

Attachment B

Clause 4.6 Variation Request

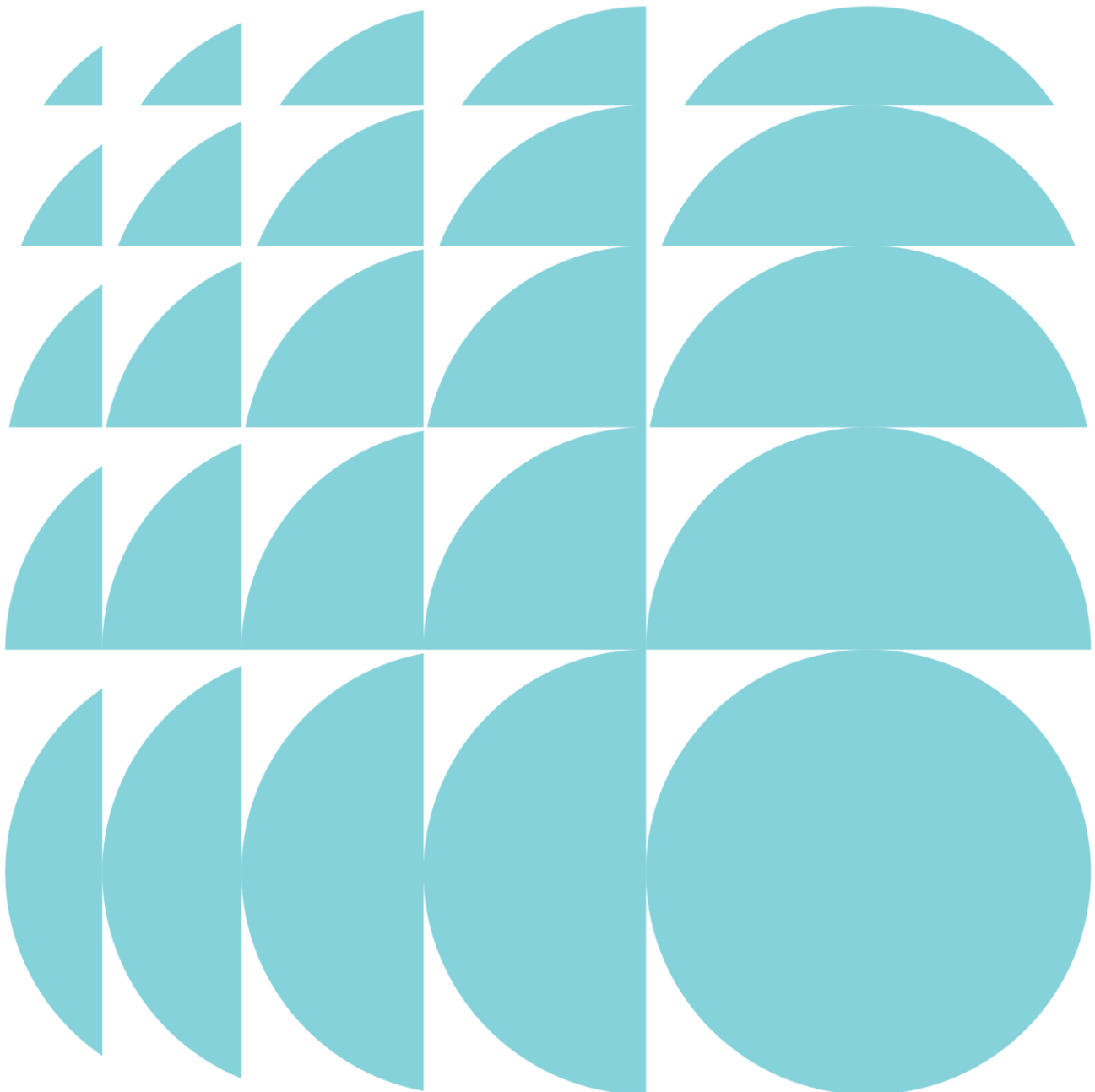
Clause 4.6 Variation Request Report

205-225 Euston Road, Alexandria

Submitted to City of Sydney Council

On behalf of Maxida International Alexandria Property
Australia Pty Ltd

15 November 2019 | 218026



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1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of Maxida International Alexandria Property Australia Pty Ltd. It is submitted to the City of Sydney Council (the Council) in support of a development application (DA) for the mixed use redevelopment at 205-225 Euston Road, Alexandria (the site).

