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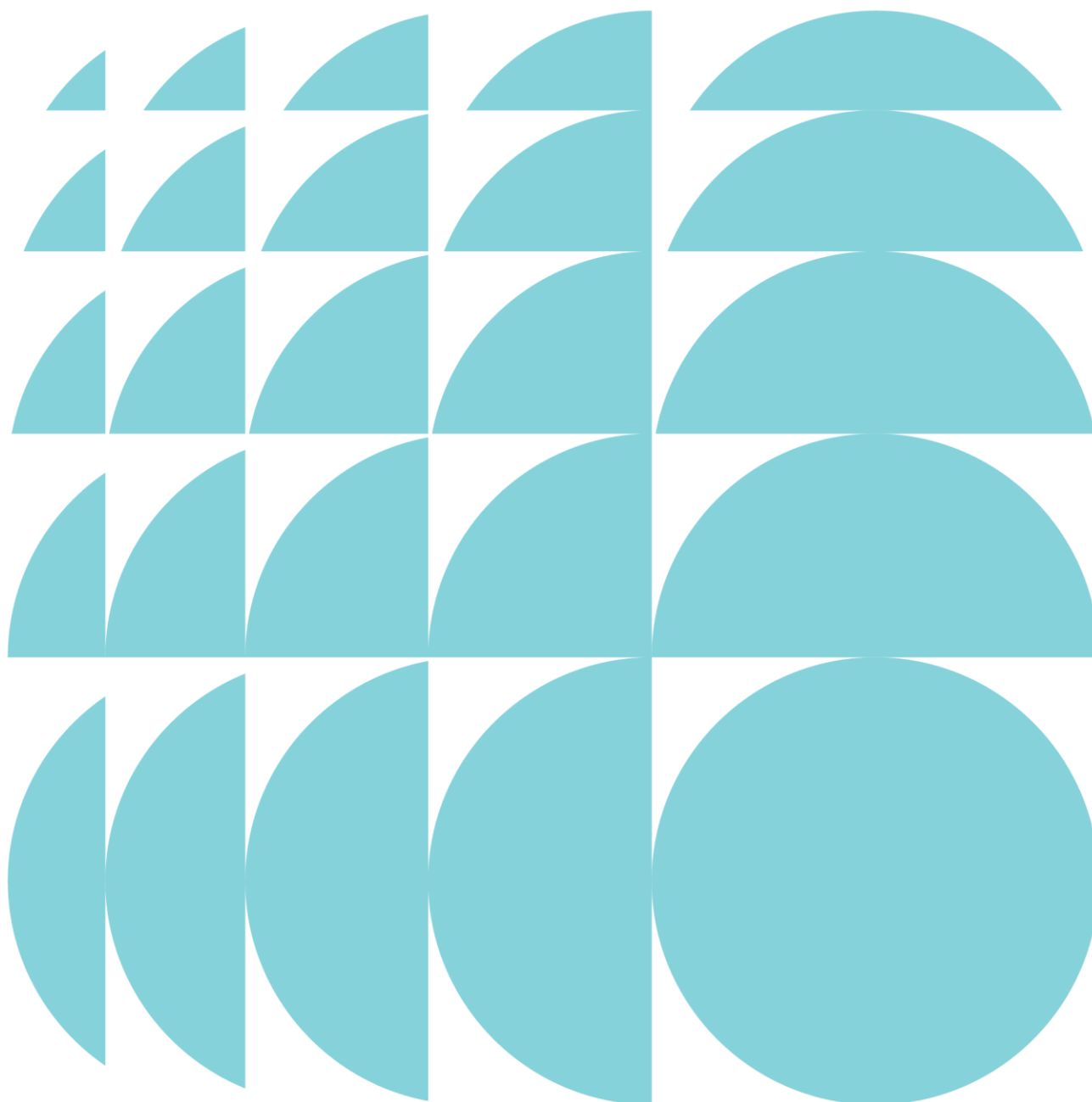
Clause 4.6 Variation Requests

**Clause 4.6 Variation
Maximum Building Height**

505-523 George Street, Sydney
Stage 2 Development Application

Submitted to City of Sydney
On behalf of Coombes Property Group

2 August 2019 | 218575



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VERSION NO.	DATE OF ISSUE	REVISION BY	APPROVED BY
1.0 DRAFT	27 May 2019	JD	JH
2.0 DRAFT	30 July 2019		
3.0 FINAL	2 August 2019		

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1.0 Introduction

Overview of Justification for Clause 4.6 Variation Report

The maximum building height that applies to the site is 260 metres. The height to the top of the roof slab is 260m, which complies with the maximum building height development standard.

This clause 4.6 variation request has been prepared as a precautionary measure in relation to the identification of a potential minor exceedance of the maximum building height development standard set out in clause 6.32 of the *Sydney Local Environmental Plan 2012* (the SLEP 2012). This clause 4.6 variation request is also provided to provide assistance to Sydney of City Council (Council) consideration of DA for a 270m high mixed-use development at 505-523 George Street, Sydney by addressing the relationship between the definition of building height and clause 5.6 Architectural roof features pursuant to SLEP 2012, and any consequential exceedance of height limits resulting from the utilisation of clause 5.6.

Notwithstanding the variation to the maximum building height standard in the SLEP 2012, the proposed development:

- Achieves the objective of clause 6.32 of the SLEP 2012 by providing centre-based childcare facility, a community meeting facility and publicly accessible toilets on-site;
- Achieves the objectives of clause 4.3 of the SLEP 2012 by:
 - Providing a building of a height that is appropriate for the site's CBD context, and is surrounded by many of Sydney's tallest buildings;
 - Appropriately transitioning to surrounding heritage items, particularly the Judge's House at 531 Kent Street;
 - Promoting the sharing of views by providing a single, slender tower form; and
 - Marking the southern end of the core CBD.
- Achieves the objectives and provisions of clause 5.6 of the SLEP 2012 by providing an architectural roof feature that:
 - Is minor in the extent that it exceeds the height limit and does not cause any adverse visual or amenity impacts to surrounding buildings;
 - Is a central part of the building design, expressed as an elegant, singular tower form;
 - Is a decorative element at the top of the tower that contains no habitable floorspace or signage;
 - Causes minimal additional overshadowing to public open space and has no additional impact on the solar access of key surrounding residential buildings when compared to the approved building envelope; and
 - Contains plant equipment for building servicing and lift overruns that are fully integrated into its design.
- The proposed development is in the public interest because it is consistent with the objectives of both the site-specific development standards and the B8 Metropolitan Centre Zone; and
- Is consistent with the most recent metropolitan plan for Sydney and does not raise any matter of significance for State or regional planning.
- Importantly, the minor exceedance in the maximum building height caused by the roof feature, plant and lift overrun does not provide habitable floor area and does not affect the maximum permissible gross floor area (GFA).

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

Executive Summary

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of Coombes Property Group. It is submitted to the City of Sydney (Council) in support of a Development Application (DA) for the construction of a mixed-use development at 505-523 George Street, Sydney (the site).

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

This clause 4.6 variation request has been prepared as a precautionary measure and relates to a potential minor exceedance from the development standard for maximum building height. Part 4 Principal development standards, under clause 4.3 of the SLEP 2012, deals with the height of buildings and sets out the objectives of the clause and the maximum building height by referencing the Height of Buildings Map. However, the subject site is also subject to a site-specific clause, clause 6.32 of the SLEP 2012 which allows, despite clause 4.3, for development consent to be granted to the erection of a building with a maximum height of 260 metres on 505-523 George Street, Sydney, being Lot 1 DP 573250.

The definition of building height in the SLEP 2012 is as follows:

building height (or height of building) means:

- (a) *in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
- (b) *in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

Clause 5.6 of the SLEP 2012 also applies, which allows minor architectural roof features to exceed height standards set in the SLEP 2012, including equipment for servicing the building (such as plant, lift motor rooms, fire stairs and the like) contained in or supported by the roof feature, if fully integrated into the design of the roof feature. The proposed development includes an architectural roof feature that has been designed in accordance with clause 5.6 of the SLEP 2012.

Clause 5.6 reads as follows:

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

- (a) *to allow minor architectural roof features to exceed height limits,*
- (b) *to ensure that any architectural roof feature does not cause an adverse visual impact or adversely affect the amenity of neighbouring premises,*
- (c) *to ensure that architectural roof features are considered in the design of a building and form an integral part of a building's design.*
- (2) *Development that includes an architectural roof feature that exceeds, or causes a building to exceed, the height limits set by this Plan may be carried out, but only with development consent.*
- (3) *Development consent must not be granted to any such development unless the consent authority is satisfied that:*
 - (a) *the architectural roof feature:*
 - (i) *comprises a decorative element on the uppermost portion of a building, and*
 - (ii) *is not an advertising structure, and*
 - (iii) *does not include floor space area and is not reasonably capable of modification to include floor space area, and*
 - (iv) *will cause minimal overshadowing, and*
 - (b) *any building identification signage or equipment for servicing the building (such as plant, lift motor rooms, fire stairs and the like) contained in or supported by the roof feature is fully integrated into the design of the roof feature.*

The definition of building height includes plant and lift overruns, whilst clause 5.6 of the SLEP 2012 permits plant and lift overruns within an architectural roof feature. It is for this reason the clause 4.6 request for variation is precautionary in nature and intends to address any potential non-compliance resulting from utilisation of clause 5.6.

