Five Pty Ltd v Ashfield Council* NSWLEC 1009 requires the identification of grounds particular to the circumstances of the proposed development, as opposed to grounds that would apply to any similar development in the vicinity of the site.

His Honour Preston CJ set out five alternative ways of establishing that compliance is unreasonable or unnecessary in the preparation of a SEPP 1 objection in *Wehbe v Pittwater Council* (2007) NSW LEC 827, albeit only one of these 5 ways needs to apply in order for the objection to be well founded. The same approach has been held by the Land and Environment Court to be appropriate in assessing a Clause 4.6 request.

The five alternative ways are:

- a. 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.
- b. Establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.
- c. Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.
- d. Establish that 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 unreasonable or unnecessary.
- e. Establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary..."

Each criteria under Wehbe is addressed as follows.

- a. 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.

The objectives of the Height standard under Clause 4.3 of the Sydney LEP 2012 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.

Objective (a) and (b)

The proposal results in a four storey mixed use development with a maximum height of 12.79m

Objective (a) establishes consideration to the condition of the site and its context. Objective (b) relates appropriate height transitions. Both these objectives are addressed combined.

The assessment throughout this report demonstrates that the proposal provides a contextually appropriate height transition. The height standard 12m does not allow the development to rationalise an appropriate height transition between 11 to 15 Brodrick St. Taking into consideration the condition of the site, being the natural variance in ground level, strict adherence to the numerical 12m would not allow objectives a and b to be met the best possible way. The proposed height therefore demonstrates that there is a disconnect or an inconsistent relationship between the Height standard and the objectives. In this circumstance, it is necessary to vary the Height to achieve the desired transition. Critically, the application complies with the FSR standards. Therefore, it is of a scale and height that would be reasonably contemplated for the site.

The site will provide acceptable density within an accessible location within the Camperdown health and education precinct. Therefore, given the site's accessible location, it is appropriate to provide increased density, where it can be demonstrated that a proposal does not result in impacts to adjoining properties or the streetscape.

The proposal will create an interesting articulation that will provide a suitable streetscape presentation that will contribute to Brodrick St. The resulting bulk of the development is of a medium density building that is reflective of the desired future character for the locality and results in an acceptable density when viewed from the street and adjoining properties.

On this basis, the proposal is reflective and consistent with the desired future character of the area and the minor numerical departure will not compromise the attainment of the objective (b) of the standard.

Accordingly, the proposal satisfies objective (a) and (b) of the Height standard.



### Objective (c), (d) and (e)

In relation to objective (c), given the taller buildings on the northern side of Brodrick St and 15 Brodrick St, no views will be blocked or achieved from the proposal.

Objective (d) will be met, however this is not seen as being as relevant as the direct transition between 11 and 15 Brodrick St/

Objective (e) is not applicable.

In summary, the proposed departure does not result in a discernible impact to the site, streetscape or adjoining properties.

Consideration is given to the Planning Principles of the Land and Environment Court in relation to bulk, scale, height and amenity impact.

Veloshin v Randwick Council [2007] NSWLEC 428 and Stockland Development Pty Ltd v Manly Council [2004] NSWLEC 472, established the following principles:

- Are the impacts consistent with impacts that may be reasonably expected under the controls?
- How does the proposal's height and bulk relate to the height and bulk desired under the relevant controls?
- Does the area have a predominant existing character and are the planning controls likely to maintain it?
- Does the proposal fit into the existing character of the area?
- Is the proposal consistent with the bulk and character intended by the planning controls?
- Does the proposal look appropriate in its context?

The proposed Height, does not result in discernible impacts to adjoining properties. The building forms part of an existing streetscape essentially complementing and completing the adjoining properties. The resulting shadow does not impact upon adjoining residential properties. The articulation of the façade (upper level setback) and proposed materials and finishes will reduce any perceived impact associated with visual bulk and scale.

The proposal sits harmoniously with the surrounding built form and represents a contextual good fit with the existing character of the area, providing a suitable built form within the streetscape.

To strictly apply the development standard, in the absence of any tangible impact, would be unreasonable and without basis.

On this basis, the resulting impacts of the proposal are considered acceptable and therefore the proposal is considered compliant with objective (a) and (b) of the Height standard.

In summary, compliance with the Height standard is considered unreasonable and unnecessary, given the proposal complies with the objectives of the standard, and therefore the proposal is equivalent to or, put simply, the same as a development that would strictly comply with the numerical Height standard. Therefore, strict compliance with the Height standard is unreasonable or unnecessary in this instance and satisfies the requirements of test (a) in *Wehbe v Pittwater Council* (2007)

#### Wehbe Criterion (b)

- b. Establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.