Clause 4.6 of the *Sydney Local Environmental Plan 2012* (Sydney LEP) 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 relates to the height of buildings development standard under clause 4.3 of the Sydney LEP and should be read in conjunction with the Amended DA package, within the meaning of Clause 55 of the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation).

Clause 4.6 requires that a consent authority be satisfied of the following matters before granting consent to a development that contravenes a development standard:

- That the applicant's written request has adequately addressed that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case: cl. 4.6(4)(a)(i);
- That the applicant's written request has adequately addressed that there are sufficient environmental planning grounds to justify contravening the development standard: cl. 4.6(4)(a)(i); and
- 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 in which the development is proposed to be carried out: cl. 4.6(4)(a)(ii).

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

This clause 4.6 variation request demonstrates that, notwithstanding the non-compliance with the development standard, the proposed development:

- Achieves the objectives of the height of buildings development standard;
- Achieves the objectives of the B4 Mixed Use zone;
- Building height is considered suitable given the site's unique setting and the specific design response results in minimal visual impact when viewed from Sydney Park;
- Is not located in the vicinity of any items of heritage and will not impact on the understanding of heritage items located away from the site;
- Results in a superior planning outcome for the site and provides enhanced amenity to the public plaza and residential apartments within the development;
- Provides for on-site power generation (by way of rooftop solar) and landscape roof areas resulting in a 'carbon smart' development;
- Offers to improve the site's ecology and habitat relationship with the adjoining Park;
- Appropriately manages the site's sensitivities and constraints through innovative urban design and architectural solutions;
- Increase housing supply in a locality with growing housing demand;
- Facilitates remediation of a previously industrial site, future proofing it for a variety of sensitive land uses;
- Has high sustainability goals and strives to achieve ESD targets above the standard industry benchmark;
- Is below the permissible maximum floor space ratio, demonstrating that it is at a desirable intensity for the site; and

- Is in the public interest in light of the numerous positive social, ecological, design and economic impacts it will deliver for the site.

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

In addition, the consent authority can be satisfied that the proposal is in the public interest because it is consistent with the objectives of the height control and the B4 Mixed Use zone. In this regard, the proposal will contribute to the local community by providing additional services, community use areas, and amenities to the users of Sydney Park, will enhance the local urban ecology and deliver a development with high ESD aspirations. Overall, the proposal is seen to be in public interest.

The concurrence of the Secretary of the Department of Planning, Industry and Environment (DPIE) is also required before the consent authority can grant development consent: cl 4.6(4)(b).

This report should be read in conjunction with the amended architectural plans prepared by Silvester Fuller and MHNDU dated 15 November 2019 and supporting consultant's reports.

2.0 Background

2.1 Site Context

Site context is a key consideration when determining the appropriateness and necessity of a development standard. Specifically, the site is located in the southern part of Alexandria approximately 5km south of the CBD, 1.5km south west of Green Square and approximately 2km north of Sydney Airport. The site is located within an area of the Sydney Local Government Area (LGA) undergoing a period of transition in development including the introduction of a mix of commercial, industrial and some residential uses. This is reflected in the Sydney DCP 2012 Locality Statement for 'Euston Road and McEvoy Street'.

The site has a primary frontage of approximately 180m to western side of Euston Road, with all other adjoining boundaries being to Sydney Park. Sydney Park is surrounded by a diverse range of land uses with higher density residential to the north, industrial/commercial uses to the east and lower density residential to the west in the areas of Enmore and Marrickville.