We note that Council has accepted comparable precautionary clause 4.6 requests for the use of architectural roof features, including plant and lift overruns, that exceed maximum building heights, including for Circular Quay Tower (D/2017/1620) and 161 Clarence Street, Sydney (D/2013/1707).

The request should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban for the DA.

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

2.0 Development Standard to be Varied

2.1 Is the Planning Control in Question a Development Standard?

The maximum height of building control in clause 6.32 of the SLEP 2012 is a development standard.

2.2 Relevant Development Standard

This clause 4.6 variation request seeks to justify contravention of the development standard set out in clause 6.32 of the SLEP 2012, and to address the inter-relationship between the SLEP 2012 definition of building height and the architectural roof feature clause, and any consequent exceedance of height limits resulting from the utilisation of clause 5.6.

Clause 6.32(3) provides that:

- (3) *Despite clause 4.3, development consent may be granted to the erection of a building with a maximum height of 260 metres on land to which this clause applies.*

2.3 Variation Sought

The maximum building height standard and the proposed top of building elements is summarised in **Table 1** below.

Table 1 Proposed building heights

Building height standard	Building Height (top of roof slab)	Top of architectural roof feature
260m	260m	270m

Table 1 above identifies that the building has been designed with a maximum height of RL276.96, which complies with the maximum building height control, as measured at the southern façade of the tower. The proposed architectural roof feature extends to a height of RL286.96. This represents a 10.00m variation to the height limit, an approximate 3.85% increase.

The architectural roof feature has been designed in accordance with clause 5.6 of the SLEP 2012 and is a decorative building element containing no GFA. Equipment for servicing the building, including plant, fire stairs and lift motor rooms is fully integrated into its design.

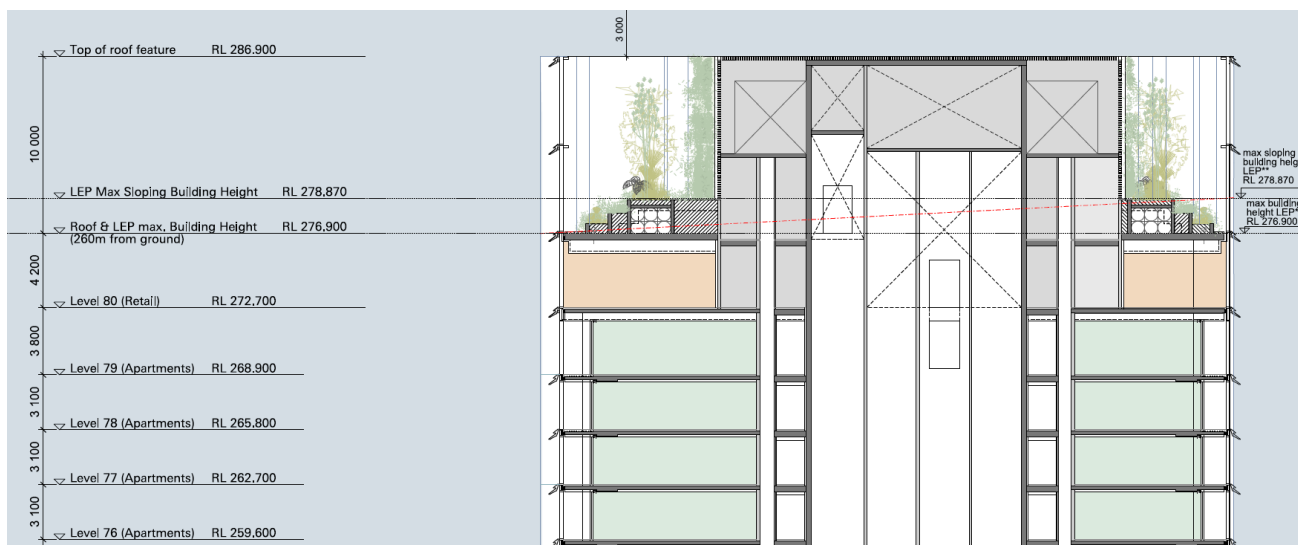


Figure 1 Section view of proposed architectural roof feature and extent of variation sought

Source: *Ingenhoven and Architectus*

3.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the SLEP 2012 provides that:

4.6 Exceptions to development standards

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

Further, clause 4.6(4)(a) of the SLEP 2012 provides that:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
- (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Secretary has been obtained.*

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

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827 (*Wehbe*);
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (*Four2Five*);
3. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (*Initial Action*);
4. *Baron Corporation Pty Ltd v The Council of the City of Sydney* [2018] NSWLEC 1552 (*Baron Corporation*); and
5. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (*Al Maha*).

Role of the consent authority

The role of the consent authority in considering a request for a clause 4.6 variation has been recently explained by the NSW Court of Appeal in *Initial Action* and in *Al Maha* to require that the consent authority needs to be satisfied in relation to two matters:

- That the applicant's request has adequately addressed the matters in in clause 4.6(4)(a)(i); and
- That the proposed development will be in the public interest because of its consistence with the objectives of the development standard and the zone objectives.

The Council is required to form these 2 opinions first before it considers the merits of the DA and it can only consider the merits of the DA if it forms the required satisfaction in relation to the matters. In particular, the Council needs to be satisfied that there are proper planning grounds to grant consent and that the contravention of the standard is justified. This report provides the basis for the Council to reach this level of satisfaction.

Accordingly, the relevant matters contained in clause 4.6 of the SLEP 2012, with respect to the maximum building height development standard, are each addressed below, including with regard to the above decisions.

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

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

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]; *Initial Action* at [16]).

As the language used in subclause 4.6(3)(a) of the SLEP 2012 is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request. The five ways outlined in *Wehbe* are:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Way**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Way**).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Way**).
- The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (**Fourth Way**).
- The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Way**).

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances because the objectives of the standard are achieved notwithstanding the non-compliance with the standard (the First Way).

In addition, this written request also establishes that compliance with the development standard is unreasonable or unnecessary since the objectives of clause 5.6 of the SLEP 2012 relating to architectural roof features expressly permit departure from the development standard in clause 4.3; and the objectives in clause 5.6 are equally achieved.

3.1.1 The underlying objectives or purposes of the development standards

The objective of the development standard contained in clause 6.32 of the SLEP 2012 is:

- (1) *The objective of this clause is to provide for additional building height on a site if the development of the site provides for the following:*
- (a) *centre-based child care facilities,*
 - (b) *publicly accessible toilets,*
 - (c) *community meeting rooms.*

This objective should not be considered in isolation and needs to be considered in light of the objectives of the maximum height standard in clause 4.3, as well as the objectives of clause 5.6 relating to architectural roof features.

The objectives of the general height of buildings development standard contained in clause 4.3 of the SLEP 2012 are:

- (1) *The objectives of this clause are as follows:*
- (a) *to ensure the height of development is appropriate to the condition of the site and its context,*

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

The objectives of clause 5.6 Architectural roof features of the SLEP 2012 are:

- (a) *to allow minor architectural roof features to exceed height limits,*
- (b) *to ensure that any architectural roof feature does not cause an adverse visual impact or adversely affect the amenity of neighbouring premises,*
- (c) *to ensure that architectural roof features are considered in the design of a building and form an integral part of a building's design.*

Further, clause 5.6 contains the following provisions:

- (3) *Development consent must not be granted to any such development unless the consent authority is satisfied that:*
 - (a) *the architectural roof feature:*
 - (i) *comprises a decorative element on the uppermost portion of a building, and*
 - (ii) *is not an advertising structure, and*
 - (iii) *does not include floor space area and is not reasonably capable of modification to include floor space area, and*
 - (iv) *will cause minimal overshadowing, and*
 - (b) *any building identification signage or equipment for servicing the building (such as plant, lift motor rooms, fire stairs and the like) contained in or supported by the roof feature is fully integrated into the design of the roof feature.*

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

The following sections demonstrate that the objectives presented in **Section 3.1.1** immediately above are achieved notwithstanding the potential non-compliance.

3.1.2.1 The objective of clause 6.32 505-523 George Street – building height and floor space is achieved

The building has been designed in accordance with the additional height provided under clause 6.32 and provides a centre-based childcare facility, publicly accessible toilets and community meeting facility. The proposed development achieves the objective of clause 6.32 despite the minor exceedance of height limit. Further, all gross floor area is located below the maximum building height control and, despite the exceedance, the proposal does not affect the maximum floor space ratio development standard applying to the site.

3.1.2.2 The objectives of clause 4.3 Height of buildings are achieved

Objective 4.3(1)(a) is *“to ensure the height of development is appropriate to the condition of the site and its context.”* Through robust environmental analysis at the planning proposal stage, the site was determined appropriate for a building of up to 260m in height, as reflected in clause 6.32 the SLEP 2012. The current proposal seeks to include a minor architectural roof feature as envisaged by clause 5.6 above the 260m height limit and is therefore consistent with the height deemed appropriate for the site at the planning proposal stage.

