

Attachment C

**Clause 4.6 Variation Request – Floor to
Ceiling Height**

CLAUSE 4.6 VARIATION REQUEST

FLOOR TO CEILING HEIGHT: SEPP 65 & APARTMENT DESIGN GUIDE

**890-898 BOURKE
STREET, ZETLAND**

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1. INTRODUCTION

This revised clause 4.6 variation request has been prepared by Urbis on behalf of Baozheng Pty Ltd, the applicant for a development application (DA) comprising a new mixed use development at 890-898 Bourke Street, Zetland.

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

The variation request is made pursuant to clause 4.6 of the *Sydney Local Environmental Plan 2012* (SLEP 2012).

2. ASSESSMENT FRAMEWORK

2.1. CLAUSE 4.6 OF SLEP 2012

Clause 4.6 of SLEP 2012 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 are:

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

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

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

- a) Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- b) There are sufficient environmental planning grounds to justify contravening the development standard.*

Furthermore, the consent authority must be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone, and the concurrence of the Secretary has been obtained.

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

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

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

This document forms a clause 4.6 written request to justify the contravention of the recommended minimum ceiling heights specified in Part 4C of the Apartment Design Guide (ADG). The assessment of the proposed variation has been undertaken in accordance with the requirements of the SLEP 2012, Clause 4.6 Exceptions to Development Standards.

3. SITE AND LOCALITY

3.1. SUBJECT SITE

The site is known as 890-898 Bourke Street, Zetland and forms part of the Green Square Urban Renewal Area. It is legally described as Lot 100 on DP788794 and has a site area of 5,194sqm.

The site is irregular in shape and has a 70.10m frontage to Bourke Street and a depth of up to 89.71m. An aerial photograph of the site is provided at **Figure 1**.

Figure 1 – Aerial Photograph



Key characteristics of the site include:

- The site contains a two-storey industrial/warehouse complex comprising eight formerly strata titled factory units (recently consolidated) occupied by a variety of commercial, light industrial and warehouse operators.
- Vehicular access is via a driveway from Bourke Street, located centrally along the frontage.
- A minor fall of 1.3m from the south-eastern (rear) corner to the north-western corner to Bourke Street. This represents a grade of 1 in 85 or 1.2%.
- There are no easements or rights of carriageway affecting the land.
- There is no significant vegetation within the site. The concept DA consent grants approval for the removal of all the existing trees on the site.
- Street trees and trees within the adjoining site at 906 Bourke Street are required to be retained and protected as detailed in the concept DA consent.

3.2. PLANNING CONTEXT

A detailed description of the site planning context is provided in the Statement of Environmental Effects prepared by Urbis.

The subject site is zoned B4 Mixed Use, is subject to a base floor space ratio (FSR) of 2.1:1 and the maximum height of building standard is 22m.

A DA is currently under assessment by the City of Sydney Council. The proposed development complies with the maximum 2.2:1 FSR (2:1 FSR + 10% design excellence bonus) and height of building standards in the SLEP 2012.

4. THE PROPOSED DEVELOPMENT

4.1. DEVELOPMENT SUMMARY

The proposed development comprises:

- Demolition of all existing buildings and structures onsite.
- Excavation to a depth of approximately 7.5m for two basement levels accommodating car spaces, bicycle spaces, motorcycle parking areas, car share spaces, service spaces, individual storage areas, garbage storage area, on-site detention tank and plant areas.
- Construction of a six storey mixed use development with a total GFA of 11,426sqm (maximum FSR of 2.2:1):
 - Ground floor residential lobby, 129sqm retail tenancy and communal open space;
 - Six levels of residential apartments comprising 142 dwellings; and
 - Communal open spaces including an internal courtyard, rooftop communal open space on Level 5; and through-site pedestrian link, which is to be publicly accessible.
- Site remediation and infrastructure works.
- Landscaping works including communal open spaces at ground level and Level 5, planting along the façade of private terraces on Levels 1, 3 and 5, and a landscaped through-site link adjacent to the north-eastern boundary.

5. EXTENT OF CONTRAVENTION

5.1. VARIATION TO CEILING HEIGHT

This clause 4.6 variation request accompanies a DA seeking consent for the development comprising a mixed use building.

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

The proposed ground and first floors have a minimum floor to ceiling height of 3.3m as set out in the ADG, with the exception of Level 1 in the eastern portion of the site. This non-compliant area relates to only 11 apartments (and associated circulation spaces) as shown in **Figure 2** and will have a floor to ceiling height of 2.7m consistent with the requirement for habitable residential rooms.