The site's setting in relation to Sydney Park and surrounding development is illustrated in **Figure 1**.



Figure 1 Site location and context

Source: Silvester Fuller and MHNDU and Sue Barnsley Design

2.2 Concept DA (Stage 1) D/2016/989

Development consent was granted to D/2016/989, being a Concept DA for the redevelopment of the site including demolition of existing structures, site remediation, establishment of building envelopes for future mixed use development containing basement car parking and aboveground retail/commercial and residential development. The Concept DA proposed eight buildings with heights ranging from 4-6 storeys above basement car parking and Condition (7) of D/2016/989 established the maximum building height of the approved building envelopes:

- Buildings A, B and C: RL26.0 to the six storey components and RL17.2 to the four storey component in Building C; and
- Buildings D, E, F, G and H: RL26.0 to the six storey components, RL20.3 to the five storey components, and RL17.2 to the four storey components.

The maximum building height approved in the Concept DA exceeds the maximum building height that applies to the site on the LEP map (18m) with the portions of buildings exceeding the height limit shown in **Figure 2**.

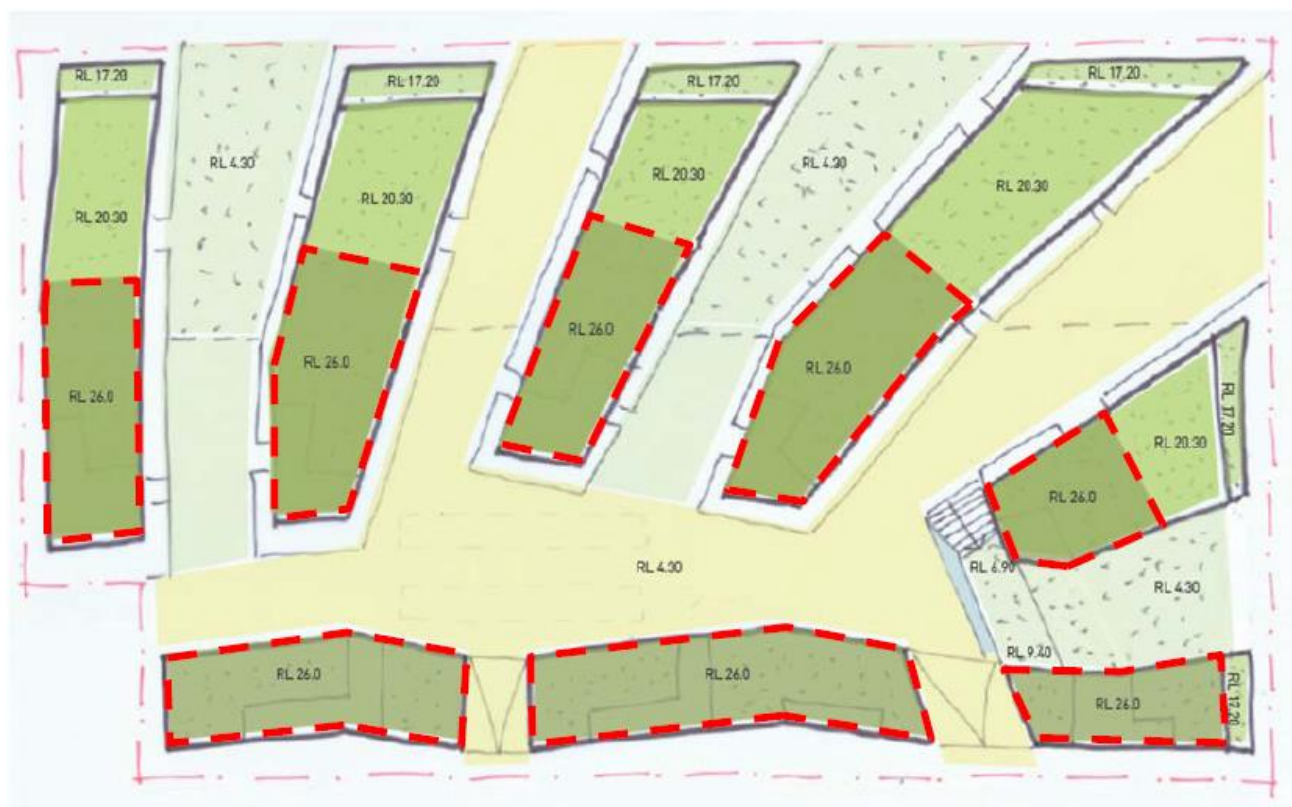


Figure 2 Extent of Concept DA that exceeds the maximum building height

Source: City of Sydney

In the assessment of the Concept DA, at paragraph 86, Council considered *that strict compliance with the building height standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify the non-compliance for the following reasons:*

- *The 6 storey components of the proposal are within smaller building footprints which if held to the 18m building height standard have limited and underutilised floor space. In amending the proposal to positively reduce the building footprints, lost floor space was redistributed in locations where the envelopes can reasonably absorb the increase. The gross floor area of the proposal is compliant with the LEP, proposed as 1.8:1 where 2.5:1 is permissible, despite this reconfigured arrangement;*
- *Strict compliance with the height standard could see the Applicant revert to the previous envelopes with sub-optimal site permeability, landscaped spaces and building separation;*