Objective 4.3(1)(b) is *“to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas.”* The site itself is not an item of heritage significance, nor is it located in a heritage conservation area or special character area. Through appropriate siting of the tower and a podium massing that responds to the existing streetscape, appropriate height transitions are

achieved to other surrounding items of heritage significance. The competition jury for the Architectural Design Competition held for the site noted that in relation to the Former Judge's House, located at 531 Kent Street, "the set back at ground level on Kent Street balances activation and animation with deference to the Judge's House and its significance as a heritage item." These transitions are not impacted by the additional height associated with the architectural roof feature, which is minor.

Objective 4.3(1)(c) is "to promote the sharing of views." Prior to the gazettal of clause 6.32, the maximum building height at the site was 150m, with potential for two towers to be developed to that height. Clause 6.32 permits a single tower of up to 260m, by redistributing the massing of a potential eastern tower to the top of the western tower. This redistribution of massing has several advantages, in particular the sharing of views within the site, for the Lumiere building directly to the north and any future redevelopment of 525 George Street to the south. The height of the proposed tower, in the context of other buildings in Sydney, means that the minor roof feature does not impact upon views and any surrounding buildings. The proposed development is consistent with the massing envisaged by Clause 6.32, and it promotes the sharing of views, which are unaffected by the architectural roof feature.

Objective 4.3(1)(d) is "to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas." The site is located within Central Sydney and, as described in above, is surrounded by many of Sydney's tallest buildings. Situated at the southern end of the CBD, the tower marks the termination of the core CBD and transition to the lower southern part of the city comprising retail, residential and cultural uses. The tower will be an important connector between the convention uses at Darling Harbour and the financial heart of the CBD further down George Street, and will be a new landmark and sight point in the city. The additional height resulting from the architectural roof feature is minor in relation to the overall building height and does not impact the proposal's contribution to height transitions from Central Sydney to surrounding areas. Further, the site is located within an area identified as a potential tower cluster in the draft Central Sydney Planning Strategy, as shown in **Figure 2**. It is therefore acknowledged that the site is capable of accommodating additional height. The proposal achieves objective 4.3(1)(d) despite the minor exceedance.



Figure 2 Draft Central Sydney Planning Strategy potential tower cluster locations

Source: City of Sydney Draft Central Sydney Planning Strategy

Objective 4.3(1)(e) applies only to Green Square. Since the site is located within Central Sydney, objective 4.3(1)(e) does not apply to the proposed development.

3.1.2.3 The objectives of clause 5.6 Architectural roof features are achieved

Objective 5.6(1)(a) is *“to allow minor architectural roof features to exceed height limits.”* The proposed architectural roof feature is 10m in height. This is minor when compared to the total building height of 270m, with the architectural roof feature comprising just 3.7% of the total building height. The architectural roof feature and integrated plant and servicing equipment exceeds the height limit of 260m, in compliance with the permitted exceedance in objective 5.6(1)(a). No other component of the building exceeds the height limit. Objective 5.6(1)(a) is achieved.

Objective 5.6(1)(b) is *“to ensure that any architectural roof feature does not cause an adverse visual impact or adversely affect the amenity of neighbouring premises.”* The architectural roof feature is located well above the height of immediately neighbouring premises. As a result, the amenity of neighbouring premises will not be adversely affected by the architectural roof feature. The design of the architectural roof feature is such that it improves the visual appearance of the uppermost part of the tower, resulting in superior visual amenity to that of a height-compliant design with no architectural roof feature. Further, a detailed solar access analysis of surrounding residential buildings confirms that the architectural roof feature will not adversely affect the amenity of any neighbouring premises compared to the approved envelope. The architectural roof feature is appropriately landscaped to ensure that sight lines from neighbouring buildings to lift overrun and servicing equipment are minimised (see **Figure 4**). Objective 5.6(1)(b) is achieved.

Objective 5.6(1)(c) is *“to ensure that architectural roof features are considered in the design of a building and form an integral part of a building’s design.”* The proposed architectural roof feature is a central element of the building design and was present in the winning entry to the Architectural Design Competition for the site. The competition jury referred to the design as contributing a “compelling, enduring and beautiful tower element within the heart of Sydney” that “presents as a single form”. Further, the jury supported the integration of soft landscaping at key levels throughout the tower, including the rooftop. The architectural roof feature has been retained and its design developed to fulfil the comments of the jury. The architectural roof feature is a central element in the expression of the tower as a single form and includes landscaping to create a sense of visual dynamism (as shown by **Figure 4**). Objective 5.6(1)(c) is achieved.

The proposal achieves the objectives of clause 5.6.

Provisions of clause 5.6(3)

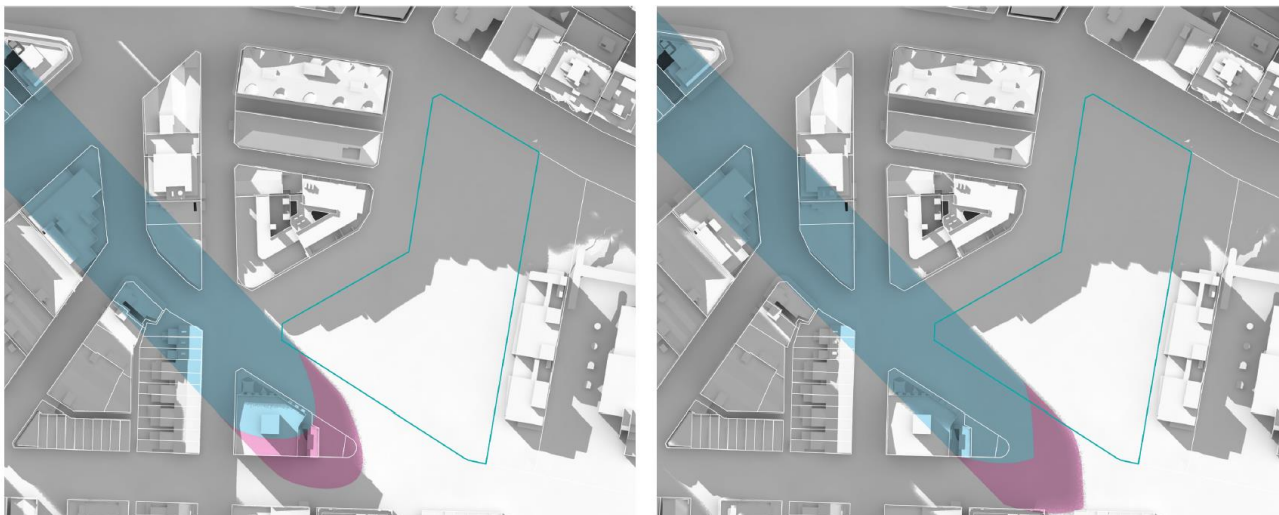
In addition to the objectives of clause 5.6(1) discussed above, clause 5.6(3) contains provisions that the consent authority must be satisfied are met prior to granting development consent to any development utilising clause 5.6.

Provision 5.6(3)(a)(i) requires that the architectural roof feature *“comprises a decorative element on the uppermost portion of a building.”* The proposed architectural roof feature is a decorative element located at the uppermost portion of the tower and is appropriately landscaped as a focal point of the tower’s representation. Further, as described above, the architectural roof feature is a central element to the design of the building and the expression of the tower form.

Provision 5.6(3)(a)(ii) requires that the architectural roof feature *“is not an advertising structure.”* The proposed architectural roof feature is not an advertising structure – instead it is a decorative element that is core to the architectural expression of the tower form.

Provision 5.6(3)(a)(iii) requires that the architectural roof feature *“does not include floor space area and is not reasonably capable of modification to include floor space area.”* The architectural roof feature does not include any floor space area and is not reasonably capable of modification to include floor space area.

Provision 5.6(3)(a)(iv) requires that the architectural roof feature *“will cause minimal overshadowing.”* A detailed analysis of the proposal’s overshadowing impacts on public space, as well as the impacts on solar access for surrounding residential apartment buildings, is provided as part of the DA. As shown in **Figure 3**, the roof feature results in a very minor amount of additional overshadowing to Harmony Park (from 2:55pm onwards on 21 June). The shadow mostly falls within the existing shadow caused by surrounding buildings and on the road. Therefore, the architectural roof feature causes minimal overshadowing.



14:55

15:00

Figure 3 Shadow diagram 2:55pm – 3:00pm, 21 June (shadow caused by roof feature shown in pink)

Source: Ingenhoven and Architectus

Finally, provision 5.6(3)(b) requires that “any building identification signage or equipment for servicing the building (such as plant, lift motor rooms, fire stairs and the like) contained in or supported by the roof feature is fully integrated into the design of the roof feature.” No building identification signage is proposed within the architectural roof feature. Servicing equipment including plant, lift motor rooms and fire stairs is contained within the architectural roof feature. The design of these elements has been carefully considered to ensure they are fully integrated into the design of the roof feature. The building servicing elements are set back from the edge of the building, concealed by planting, and reflect the curvilinear form of the tower façade and roof feature by using curved outer walls.

In light of the above, the consent authority can be satisfied that the provisions of clause 5.6(3) have been met by the proposed development.