The underlying objective and purposes remain relevant to the proposed development. The proposed development is consistent with the objectives of the Height standard as contained in the Sydney LEP 2012. This has been addressed.

#### Wehbe Criterion (c)

- c. Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.

The underlying objective or purpose of the Height standard would be thwarted if compliance was required. This position is determined on the basis that the development delivers a better environmental planning outcome and if strict compliance were required, the proposal would not be able to achieve the FSR or provide the contextual height transition.

Given the subject site currently consists of substantial commercial building on relatively small land, development in-line with 12m height limit and 1.5:1 FSR (without ARHSEPP bonus) would have to be economically viable to occur and achieve the desired future development. If compliance of the Sydney LEP Height and FSR control was required the underlying objective ARHSEPP would be defeated as the desired future development would not occur. The assessment concludes that the approval of the non-compliance meets the objective of the Height standard and does not result in an adverse environmental planning impact.

The underlying objective of the Height standard is, to provide transition between adjoining buildings (existing and future) in order to achieve the desired character and to minimise adverse environmental impacts on adjoining properties.

The proposal in its current form achieves these objectives and therefore, the variation supports the objectives. However, if compliance was required it would be unreasonable, as the resulting development could thwart the underlying objective.

If there were to be a reduction in Height, then it is likely that development would not occur, leaving the streetscape unfinished with a “missing tooth”. As such the amenity of the current residents at 1-11 Brodrick St is compromised due to shadowing (building depth) of the existing commercial building.

The mere fact that the subject site has remained undeveloped for 7 years after rezoning occurred is evidence that compliance with the Height standard would inhibit the objectives of the DCP to materialise.

The development as amended, results in positive outcomes and this would be thwarted if compliance was required.

#### Wehbe Criterion (d)

- d. Establish that 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 unreasonable or unnecessary.

The Council has not destroyed the standard, however, there have been approvals where Council has varied the Height standard. This indicates that there is somewhat a reduced importance of compliance being achieved with the numerical component of the standard and a greater importance on compliance to the objective of the standard being achieved. This demonstrates that Council has acknowledged that there is a disconnect between the height of buildings and FSR standard that apply under the Sydney LEP 2012 and as a consequence, a breach of the Height standard is common and in some cases is considered appropriate.

Whilst it is not submitted that the standard has been abandoned by Council's actions, it is stated that there are numerous precedents for Height variations. The most notable being 15 Brodrick St D/2015/544 which was approved with a maximum building height of >13m

There are a number of other departures within the Sydney LGA, however emphasis is being placed on the direct locale of the subject as all other properties forming the Brodrick St streetscape have been approved and are built or under construction.

In this context, the Height standard of 12m is a disconnect with adjoining properties and the proposed Height of 12.79 provides a better transition and is consistent with the adjoining approved developments.

#### Wehbe Criterion (e)

- e. Establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary.."

The B4 Mixed Use zoning of the land has become somewhat redundant as all the properties in the street have been developed using a residential purpose. Given the solar access requirements for residential properties, building depths are shorter, hence more height is required to achieve the same FSR as a commercial building. The B4 zoning is still appropriate for the site. The objectives of the B4 Mixed Use zone are:

- To provide a mixture of compatible land uses.
- To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encouraging walking and cycling.
- To ensure uses support the viability of centres.

Given the adjoining residential developments and site constraints, the compatible land uses becomes narrowed down significantly. It has been determined that a boarding house will be the most compatible use for the site. The proposal provides 10 boarding rooms that can cater to the influx of new employees and students within the existing and expanding Camperdown health and education precinct. The site is located in an accessible location that encourages walking and cycling and the use shall support the viability of centres.

In conclusion, the proposal complies with the objectives of the zone.

This Clause 4.6 Exception has addressed the five criteria under Wehbe and the conclusion is that the proposal satisfies two of the criteria of Wehbe, being criterion (a), (c) and (d). Therefore, compliance with the standard is unreasonable and unnecessary.

Accordingly, the application satisfies Clause 4.6(3)(a).

Additionally, there are sufficient environmental planning grounds that justify contravening the standard, as outlined below.