- *As per the Design Excellence Strategy, the Applicant will pursue up to an additional 10% building height above the LEP standard should the Stage 1 DA be approved and the competition scheme and Stage 2 DAs demonstrate design excellence. In this instance, a 10% increase for design excellence would be a 1.8m variation to the standard. The proposed variation is 3.7m as a response to reallocation of floor space within the site. The proposal represents a 21% increase in select locations where a 10% increase is envisaged under an available procedural avenue. Whilst this does not offset the proposed variation in entirety, it is a contributing and relevant factor; and*

- *The existing warehouse buildings are partially visible through and above the trees in Sydney Park. The proposed building envelopes, even with the variation to the building height standard, would have a relatively reduced building frontage to the Park compared to the warehouses and would continue to be screened by the trees in the Park. The Visual Impact Assessment and Arborist's Reports lodged with the Application demonstrate that the Sydney Park trees will grow taller than their existing height and provide further screening. Coupled with new landscaping as green roofs and green walls to be developed up in the subsequent stages, the visual outcome of the proposal, inclusive of the height non-compliance, is considered acceptable despite the non-compliance.*

Whilst the proposed development exceeds the maximum height approved as part of the Concept DA, the additional exceedance is minimal. This is addressed further in **Section 3.2**.

2.3 Competitive Design Alternatives Process

A competitive design alternatives process was conducted for the project in September 2017. This process was completed in accordance with the endorsed Design Excellence Strategy for the site, the City of Sydney Competitive Design Policy 2013 and the Competitive Design Alternative Brief, prepared by JBA and dated August 2017.

The competitive process included submissions from four invited architectural firms each in collaboration with a landscape architect, namely:

- Architectus and Turf Design Studio;
- MAKE Architects and Aspect Studios;
- Silvester Fuller and MHNDU and Sue Barnsley Design; and
- Woods Bagot and McGregor Coxall.