Figure 4 Indicative render of architectural roof feature including proposed landscaping

Source: Ingenhoven and Architectus + Turf Design Studio

3.1.2.4 Conclusion on clause 4.6(3)(a)

The above sections have demonstrated that compliance with the maximum building height development standard is unreasonable or unnecessary in the circumstances of the case for the following reasons:

- The objectives of the maximum building height development standard, set out in clause 6.32 and 4.3, have been achieved by the proposed development notwithstanding a minor exceedance;
- The site-specific objectives and provisions of clause 6.32 do not intend to restrict the use of architectural roof features designed in accordance with clause 5.6. The proposed architectural roof feature has been designed in accordance with clause 5.6 in that it:
 - Achieves the objectives under clause 5.6(1); and
 - Satisfies the provisions of clause 5.6(3).

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

Clause 4.6(3)(b) of the SLEP 2012 requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* at [24]). Further, compliance with other planning instruments, such as SEPP65 and the Apartment Design Guide, does not justify non-compliance with the development standard and is not sufficient environmental planning grounds to justify contravening the development standard (*Baron Corporation* at [58]).

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site at [60]. In this instance the relevant aspect of the development is the additional building height of the architectural roof feature that exceeds the development standard.

There are sufficient environmental planning grounds to justify contravention of the maximum building height development standard in this specific instance, as described below.

- The building has been designed with regard to its significant position as the backdrop to the Sydney Square/St Andrews/Town Hall Special Character Area. It will be a landmark addition to the city skyline and will be prominent in views along George Street and from the future Town Hall Square. The building's highly visible civic location warrants a refined and high-quality singular form that respects its location. Whilst the architectural roof area is well defined from the rest of the tower through its landscaped areas, it is critical to the tower's expression as an elegant form through the continuation of the perimeter columns.
- The proposal is 270m high (including the architectural roof feature). It will be significantly higher than the other tall buildings in the immediate vicinity (i.e. Lumiere, Frasers Suites, Meriton Serviced Apartments). The proposed exceedance will not be visible from the buildings immediately surrounding the site and the proposed exceedance will have no impact on the views or daylight access to the surrounding buildings.
- The proposal includes a public bar and restaurant on level 80. Locating plant within the architectural roof feature will enable the provision of a new Sydney landmark attraction that will contribute to Sydney's status as a global city.

The SLEP 2012, through clause 5.6, encourages the use of architectural roof features to improve the design quality and visual appearance of buildings and accordingly permits such features to exceed the maximum building height. There is no intention in clause 6.32, or in the definition of building height, to exclude the application of clause 5.6 to development at 505-523 George Street, Sydney. Strict compliance with the height control in clause 6.32 would result in a building of lesser design quality and therefore an inferior outcome in terms of visual amenity, which is an outcome that would be inconsistent with the outcomes sought by the SLEP 2012.

Further, the proposed architectural roof feature has been designed in accordance with the provisions of clause 5.6, to ensure a high-quality decorative building element, with no additional floorspace and minimal overshadowing impacts.

For these reasons, there are sufficient environmental planning grounds to justify the contravention of the maximum building height development standard, as it promotes good design and amenity of the built environment (objective 1.3(g) of the *Environmental Planning and Assessment Act 1979*).

3.3 4.3 Clause 4.6(4)(a)(i): The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3)

This written request adequately and comprehensively addresses the matters required to be demonstrated by subclause (3).

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

In *Initial Action* at [27], it was held that 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.

3.4.1 Consistency with objectives of the development standard

Consistency with the objectives of the development standard is dealt with in **Section 3.1.2**.

3.4.2 Consistency with objectives of the zone

The proposed development is consistent with the objectives of the B8 Metropolitan Centre Zone, as demonstrated below.

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

The proposed development contributes substantially to Australia's participation in the global economy by delivering a mixed-use development that will exhibit design excellence and provide retail and entertainment uses. The proposed development is consistent with the objective 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

The proposed development will provide a mix of land uses including retail, entertainment, tourist accommodation, residential accommodation, childcare facility and community meeting facility. This intensity of land uses, combined with the high-quality design of the podium and tower, is commensurate with Sydney's global status. Therefore, the proposed development is consistent with the objective 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

The proposed land uses, as described above, are compatible and are characteristic of Sydney's global status, while also serving the wider community. The mix of land uses contained throughout the podium will serve visitors and residents of the tower, as well as the wider community. Delivery of public benefits including childcare, community meeting rooms and publicly accessible toilets through a planning agreement as described in **Section 3.1.2** will serve the workforce and community, while the proposed accommodation, retail and entertainment uses will attract visitors and contribute to Sydney's global status. The proposed development is consistent with the objective 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

The proposed development provides for a constrained supply of off-street parking and is well located to promote the use of public transport. It is within walking distance of Town Hall railway station, various bus stops and the future CBD and South East Light Rail. Further, the proposal will contribute to the activation of the highly pedestrianised George Street and Kent Street frontages, encouraging walking. The proposed development is consistent with the objective 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 proposal contributes substantially to the activation of George Street and Kent Street. Almost the entire George Street frontage comprises active uses, including five retail tenancies and a through-site link. Along Kent Street, the lobby, café and pedestrian access to the podium retail offerings provides activation. The proposed development is consistent with the objective 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.

3.5 Other Matters for Consideration

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

- (5) *In deciding whether to grant concurrence, the Secretary must consider:*
- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

These matters are addressed in detail below.

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

The variation of the maximum building height development standard does not raise any matter of significance for State or regional planning. We do note, however, that the proposal is consistent with the most recent metropolitan plan for Sydney in that it:

- Contributes to the global competitiveness of the harbour CBD by providing a building that will exhibit design excellence and includes an extensive retail offering and tourist accommodation;
- Will provide housing for the growing population of the Eastern Harbour City in a highly accessible location;
- Will contribute to the generation of jobs during both the construction and operational stages; and
- Implements an ESD Strategy to reduce ongoing carbon emissions and limit energy and water use.

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

There is no public benefit in maintaining the numerical building height development standard in this instance. As outlined in **Section 3.2** above, there are sufficient environmental planning grounds to warrant contravention of the development standard and it is therefore considered to be in the public interest for the variation to be supported in this case.

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

There are no other matters required to be taken into consideration.

4.0 Conclusion

This clause 4.6 variation request has been prepared as a precautionary measure and relates to a potential exceedance of the development standard for maximum building height caused by utilising clause 5.6 of the SLEP 2012, which permits architectural roof features, including plant and lift overruns, to exceed maximum building heights.

The assessment above demonstrates that compliance with the maximum building height development standard contained in clause 6.32 of the SLEP 2012 is unreasonable and unnecessary in the circumstances of the case because it meets the exceptions to the standard provided for in clause 5.6, and there are sufficient environmental planning grounds to justify the contravention.

Notwithstanding the variation to the maximum building height development standard, the proposed development:

- Achieves the objective of clause 6.32 of the SLEP 2012 by providing centre-based childcare facility, community meeting facility and publicly accessible toilets on-site;
- Achieves the objectives of clause 4.3 of the SLEP 2012 by:
 - Providing a building of a height that is appropriate for the site's CBD context, surrounded by many of Sydney's tallest buildings;
 - Appropriately transitioning to surrounding heritage items, particularly the Judge's House;
 - Promoting the sharing of views by providing a single, slender tower form; and
 - Marking the southern end of the core CBD.
- Achieves the objectives and provisions of clause 5.6 of the SLEP 2012 by providing an architectural roof feature that:
 - Is minor in the extent that it exceeds height limits and does not cause any adverse visual or amenity impacts to surrounding buildings;
 - Is a central part of the building design, expressed as an elegant, singular tower form;
 - Is a decorative element at the top of the tower that contains no habitable floorspace or signage;
 - Causes minimal additional overshadowing to public open space and has no additional impact on the solar access of key surrounding residential buildings when compared to the approved building envelope; and
 - Contains equipment for building servicing that is fully integrated into its design.
- Is in the public interest because it is consistent with the objectives of both the development standard and the B8 Metropolitan Centre Zone; and
- Is consistent with the most recent metropolitan plan for Sydney and does not raise any matter of significance for State or regional planning.
- Importantly, the minor exceedance in the maximum building height caused by the roof feature, plant and lift overrun does not provide habitable floor area and does not affect the maximum permissible gross floor area (GFA).

Therefore, the consent authority can be satisfied that there is sufficient justification for the height variation as proposed in accordance with the flexibility allowed under Clause 4.6 of the Sydney LEP 2012.