*Assessment under Clause 4.6(3)(b)*

The following outlines the environmental planning grounds that justify the contravention of the standard:

- I. The proposed bulk, mass and density of the development is contextually appropriate and rationalises the height and FSR standards. The proposed Height better reflects the FSR standard. In this context, the Height standard of 12m is a disconnect with the FSR standard, considering adjoining developments have been residential and additional height is required to achieve the same FSR in a residential building as a commercial building. The proposed Height of 12.79m provides a better relationship with the height standard and enables the realisation of the desired FSR.
- II. The resulting development is reflective of the desired future character for the site and locality and the design of the development is considered to be a superior urban outcome that will compliment adjoining development.
- III. The proposed architecturally designed development will provide an improved streetscape presentation and building form that includes good quality finishes and materials and will activate the locality.
- IV. The proposal does not result in an undue or adverse environmental planning impact in terms of shadow, holistic amenity, privacy, traffic, view loss or streetscape presentation.
- V. The proposed development is compatible with the desired future character of the area and is not considered to detract from the streetscape. The proposal is exemplary of the desired future character of the area, as established through the land use zone under the Sydney LEP 2012 and surrounding recently approved development.
- VI. The proposal retains compliance with the objectives of the Height standard.
- VII. The proposal retains compliance with the zone objectives.

Holistically, for the reasons above, permitting flexibility in the Height standard will result in the development achieving a suitable urban outcome for the site that is consistent with the desired future character of the area.

This Clause 4.6 submission establishes that while the proposal departs from the Height standard, there are sufficient environmental planning grounds to justify the variation, with the grounds being particular to the circumstances of the proposed development, and demonstrates that compliance is unreasonable and unnecessary in the circumstance of this case. In this case there is planning merit in permitting the numerical departure.

Accordingly, the application satisfies Clause 4.6(3)(b).

Therefore, on balance, the variation to the Height is reasonable given the resultant development is compliant with the objective of the standard and zone under the Sydney LEP 2012.

- 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.

Comment:

This request has adequately addressed the matters required under sub-clause (3) and it adequately satisfies the relevant test to establish that compliance is unreasonable or unnecessary and that there are sufficient environmental planning grounds to justify the contravention.

Additionally, the development is in the public interest because it is consistent with the objectives of the zone and the objectives for development within the B4 Mixed Use zone, as detailed within this Clause 4.6.

Additionally, the numerical departure retains compliance with the relevant objects of the Environmental Planning & Assessment Act 1979, being the objects set down in Section 5(a)(i) and (ii):

- a) to encourage
  - 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 proposal facilitates the orderly and economic use and development of land and the numerical non-compliance is not contrary to any matter of State or Regional planning significance. The proposal will facilitate a development that is permissible in the zone and deliver additional housing within proximity to public transport services and the local Town centre.

This Clause 4.6 Exception has established that the proposal retains compliance with the objectives of the Height standard, objectives of the zone, and delivers a good planning outcome for the site. This outcome is considered to be in the public interest.

Concurrence from the Director-General has been given to Council to permit a departure to a development standard where there is sufficient planning merit.

On the basis of justification in this Clause 4.6, it is considered that strict compliance with the floor space ratio standard is unreasonable and unnecessary in this instance. This Clause 4.6 Exception has considered relevant Planning Principles of the Land & Environment Court in adequately addressing the matters required under sub-clause (3).

- 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.

Comment:

The proposed variation to the Height standard does not raise any matters of significance for state or regional planning. The variation is also not contrary to any state policy of ministerial directive.

There is no public benefit of maintaining the development standard in this instance as the site represents an opportunity to provide an exceptionally designed building. The building provides a well-balanced level of articulation and suitable palette of materials to encourage visual interest and relief.

It is therefore considered acceptable that an exception to the Height standard is granted in this instance for the following reasons:

- The purpose of the standard is being achieved and the development complies with the non-numerical objectives of Height standard under the Sydney LEP 2012.
- The justification is particular to the circumstances of the application and there are sufficient environmental planning grounds that justify the contravention.
- The proposal does not result in an adverse environmental planning impact.

- The underlying objective and purpose of the standards would be thwarted if compliance was required.
- The proposal results in a public benefit in the form of public domain works.
- The non-compliance enables compliance with the objects and purpose of the Environmental Planning & Assessment Act 1979
- The non-compliance is not contrary to any matter of state or regional planning significance.
- The aims of the LEP are to establish controls that encourage good quality urban design, high residential amenity and environmental sustainability. The subject application represents a high quality orderly and economic use and development of the site, achieving an appropriate building form consistent with the changing nature of the precinct.

## **Conclusion**

The proposed variation to the building height development standard is considered to be well founded and has sufficient planning merit.

Strict adherence to the development standard in this instance is unreasonable and unnecessary as the non-compliance with the height generates no environmental planning impact and the environmental grounds to justify the contravention are particular to the application.

Specifically, the granting of approval to the application will facilitate a better planning outcome for the site.

On this basis, it is considered appropriate to vary the numerical height standard.