The Selection Panel was of the opinion that the Silvester Fuller and MHNDU and Sue Barnsley scheme was capable of achieving design excellence and was selected as the winner of the design alternatives process for the following reasons:

- The scheme demonstrates a strong relationship between the architects and landscape architect, and the Panel encourages this relationship to continue.
- The overall landscape concept and extent of deep soil planting
- The ground plane and sub-ground arrangement of the scheme, with its arrival sequence and vehicle entry, provided a new proposition for this typology.
- The treatment to the eastern building as a wall to Euston Road which has the potential to balance acoustic impacts with ventilation to the apartments.
- The finger buildings proposed are slimmer than Stage 1 DA envelopes, and so present slimmer edges to the park.
- The unit plans and layout generally exhibit a high level of amenity.
- Low proportion of circulation space with a low number of apartments per core
- The consideration given to the incorporation of the internal design of stairs, including hold open fire doors to encourage use of stairs as an alternative to lifts
- Faceting of the façade gives the flexibility to resolve the interface issues (such as privacy) between buildings.
- The façade design allows view corridors for a greater number of residents.
- The use of water in the public plaza and incorporation of pool to the Euston Road building.
- The amenity offered by, and the number of opportunities for, retail and communal uses.
- Maximising the use of open urban space, including opening up the northern area of the site.
- The potential to integrate the landscape with that of Sydney Park.

It is noted that the competition scheme varied the building envelopes from that of the approved Concept DA (D/2016/989 as described above). The scheme maintained the six storey built form but altered the extent of the building envelopes, locating built form closer to Sydney Park in order to provide a greater level of solar access to the publicly accessible internal plaza. The selection panel recommended that the winning scheme required design development to achieve the built form controls established in the Concept DA, including building height.

Renders of the winning design scheme are shown at **Figure 3**.



Figure 3 Silvester Fuller and MHNDU and Sue Barnsley Design winning Scheme

3.0 Development Standard to be Varied

3.1 Height of Buildings Development Standard

This clause 4.6 variation request seeks to justify contravention of the height of buildings development standard set out in clause 4.3 of the Sydney LEP. Clause 4.3 provides that:

- (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.*
- (2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

An excerpt of the Height of Buildings Map, identifying the maximum building height applying to the site is presented in **Figure 4**. The maximum building height applying to the site is 18m.

Notwithstanding the maximum building height established in clause 4.3 of the Sydney LEP, clause 6.21(7) makes allowance for the project to be eligible for an additional 10% in building height above that shown on the height of buildings map. This is also reinforced by Condition 7 of the Concept DA consent. As the project has completed a design alternatives process in accordance with the *Competitive Design Policy 2013* (refer to **Section 2.3** above) and the winning scheme is considered to exhibit design excellence, the maximum permissible building height applied to the project is 19.8m above existing ground level.