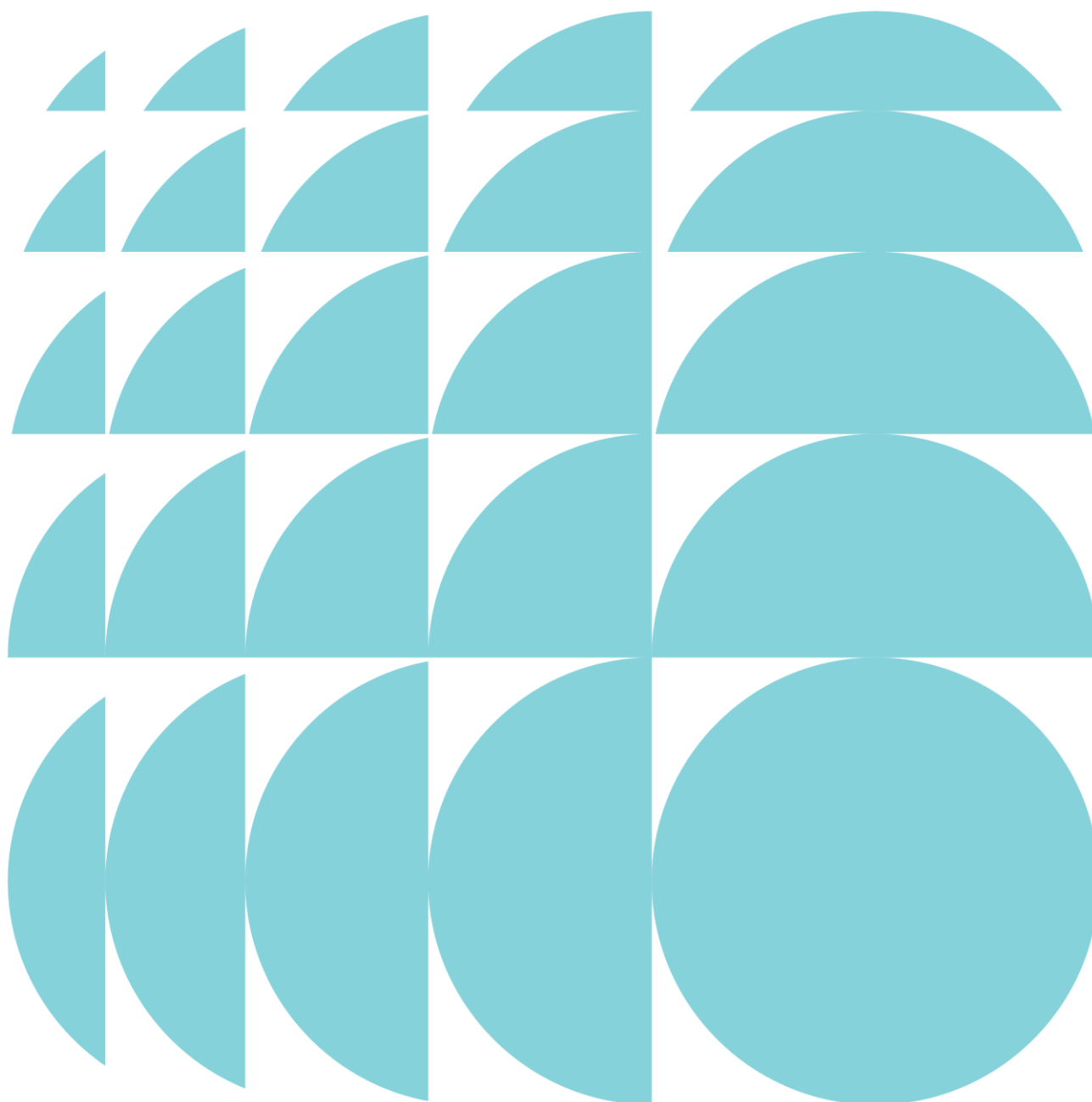
ETHOS URBAN

Clause 4.6 Variation Floor Space Ratio

505-523 George Street, Sydney
Development Application

Submitted to City of Sydney
On behalf of Coombes Property Group

23 March 2020 | 218575



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VERSION NO.	DATE OF ISSUE	REVISION BY	APPROVED BY
1.0 DRAFT	30 July 2019	JM	JH
2.0 FINAL	7 August 2019		

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1.0 Introduction

Overview of Justification for Clause 4.6 Variation Report

This clause 4.6 variation has been prepared to address a variation to the maximum floor space ratio development standard of the *Sydney Local Environmental Plan 2012* (the SLEP 2012) as it applies to the proposed time-limited serviced apartment use only.

The development application (the DA) seeks consent for a residential tower above a mixed use podium and basement levels (the base proposal). The base proposal complies with the applicable maximum floor space ratio for the site.

The DA also seeks consent for a time-limited alternate use for the purpose of serviced apartments over all or part of the residential tower for up to 20 years (the time-limited proposal). This clause 4.6 variation request has been prepared to address the exceedance of the development standard for maximum floor space ratio while the tower is used for the time-limited purpose of serviced apartments. Clause 4.5A of the SLEP 2012 provides for residential flat buildings to exclude the floor area of 'wind-affected balconies' from the calculation of total floor area. While it appears unintended, this does not apply to the time-limited serviced apartment use. This results in a 6.4% exceedance of the total permissible gross floor area for the time-limited serviced apartment use.

This 4.6 variation request demonstrates that compliance with the maximum floor space ratio development standard of the SLEP 2012 is unreasonable and unnecessary in the circumstances of the case and there are sufficient environmental planning grounds to justify the contravention.

Notwithstanding the variation to the maximum floor space ratio development standard, the proposed development:

- Achieves the objective of clause 6.32 of the SLEP 2012 by providing centre-based childcare, community meeting room and publicly accessible toilets on-site;
- Achieves the objectives of clause 4.4 of the SLEP 2012 by providing:
 - Sufficient floor space on site to facilitate a high-quality residential, retail and serviced apartment development that will contribute to making Sydney a globally competitive and innovative city.
 - A built form that is consistent with the site-specific DCP envelope which accommodates appropriate density and land use intensity without creating unacceptable impacts on traffic generation or pedestrian movements.
 - A significant and high-quality contemporary architectural contribution to the city skyline which will form an appropriate backdrop to the Sydney Square/Town Hall/St Andrews Special Character Area.
 - An intensity of development that is commensurate with a complying proposal and that can be adequately serviced by existing and planned infrastructure.
- Will provide a level of amenity for serviced apartments that is equivalent to the requirements of a residential flat development, in a manner that is consistent with the requirements of Part 4.4.8.5 of the SDCP 2012 and Council's serviced apartments planning proposal (September 2018).
- Is in the public interest because it is consistent with the objectives of both the development standard and the B8 Metropolitan Centre Zone; and
- Is consistent with the most recent metropolitan plan for Sydney and does not raise any matter of significance for State or regional planning.

Therefore, the consent authority can be satisfied that there is sufficient justification for the variation to the maximum floor space ratio development standard as proposed in accordance with the flexibility allowed under Clause 4.6 of the Sydney LEP 2012.

Executive Summary

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of Coombes Property Group (CPG). It is submitted to the City of Sydney (Council) in support of a DA for the construction and use of a mixed-use development at 505-523 George Street, Sydney (the site).

Clause 4.6 of the SLEP 2012 enables Council to grant consent for development even though the development contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

The DA seeks consent for residential apartments in a tower above a mixed use podium and basement levels for parking, servicing and storage (the base proposal). The maximum FSR for the base proposal is 15.1:1. The FSR for the base proposal has been calculated in accordance with clause 6.32(5)(b) '505-523 George Street-building height and floor space' of the SLEP 2012 by applying the base FSR under clause 4.4 'Floor space ratio' and including additional floor space in accordance with clause 6.4 'Accommodation floor space', clause 6.7 'Entertainment and club floor space', clause 6.21 'Design excellence' and clause 6.32(5)(a); and by excluding residential balcony floor space in accordance with clause 4.5A 'Balconies on certain residential buildings'.

The base proposal's maximum permissible FSR equates to total a gross floor area of 65,030m². The proposed gross floor area of the base proposal is 63,533m² which complies with the maximum permissible FSR.

The DA also seeks consent for a time-limited alternate use for the purpose of serviced apartments over all or part of the residential tower for up to 20 years (the time-limited proposal). The maximum FSR for the time-limited proposal if the whole tower is used for the purpose of serviced apartments is 15.22:1. The FSR for the time-limited proposal has been calculated in accordance with clause 6.32(5)(b) '505-523 George Street-building height and floor space' of the SLEP 2012 by applying the base FSR under clause 4.4 'Floor space ratio' and including additional floor space in accordance with clause 6.4 'Accommodation floor space', clause 6.7 'Entertainment and club floor space', and clause 6.21 'Design excellence' and clause 6.32(5)(a). Clause 4.5A does not apply to serviced apartment balconies, and the balcony floor space excluded from the calculation of total floor area for the base proposal cannot be excluded to the time-limited serviced apartment use for the purpose of calculating total floor area.

The time-limited proposal will not result in any changes to the external built form, appearance or building envelope.

The time-limited proposal's maximum permissible FSR equates to total a gross floor area of 65,577m². If the area of wind-affected balconies is not excluded the proposed gross floor area of the time-limited proposal is 69,772m² which exceeds the maximum permissible FSR by 4,195m² (6.4 %). The proposed exceedance is directly attributable to the inclusion of 'wind-affected balconies' in the total floor space calculations which would otherwise be excluded under clause 4.5A if the serviced apartments were residential apartments.