It is noted that the mechanical ventilation to kitchens and horizontal plenums for noise-affected apartments have been designed and located so they do not reduce the floor to ceiling height of kitchens, living rooms and bedrooms. All habitable rooms, including kitchens achieve a minimum floor to ceiling height of 2.7m.

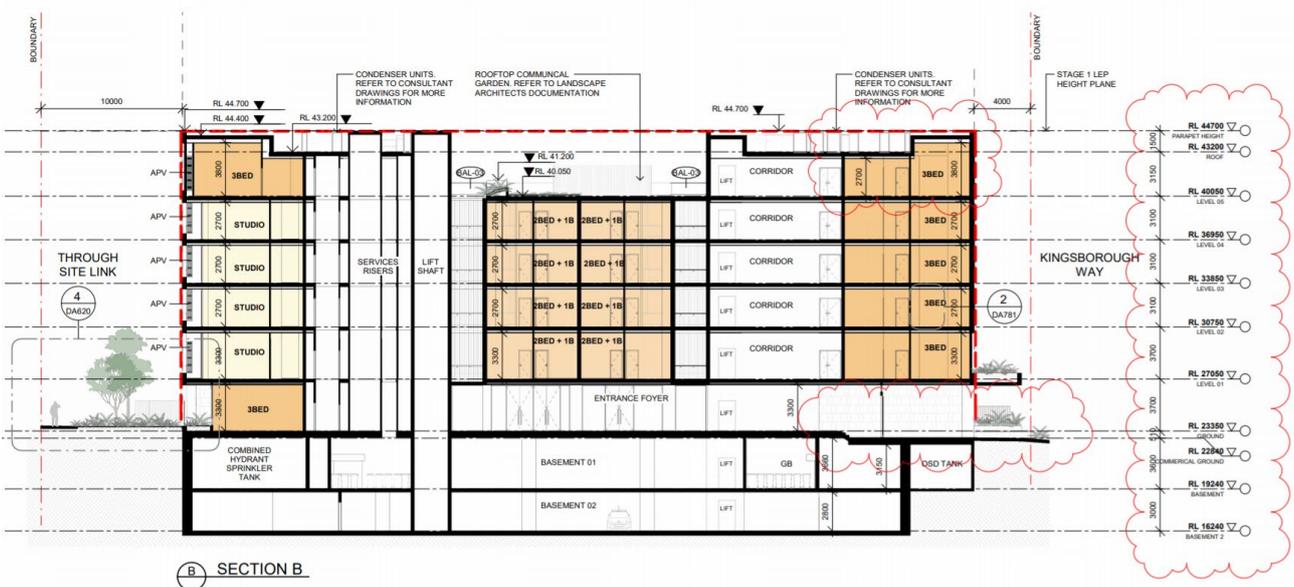
Figure 2 – Level 1 footprint where 2.7m floor to ceiling height proposed



Source: WMK Architecture

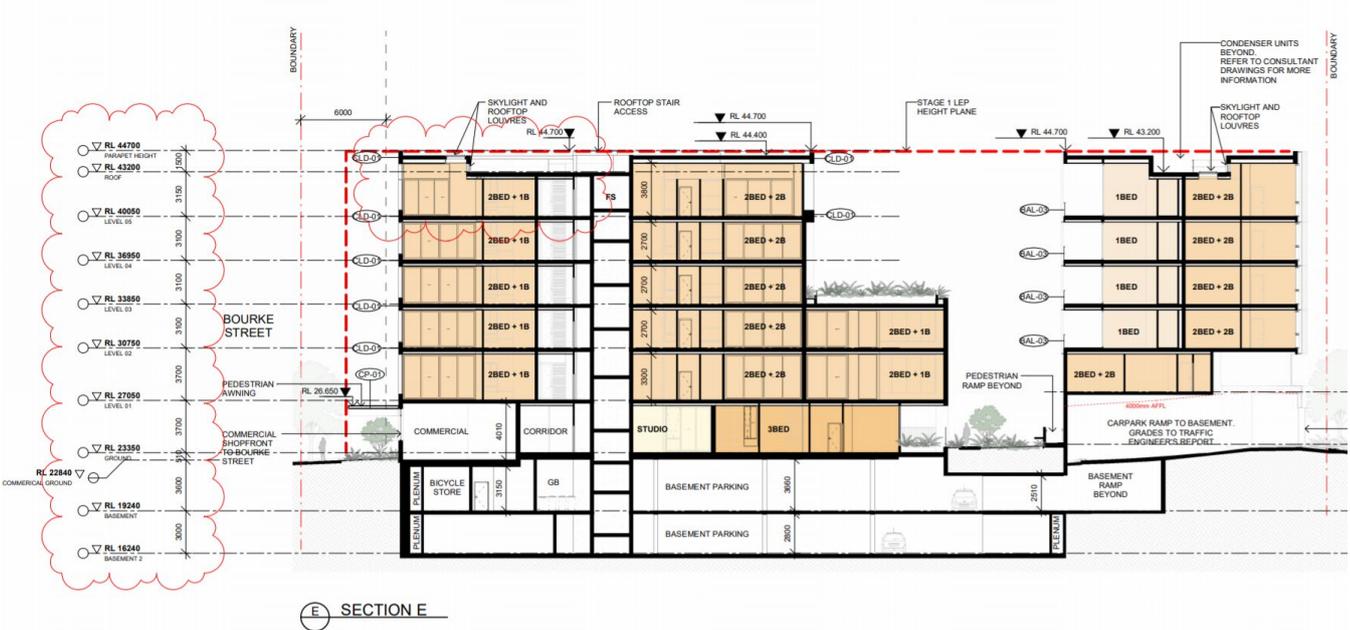
The typical layout and ceiling heights are illustrated in **Figure 3** and **Figure 4** below.