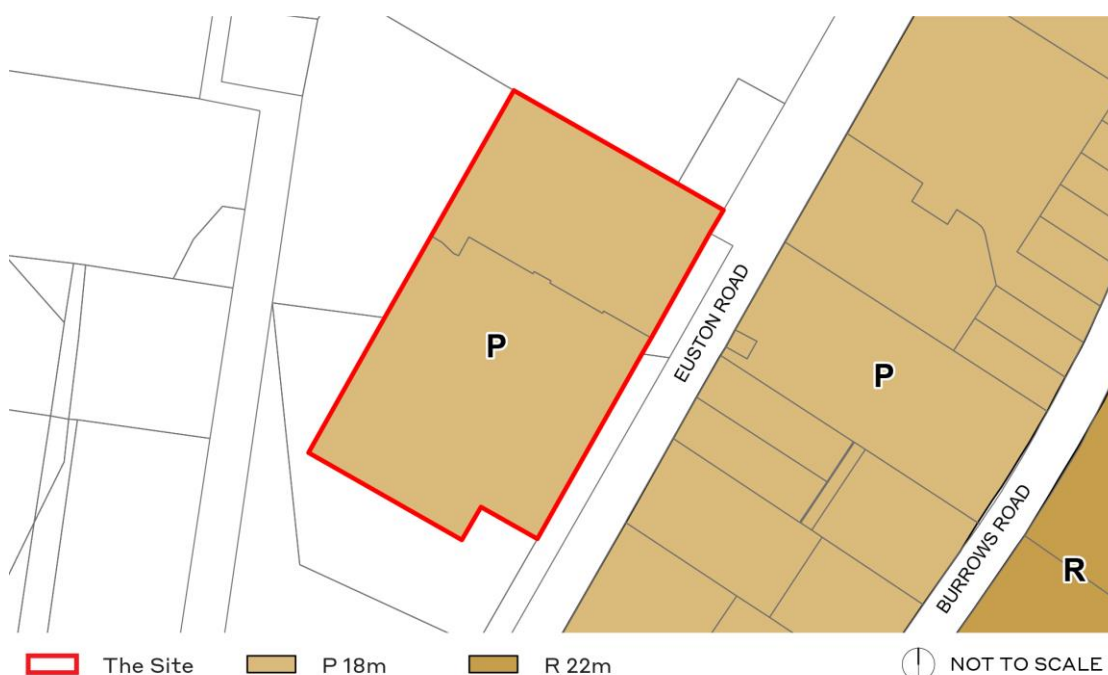


Figure 4 Excerpt of Height of Buildings Map

Source: Sydney Local Environmental Plan 2012

3.2 Extent and Nature of the Variation

As outlined in the SEE and illustrated on the Architectural Plans at Appendix A of the SEE as well as in the Response to Council's request for information (RFI), the proposed development comprises the construction of eight buildings. The maximum building height proposed for each building is set out in **Table 1**. This maximum height does not apply evenly across the entirety of the roof area of all buildings.

The proposed building height in relation to the Sydney LEP height control is presented in **Figure 6**. The proposed landscaping treatment to the rooftop involves the creation of topography features within the roofline. The design intention is to mimic the mounding topography of Sydney Park within the development, whilst providing an architectural roof feature screening building services and lift motor rooms as shown in **Figure 7**.

For greater detail, refer to the relevant proposed building elevations and sections within the Architectural Plans at Appendix A, and the Landscape Plans at Appendix C of the SEE.

While for the purposes of this Clause 4.6 variation request the maximum variation is the variation from the 19.8m SLEP height standard, given the staged nature of the DA consent, the variation of the proposed development is to also be assessed against the approved concept development (**Table 1**).

A maximum height of RL 26.0m was approved under the Concept DA. As discussed in **Section 2.2**, Council considered that the height variation under the Concept DA acceptable on the basis that the additional height reduced the building footprint, improved site permeability, landscaped spaces and building separation.

As presented in **Table 1**, the maximum variation sought from the approved Concept envelope (under D/2016/989/A) ranges from 1.10m to 1.80m. The only exceptions being Buildings G and E whose exceedances are associated with the lift overrun (being 5.03m and 2.15m above the Concept DA height respectively) and therefore limited to only two points on the rooftops of the respective buildings. The actual departure (from the approved Concept DA envelope) is far less across the length of the building, as a majority of the building only exceeds the approved concept building height (RL 26.0m) by approximately 500mm (see **Figure 5**). As shown in **Figure 6**, the maximum height of the Euston Road Buildings is RL 26.90m (which includes the landscaping soil). However, for the purposes of the clause 4.6 report, **Table 1** sets out the **maximum** variation from the approved concept envelope height and the SLEP height limit respectively.

Table 1 Proposed maximum building height

Building	Parapet Height (COLUMN A)	Maximum Height (COLUMN B)	Variation to Approved Concept DA height (i.e. RL 26.0m minus COLUMN B)	Variation to SLEP 2012 height limit (19.8m* minus COLUMN B)
Building A	RL26.50 (21.9m)	RL27.80 (23.20m)	1.80m	3.4m
Building B	RL26.50 (21.9m)	RL27.80 (23.20m)	1.80m	3.4m
Building C	RL26.50 (21.9m)	RL27.80 (23.20m)	1.80m	3.4m
Building D	RL26.50 (21.9m)	RL27.80 (23.20m)	1.80m	3.4m
Building E	RL26.9 (22.3m)	RL30.55 (25.95m)	2.15m	3.75m
Building F	RL26.9 (22.3m)	RL27.10 (22.50m)	1.10m	2.7m
Building G	RL26.9 (22.3m)	RL31.03 ¹ (26.43m)	5.03m	6.63m
Building H	RL26.9 (22.3m)	RL27.10 (22.50m)	1.10m	2.7m

¹This height applies to the top of the lift overrun (RL 30.55m) and the landscape mounding which sits on top of the built form structure (RL 31.03m), providing accessible roof access and softening the roofscape.