The proposed apartments include balconies designed to be partially enclosed in accordance with the requirements of clause 4.5A of the SLEP 2012 and part 4.2.3.13 of the SDCP 2012 (refer **Figure 1**). The balconies are designed to mitigate wind and other weather impacts which will increase their comfort and usability and consequentially improve the amenity of the residential apartments including when used as serviced apartments. However, as a consequence of the partial enclosure the balcony area is defined as gross floor area under the SLEP 2012. Clause 4.5A permits the balcony floor area to be excluded from the calculation of total floor area for **residential flat buildings only**. Therefore, while the tower is used for the purpose of serviced apartments, the balcony floor area cannot be excluded, under clause 4.5A, from the calculation of total floor area. If serviced apartments were eligible for the floor space exclusion under clause 4.5A of the SLEP 2012, the time-limited proposal would comply with the maximum permissible FSR.

Further, Part 4.4.8.5 (2) of the SDCP 2012 states that:

"Serviced apartments are to be designed so that the level of residential amenity within each apartment is equivalent to the requirements of a residential flat development"

Council's position that serviced apartments perform to the same level of residential apartments is in the process of being further reinforced by proposed amendments to SLEP 2012 to require:

- *Serviced apartments provide the same level of amenity as residential flat buildings; and*
- *Substandard residential accommodation occurring through the conversion of serviced apartments to residential flat buildings is prevented*
- *Development which includes serviced apartments, must be considered against the design principles in:*
 - *State Environmental Planning Policy No. 65 and*
 - *the Apartment Design Guide*

In this context, it is reasonable to apply the development standard with a degree of flexibility to provide the same level of amenity to time-limited serviced apartments as applies to residential apartments.

While the base proposal complies with the maximum FSR for the site, notwithstanding, this 4.6 request for a variation to the maximum floor space ratio has been prepared as a precaution to address the non-compliance resulting from the time-limited serviced apartment use and its exclusion from the application of clause 4.5A.

The request should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban for the DA.

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

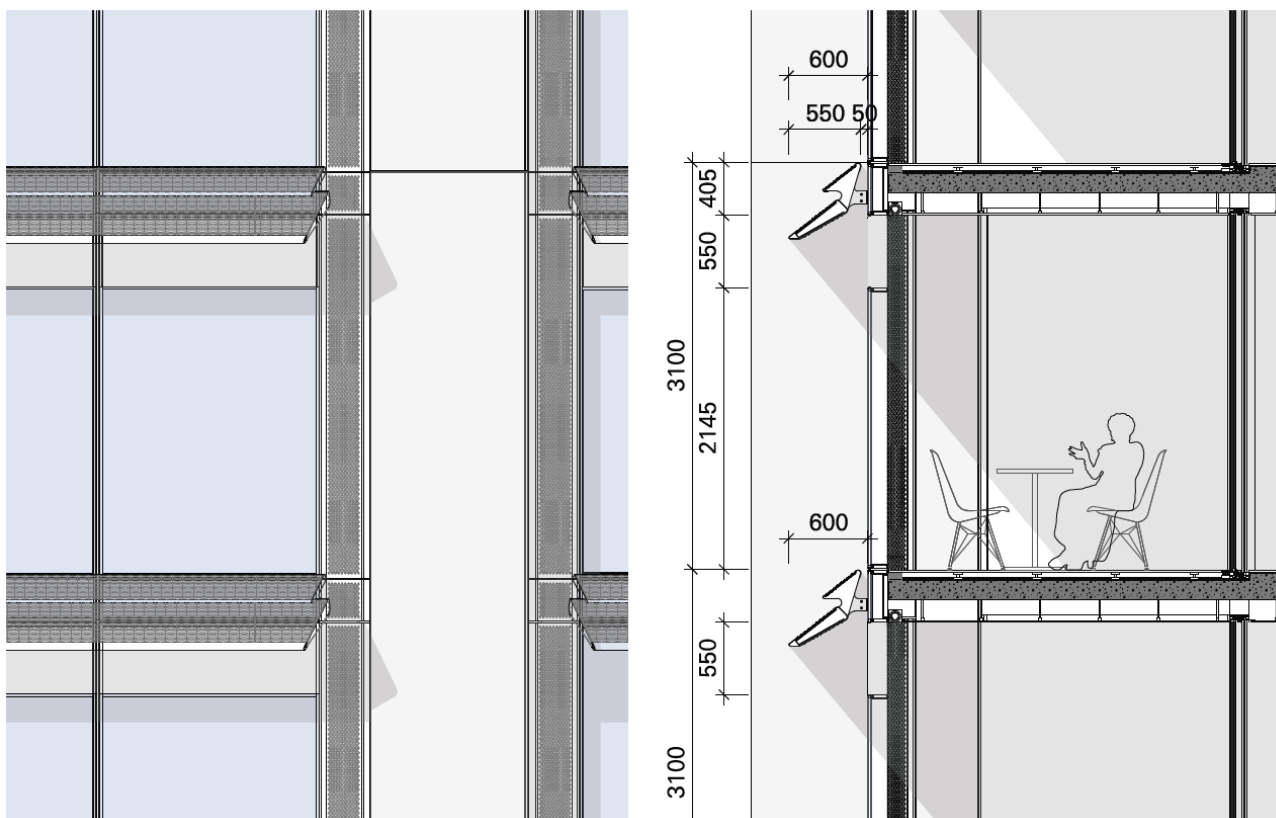


Figure 1 Wind-affected balconies design (left: tower elevation, right: section)

Source: Ingenhoven and Architectus

2.0 Development Standard to be Varied

2.1 Is the Planning Control in Question a Development Standard?

The maximum FSR control in the SLEP 2012 is a development standard.

2.2 Relevant Development Standard

This clause 4.6 variation request seeks to justify contravention of the development standard set out in the SLEP 2012. Clause 6.32(5)(b) provides that:

- (5) *A building on land to which this clause applies, in respect of which the consent authority is satisfied of the matters referred to in subclause (4):*
- (b) *despite clause 4.4, may have a gross floor area that exceeds the maximum permitted as a result of the floor space ratio shown for the land on the Floor Space Ratio Map by an amount no greater than the sum of any additional floor space for which the building may be eligible under this Plan.*

Under clause 4.4 of the SLEP 2012, the site is afforded a base FSR of 8:1, however, as recognised by clause 6.32(5)(b) there are other provisions in the SLEP 2012 that are available to achieve an FSR beyond 8:1. Of relevance are the following:

- Clause 6.4 (c) and (d) Accommodation floor space:
 - The site is identified as within 'Area 2' on the SLEP FSR map where clause 6.4(c) stipulates that a building used for office premises, business premises or retail premises is eligible for an additional 4.5:1, and clause 6.4(d) stipulates that a building used for the purpose of residential accommodation, serviced apartments, hotel or motel accommodation, community facilities or centre-based child care facilities is eligible for an additional 6:1.
- Clause 6.7 Entertainment and club floor space:
 - Clause 6.7 stipulates that a building in Central Sydney that includes parts of the basement used for the purpose of entertainment facilities is eligible for an amount of additional floor space equivalent to the basement area used for entertainment facilities.
- Clause 6.21 (7)(b) Design excellence
 - Clause 6.21 stipulates that a building demonstrating design excellence is eligible for an amount of additional floor space of up to 10% of the amount shown on the Floor Space Ratio Map and any accommodation floor space for which the building is eligible under Division 1 of the SLEP 2012.
- Clause 6.32(5)(a) 505-523 George Street-building height and floor space
 - Clause 6.32 stipulates that a building on land to which this clause applies is eligible for an amount of additional floor space equal to the gross floor area of any part of the building podium that will be used for the purpose of a centre-based child care facility, excluding any outdoor play area, provided the building podium includes a centre-based child care facility, publicly accessible toilets, and a community meeting room.

Accordingly, if the whole tower is used for the purpose of serviced apartments the SLEP 2012 provides the maximum permissible FSR and gross floor area (GFA) for the site (without any application under clause 4.6) as set out in **Table 1** below. For clarity, **Table 1** outlines the maximum FSR applicable to the site under the time limited serviced apartment use. As outlined in the SEE, there are a number of potential residential / serviced apartment configurations, which would result in a different maximum FSR, however, the maximum FSR under any other configuration would be lower than the FSR contemplated in **Table 1**.

Table 1 Time-limited proposal GFA and FSR with 10% design excellence bonus

Component	Proposed GFA	Proposed FSR	Proportion
Serviced Apartments (including balconies and ancillary podium and basement uses)	62,446m ²	14.50:1	89.5%
Retail	6,911m ²	1.60:1	9.9%
Community facility	263m ²	0.04:1	0.4%
Cinema (above basement)	152m ²	0.06:1	0.2%
Childcare	1,481m ² (additional floor space)	-	-
Entertainment floor space	816m ² (additional floor space)	-	-
Design Excellence	5,962m ²	-	-
Total	69,772m²	16.20:1	-
Maximum permissible	65,577m²	15.22:1	-

2.3 Variation Sought

The maximum FSR for the site under the SLEP 2012 if the whole tower is used for the purpose of serviced apartments is 15.22:1 which equates to a total GFA of 65,577m². The proposed GFA if the whole tower is used for the purpose of serviced apartments is 69,772m² which equates to a total FSR of 16.20:1. The difference equates to 4,195m² (6.4%) and is entirely attributable to the wind-affected balconies being included in the total floor area calculation rather than excluded, which they are under the base residential proposal. As a precaution, the variation therefore seeks consent to increase the total GFA for the time-limited proposal by a maximum of 4,195m² (6.4%) (and includes increases of less than 4,325m² where the serviced apartment use is less than the maximum proposed as provided in Section 6.2 of the SEE) which would result in a maximum FSR of 16.20:1 on the site for the building under the time-limited proposal. If the area of wind-affected balconies is excluded the proposed gross floor area of the time-limited proposal is 65,527m². The time-limited proposal's GFA will not exceed the maximum permissible FSR in circumstances where the 4.6 variation request to exclude the area of the wind affected balconies is granted.