Figure 3– Section B



Source: WMK Architecture

Figure 4 – Section E



Source: WMK Architecture

Table 1 below sets out the location and extent of variations to the minimum floor to ceiling heights.

Table 1 – Location of proposed variations to minimum ceiling heights

Unit Nos.	Recommended Minimum Ceiling Height	Proposed Ceiling Height
Habitable rooms within G.06, G.07, G.08, G.09, G.10, G.11, G.12, G.13, G.14, G.15	3.3m – Ground and First Floor in mixed-use area	2.7m
Non-habitable rooms within G.06, G.07, G.08, G.09, G.10, G.11, G.12, G.13, G.14, G.15	3.3m – Ground and First Floor in mixed-use area	2.7m
Communal areas	3.3m – Ground and First Floor in mixed-use area	2.7m

6. CLAUSE 4.6 VARIATION REQUEST: CEILING HEIGHT

The following sections of the report provide an assessment of the request to vary the development standard relating to the recommended minimum ceiling heights specified in Part 4C of the Apartment Design Guide – in accordance with clause 4.6 of SLEP 2012.

6.1. PART 4C CEILING HEIGHTS

The recommended minimum ceiling heights specified in Part 4C of the ADG are shown at **Figure 5**. The objectives of Part 4C of the ADG are as follows:

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

Figure 5 – Part 4C recommended minimum ceiling heights

Design criteria	
1. Measured from finished floor level to finished ceiling level, minimum ceiling heights are:	
Minimum ceiling height for apartment and mixed use buildings	
Habitable rooms	2.7m
Non-habitable	2.4m
For 2 storey apartments	2.7m for main living area floor 2.4m for second floor, where its area does not exceed 50% of the apartment area
Attic spaces	1.8m at edge of room with a 30 degree minimum ceiling slope
If located in mixed used areas	3.3m for ground and first floor to promote future flexibility of use
These minimums do not preclude higher ceilings if desired	

Source: Apartment Design Guide

6.2. KEY QUESTIONS

Is the Planning Control a Development Standard?

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

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

It is therefore understood that the recommended minimum ceiling heights specified in Part 4C of the ADG are development standards capable of being varied under clause 4.6 of SLEP 2012.

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

The development standard is not excluded from the operation of clause 4.6 as it is not listed within clause 4.6(6) or clause 4.6(8) of SLEP 2012.

What is the Underlying Object or Purpose of the Standard?

The objectives of Part 4C of the ADG are set out in **Section 6.1** of this report.

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

6.3. CONSIDERATIONS

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

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are listed within the ‘five-part test’ outlined in *Wehbe v Pittwater [2007] NSWLEC 827*.

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

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

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

The proposed development achieves the objective of Part 4C-1 of the ADG as detailed in **Table 2** below.