3.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the SLEP 2012 provides that:

4.6 Exceptions to development standards

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

Further, clause 4.6(4)(a) of the SLEP 2012 provides that:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
- (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

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

(b) *the concurrence of the Secretary has been obtained.*

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

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827 (*Wehbe*);
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (*Four2Five*);
3. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (*Initial Action*);
4. *Baron Corporation Pty Ltd v The Council of the City of Sydney* [2018] NSWLEC 1552 (*Baron Corporation*); and
5. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (*Al Maha*).

Role of the consent authority

The role of the consent authority in considering this request for a clause 4.6 variation has been recently explained by the NSW Court of Appeal in *Initial Action* and in *Al Maha* to require that the consent authority needs to be satisfied in relation to two matters:

- That the applicant's request has adequately addressed the matters in in clause 4.6(4)(a)(i); and
- That the proposed development will be in the public interest because of its consistence with the objectives of the development standard and the zone objectives.

The Council is required to form these 2 opinions first before it considers the merits of the DA and it can only consider the merits of the DA if it forms the required satisfaction in relation to the matters. In particular, the Council needs to be satisfied that there are proper planning grounds to grant consent and that the contravention of the standard is justified. This report provides the basis for the Council to reach this level of satisfaction.

The relevant matters contained in clause 4.6 of the SLEP 2012, with respect to the maximum FSR standard, are each addressed below, including with regard to the above decisions.

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

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

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]; *Initial Action* at [16]).

As the language used in subclause 4.6(3)(a) of the SLEP 2012 is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request. The five ways outlined in *Wehbe* are:

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

- The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (**Fourth Way**).
- The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Way**).

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances because the objectives of the standard are achieved notwithstanding the non-compliance with the standard (the First Way).

In addition, this written request also establishes that compliance with the development standard is unreasonable as the provision of wind-affected balconies with the time-limited serviced apartments is entirely consistent with the Council's resolution in September 2018 to support an amendment to the SLEP 2012 to ensure consistency between the design of serviced apartments and residential apartments, particularly:

- *Serviced apartments provide the same level of amenity as residential flat buildings; and*
- *Substandard residential accommodation occurring through the conversion of serviced apartments to residential flat buildings is prevented*
- *Development which includes serviced apartments, must be considered against the design principles in:*
 - *State Environmental Planning Policy No. 65 and*
 - *the Apartment Design Guide*

We understand the Planning Proposal facilitating the proposed SLEP 2012 amendment is with the Department of Planning, Infrastructure and Environment for finalisation. In this context, it is reasonable to apply the development standard with a degree of flexibility providing the same level of amenity to time-limited serviced apartments as applies to residential apartments.

3.1.1 The underlying objectives or purposes of the development standard

The objective of clause 6.32 of the SLEP 2012 is:

- (1) *The objective of this clause is to provide for additional building height on a site if the development of the site provides for the following:*
- centre-based child care facilities,*
 - publicly accessible toilets,*
 - community meeting rooms.*

Subclause 6.32(5)(b) permits additional floor space and has the effect of amending the maximum floor space ratio identified in clause 4.4. Therefore, the objective of the clause should not be considered in isolation and needs to be considered in light of the objectives of the floor space ratio standard in clause 4.4. The objectives of the general floor space ratio development standard contained in clause 4.4 of the SLEP 2012 are:

- to provide sufficient floor space to meet anticipated development needs for the foreseeable future,*
- to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,*
- to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,*
- to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.*

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

The following sections demonstrate that the objectives presented in **Section 3.1.1** immediately above are achieved notwithstanding the potential non-compliance.

3.1.2.1 The objective of clause 6.32 505-523 George Street – building height and floor space is achieved

The building provides a centre-based childcare facility, publicly accessible toilets and community meeting room. The proposed development achieves the objective of clause 6.32 despite the minor exceedance of floor area.

3.1.2.2 The objectives of clause 4.4 Floor space ratio are achieved

Objective 4.4(1)(a) is “to provide sufficient floor space to meet anticipated development needs for the foreseeable future”. The proposed development is the outcome of a significant and considered planning process for the redevelopment of a key George Street site. The base proposal complies with the maximum FSR for the site and will ultimately deliver approximately 507 apartments above a high-quality mixed use podium in a central Sydney location. The podium will provide a range of child care, conference, retail, food and drink, and entertainment uses that will contribute to economic and social activity within the Sydney CBD.

Objective 4.4(1)(b) is “to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic”

Density of development

The density of the development within the City of Sydney is regulated by the FSR controls within the SLEP 2012. The base proposal can achieve a maximum FSR of 15.1:1 under the current provisions of the SLEP 2012. This includes the full utilisation of the 10% floor space bonus awarded for design excellence where a competitive design process has been held in accordance with the City of Sydney Competitive Design Policy. The base proposal complies with maximum FSR.

The time-limited proposal is contained within the same building envelope and can achieve a maximum FSR of 15.22:1 under the current provisions of the SLEP 2012. This includes the full utilisation of the 10% floor space bonus awarded for design excellence where a competitive design process has been held in accordance with the City of Sydney Competitive Design Policy. As discussed above, the time-limited proposal cannot utilise clause 4.5A, otherwise it would comply with the maximum FSR.

The proposed variation to the maximum FSR for the time-limited use does not alter the base proposal’s compliance and the Council’s expectations for density on the site as set out in the SLEP 2012 which will be met.

Built form

The built form for the site is regulated by the site-specific building envelope within the SDCP 2012. The built form envelope for the base proposal and the time-limited proposal is identical. The assessment in the SEE demonstrates that the proposed development achieves the objectives of the site-specific DCP and that the built form is generally consistent with the site-specific building envelope within the SDCP 2012.

Land use intensity

The land use intensity is regulated by the maximum amount of gross floor area that can be accommodated on the site. The base proposal accommodates 63,533m² which complies with maximum gross floor area permissible under the FSR. The base proposal is therefore consistent with the City’s expectations for land use intensity on the site.

The time-limited proposal will increase the permissible gross floor area by 6.4%, which is a direct consequence of including wind-affected balconies in the calculation of total floor area. Due to the nature of their use, the wind-affected balconies will not intensify the land uses on site above the level achievable under the maximum permissible FSR or gross floor area.

Control Generation of Vehicle Traffic

The additional gross floor area resulting from the wind-affected balconies will not give rise to any additional impacts from vehicle traffic as the floor area will not increase the maximum number of car parking spaces permissible under Part 7 Division 1 of the SLEP 2012.

Control Generation of Pedestrian Traffic

The provision of a publicly accessible through-site link in the podium will improve the CBD pedestrian network by providing a safe pedestrian path between George Street and Kent Street.

Objective 4.4(1)(c) is “to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure”. The proposed 6.4% increase in the maximum FSR permissible for the time-limited proposal is not significant. It relates entirely to apartment balconies and will not create an intensity of development above an intensity that is commensurate with a complying proposal and with demands that can be met by the capacity of existing and planned infrastructure.

Objective 4.4(1)(d) is “to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality”. The site is located within the Sydney CBD on the periphery of the Sydney Square/Town Hall/St Andrews Special Character Area. Clause 6.3.7.4 in the site-specific DCP includes provisions to regulate the proposal’s impact on the Special Character Area. **Table 2** below considers the proposal against the provisions and demonstrates that it will provide an appropriate contemporary contribution to the locality.

Table 2 Consideration of Site-Specific DCP clause 6.3.7.4 - Sydney Square/Town Hall/St Andrews Special Character Area

Provision	Comment
(1) The tower component is to provide an appropriate backdrop to the civic character of the Sydney Square/Town Hall/St Andrews Special Character Area by way of suitable facade composition, building materials, colours and textures, and by appropriate building articulation.	<p>A Heritage Impact Statement has been prepared and is provided at Appendix X. The report finds that the tower provides an appropriate backdrop to the civic character of the Sydney Square / Town Hall / St Andrews Special Character Area and concludes that the proposal will have no impact on the heritage items which are located within the area</p> <p>Furthermore, the competition jury noted that <i>‘the use of a light-coloured concrete and the texture created by the expressed structure and shading elements responds and contributes to a recognisable Sydney tower language in contemporary form.’</i></p>
(2) The tower component is to be appropriately articulated to terminate vistas.	The tower has been positioned in accordance with the site-specific DCP envelope and presents as a singular form. The height and articulation of the tower form, as set between Fraser Suites and Lumiere, provides a terminating vista when viewed from the Sydney Square / Town Hall / St Andrews Special Character Area.

3.1.2.4 Conclusion on clause 4.6(3)(a)

The above sections have demonstrated that compliance with the maximum floor space ratio development standard is unreasonable or unnecessary in the circumstances of the case for the following reasons:

- The objectives of the maximum floor space ratio development standard, set out in clause 6.32 and 4.4, have been achieved by the proposed development notwithstanding a minor exceedance as a result of wind-affected balconies being included in the calculation of total floor area for the time-limited proposal;
- The site-specific objectives and provisions of clause 6.32 do not intend to prevent the provision of appropriately designed balconies that will provide the same level of amenity to residential apartments and serviced apartments.

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

Clause 4.6(3)(b) of the SLEP 2012 requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* at [24]). Further, compliance with other planning instruments, such as SEPP 65 and the Apartment Design Guide, does not justify non-compliance with the development standard and is not sufficient environmental planning grounds to justify contravening the development standard (*Baron Corporation* at [58]).

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site at [60]. In this

instance the relevant aspect of the development are the wind-affected balconies that result in the exceedance of the development standard.

There are sufficient environmental planning grounds to justify contravention of the maximum floor space ratio development standard in this specific instance, as described below.

- The building has been designed with regard to its significant position as the backdrop to the Sydney Square/St Andrews/Town Hall Special Character Area. It will be a landmark addition to the city skyline and will be prominent in views along George Street and from the future Town Hall Square. The building's highly visible civic location warrants a refined and high-quality singular form that respects its location. Partially enclosing and integrating the balconies into the building façade contributes to this outcome.
- The serviced apartment use will generate additional employment and economic activity that would not otherwise occur. This will contribute the Council's strategic aim to increase employment in Central Sydney. If the serviced apartment use was unable to operate, the opportunity for employment and economic activity at the site would be reduced.
- The Council recognise that open balconies in Sydney above 30 metres have reduced usability due to Sydney's high wind environment. The proposed development is 270 metres high. Open balconies on buildings this tall in this location, regardless of the land use would be unusable. Partially enclosing the balconies provides serviced apartments with the same level of environmental comfort as residential apartments.
- Buildings of this significance, size and height in Australia are rare. To enable a development of this scale to be realised, and enhance Sydney's status as a global city, it is proposed to seek a degree of land use flexibility. A particular consequence of applying a degree of flexibility is that the enclosed balconies create a technical non-compliance. The technical non-compliance should be considered with a degree of flexibility to promote good design and to allow the orderly and economic use and development of the land.
- The site is approximately 4,308m², and is large in the context of central Sydney. There is sufficient space within the site to accommodate the enclosed balconies without creating unreasonable environmental impacts to the surrounding buildings or public domain.

Further, the SLEP 2012, through clause 4.5A, encourages the use of wind-affected balconies to improve the design quality and amenity of apartments in residential flat buildings over 30 metres high and accordingly permits wind-affected balconies to be excluded from the calculation of total floor area in certain residential flat buildings. The Council resolved on 17 September 2018, following the public exhibition of their serviced apartments planning proposal, to amend the SLEP 2012 to ensure 'serviced apartments provide the same level of amenity as residential flat buildings' as required by Part 4.4.8.5 of the SDCP 2012. The wind-affected balconies have been designed in accordance with the requirements of clause 4.5A of the LEP 2012 and part 4.2.3.13 of the SDCP 2012. They are integrated into the architectural language of the tower façade and will contribute to the high-quality appearance of the proposed development. Strict compliance with the floor space development standard for the time-limited use is inconsistent with the City's planning proposal and would be contrary to their intention to enable serviced apartments to provide the same level of amenity as residential flat buildings.

For these reasons, there are sufficient environmental planning grounds to justify the contravention of the maximum floor space ratio development standard, as it promotes good design and amenity of the built environment (objective 1.3(g) of the *Environmental Planning and Assessment Act 1979*).

3.3 4.3 Clause 4.6(4)(a)(i): The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3)

This written request adequately and comprehensively addresses the matters required to be demonstrated by subclause (3).

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

In *Initial Action* at [27], it was held that 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.

3.4.1 Consistency with objectives of the development standard

Consistency with the objectives of the development standard is dealt with in **Section 3.1.2**.

3.4.2 Consistency with objectives of the zone

The proposed development is consistent with the objectives of the B8 Metropolitan Centre Zone, as demonstrated below.

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

The proposed development contributes substantially to Australia's participation in the global economy by delivering a mixed-use development that will exhibit design excellence and provide retail and entertainment uses. The proposed development is consistent with the objective 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

The proposed development will provide a mix of land uses including retail, entertainment, tourist accommodation, residential accommodation, childcare and community meeting rooms. This intensity of land uses, combined with the high-quality design of the podium and tower, is commensurate with Sydney's global status. Therefore, the proposed development is consistent with the objective 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

The proposed land uses, as described above, are compatible and are characteristic of Sydney's global status, while also serving the wider community. The mix of land uses contained throughout the podium will serve visitors and residents of the tower, as well as the wider community. Delivery of public benefits including childcare, community meeting rooms and publicly accessible toilets through a planning agreement as described in **Section 3.1.2** will serve the workforce and community, while the proposed accommodation, retail and entertainment uses will attract visitors and contribute to Sydney's global status. The proposed development is consistent with the objective 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

The proposed development provides for a constrained supply of off-street parking consistent with SLEP 2012 and is well located to promote the use of public transport. It is within walking distance of Town Hall railway station, various bus stops and the future CBD and Eastern Suburbs Light Rail. Further, the proposal will contribute to the activation of the highly pedestrianised George Street and Kent Street frontages, encouraging walking. The proposed development is consistent with the objective 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 proposal contributes substantially to the activation of George Street and Kent Street. Almost the entire George Street frontage comprises active uses, including five retail tenancies and a through-site link. Along Kent Street, the lobby, café and pedestrian access to the podium retail offerings provides activation. The proposed development is consistent with the objective 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 and is a significant improvement on the existing level of activation on-site.

3.5 Other Matters for Consideration

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

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

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

These matters are addressed in detail below.

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

The variation of the maximum floor space ratio development standard does not raise any matter of significance for State or regional planning. We do note, however, that the proposal is consistent with the most recent metropolitan plan for Sydney in that it:

- Contributes to the global competitiveness of the harbour CBD by providing a building that will exhibit design excellence and includes an extensive retail offering and tourist accommodation;
- Will provide housing for the growing population of the Eastern Harbour City in a highly accessible location;
- Will contribute to the generation of jobs during both the construction and operational stages; and
- Implements an ESD Strategy to reduce ongoing carbon emissions and limit energy and water use.

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

There is no public benefit in maintaining the numerical floor space ratio development standard in this instance. As outlined in **Section 3.2** above, there are sufficient environmental planning grounds to warrant contravention of the development standard and it is therefore considered to be in the public interest for the variation to be supported in this case.

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

There are no other matters required to be taken into consideration.

4.0 Conclusion

The base proposal for a residential tower above a mixed use podium complies with the applicable maximum floor space ratio for the site. This clause 4.6 variation request has been prepared as a precautionary measure and relates to the exceedance of the development standard for maximum floor space ratio while the tower is used for the time-limited purpose of serviced apartments. Clause 4.5A which enables residential flat buildings to exclude the floor area of 'wind-affected balconies' from the calculation of total floor area cannot be utilised by serviced apartments. This results in a maximum 6.4% exceedance of the total gross floor area for the time-limited serviced apartment use.

The assessment above demonstrates that compliance with the maximum floor space ratio development standard is unreasonable and unnecessary in the circumstances of the case and there are sufficient environmental planning grounds to justify the contravention.

Notwithstanding the variation to the maximum floor space ratio development standard, the proposed development:

- Achieves the objective of clause 6.32 of the SLEP 2012 by providing centre-based childcare, community meeting room and publicly accessible toilets on-site;
- Achieves the objectives of clause 4.4 of the SLEP 2012 by providing:
 - Sufficient floor space on site to facilitate a high-quality residential, retail and serviced apartment development that will contribute to making Sydney a globally competitive and innovative city.
 - A built form that is consistent with the site-specific DCP envelope which accommodates appropriate density and land use intensity without creating unacceptable impacts on traffic generation or pedestrian movements.
 - A significant and high-quality contemporary architectural contribution which is an appropriate backdrop to the Sydney Square/Town Hall/St Andrews Special Character Area.
 - An intensity of development above that is commensurate with a complying proposal and the capacity of existing and planned infrastructure.
- Will provide a level of amenity for serviced apartments that is equivalent to the requirements of a residential flat development, in a manner that is consistent with the requirements of Part 4.4.8.5 of the SDCP 2012 and Council's serviced apartments planning proposal (September 2018).
- Is in the public interest because it is consistent with the objectives of both the development standard and the B8 Metropolitan Centre Zone; and
- Is consistent with the most recent metropolitan plan for Sydney and does not raise any matter of significance for State or regional planning.

Therefore, the consent authority can be satisfied that there is sufficient justification for the variation to the floor space ratio development standard as proposed in accordance with the flexibility allowed under Clause 4.6 of the Sydney LEP 2012.