Table 2 – Demonstrated achievement of the objective of Part 4C-1 of the ADG

Objective	Development Response
<p>Objective 4C-1 Ceiling height achieves sufficient natural ventilation and daylight access</p> <p>Objective 4C-2 Ceiling height increases the sense of space in apartments and provides for well-proportioned rooms.</p>	<p>Despite the non-compliance with the recommended ceiling heights within the first floor level, the apartments achieve sufficient natural ventilation and daylight access. Specifically:</p> <ul style="list-style-type: none"> As detailed in the cross ventilation diagram prepared by WMK (Drawing No. DA014), a total of 63.38% of the apartments meet the deemed to satisfy requirements of SEPP 65 for natural cross ventilation with openings on orthogonal or opposite aspects. As detailed in the Solar Access Assessment prepared by SLR and solar access diagram prepared by WMK (Drawing No. DA013), 70.4% of the apartments achieve at least two hours of direct solar access to the window(s) of the living area and private open space. Apartment depths are limited to maximise ventilation and airflow. Apartments include well-proportioned rooms that meet the minimum room dimensions recommended by the ADG.
<p>Objective 4C-3 Floor to ceiling heights of ground and first floor levels promote flexibility of use</p>	<p>Despite the non-compliant ceiling heights within the eastern portion of the first floor, the following is noted:</p> <ul style="list-style-type: none"> The residential use of the site is permitted with consent and considered appropriate in the context of the site and surrounding land uses.

Objective	Development Response
	<ul style="list-style-type: none"> • The entire ground floor achieves the recommended 3.3m floor to ceiling height. In addition, the ground floor commercial tenancy achieves a 4m floor to ceiling height to provide flexibility for a future café use in accordance with the ADG. • The northern portion of the first floor (15 apartments), which benefits from access and exposure to Bourke Street and the public park to the west, achieves the recommended 3.3m floor to ceiling height. • The non-compliant first floor area is located to the rear of the site, with separate access provided from Kingsborough Way, a new street that provides local access only. The limited exposure to a main road and the surrounding residential context at the rear of the site does not support non-residential uses at the first floor. • Following the strata subdivision of the development, it is not considered likely that the residential apartments at the first floor level will be adapted for a non-residential use.

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

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

Not relied upon.

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

Not relied upon.

Test 4: The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable

Not relied upon.

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

Not relied upon.

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

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

- The 2.7m floor to ceiling height in the eastern portion of the first floor is consistent with the requirement for habitable residential rooms and will therefore not compromise the amenity of future residents in terms of natural ventilation and daylight access.
- There is flexibility to convert the lower levels to non-residential uses, with the entire ground floor and a large portion of the first floor achieving a minimum 3.3m floor to ceiling height.
- The reduced floor to ceiling height at the first floor ensures that the development complies with the approved building envelope (RL44.70) and SLEP 2012 height limit (22m). This in turn will ensure that the building does not unreasonably overshadow surrounding properties, in particular, 906 Bourke Street to the south of the site.

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

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

The proposed development is consistent with the objectives of Part 4C of the ADG as detailed in **Table 2** above.

The proposal is also consistent with the land use objectives that apply to the site under SLEP 2012. The site is located within B4 Mixed Use Zone as outlined within **Table 3**.

Table 3 – Assessment of compliance with land use zone objectives

Objective	Compliance Assessment
<i>To provide a mixture of compatible land uses</i>	The proposed development comprises a commercial tenancy in the ground floor level and residential apartments on the ground floor and upper floor levels. These uses will contribute to the viability of the site and the wider Green Square Urban Renewal area and are compatible with the desired future land use outcomes for the precinct.
<i>To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.</i>	<p>The site is located in close proximity to Green Square Railway Station and Green Square Bus Interchange. It is well connected to the greater Sydney metropolitan area.</p> <p>The multiple uses will result in an increase in employment and housing opportunities in a highly accessible location. The provision of bicycle parking will encourage cycling and the limited vehicular parking will encourage public transport patronage.</p>
<i>To ensure the uses support the viability of centres.</i>	The development contributes to the commercial uses in the locality with a commercial tenancy on the prime street corner.

The proposal is considered to be in the public interest as the development is consistent with the objective of the development standard, and the land use objectives of the zone.

6.3.4. Clause 4.6(5)(a) - Would Non-Compliance Raise any Matter of Significance for State or Regional Planning?

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

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

The proposed development achieves the objective of the development standard, as well as the land use zoning objectives despite the minor non-compliance. The strict application of the recommended minimum ceiling heights would result in reductions to the floor to ceiling height elsewhere in the development.

It is noted that the ‘development standard’ in question relates to “recommended” ceiling heights provided in the ADG. The proposed non-compliance is extremely minor in nature, achieves the objectives of Part 4C of the ADG, and is a direct result of complying with the floor to ceiling heights for the proposed uses within the development. Therefore, there is no public benefit of maintaining the planning control standard in the circumstances.

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

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

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