* 19.8m is the maximum height permissible under the SLEP 2012 (i.e. 18m height control + 10% design excellence bonus)

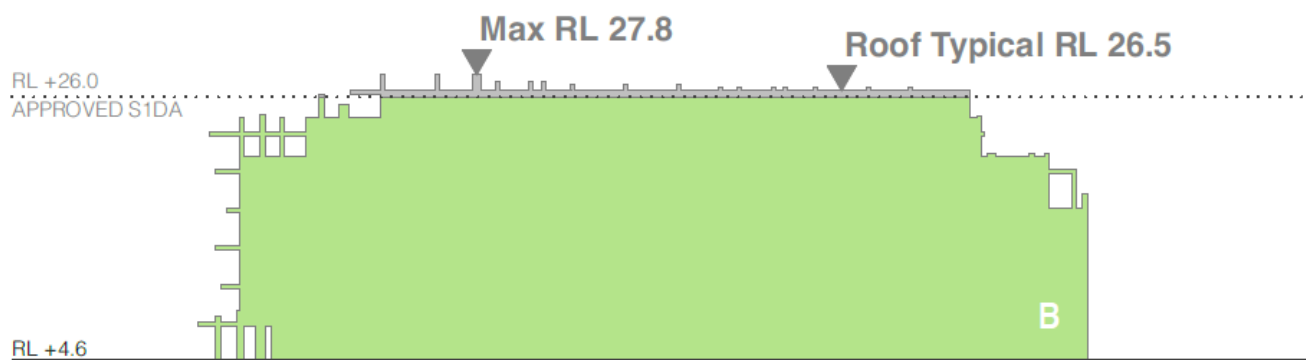
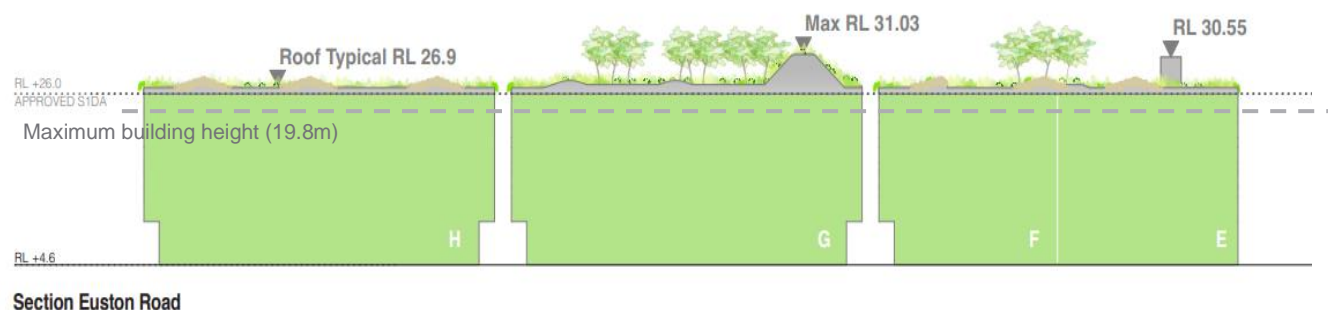


Figure 5 Typical nature of building height exceedance for Parkside Buildings

Source: SF and MHNDU



Section Euston Road

Figure 6 Proposed building height in relation to height of buildings standard (shown on Section B)

Source: Silvester Fuller and MHNDU and Sue Barnsley Design

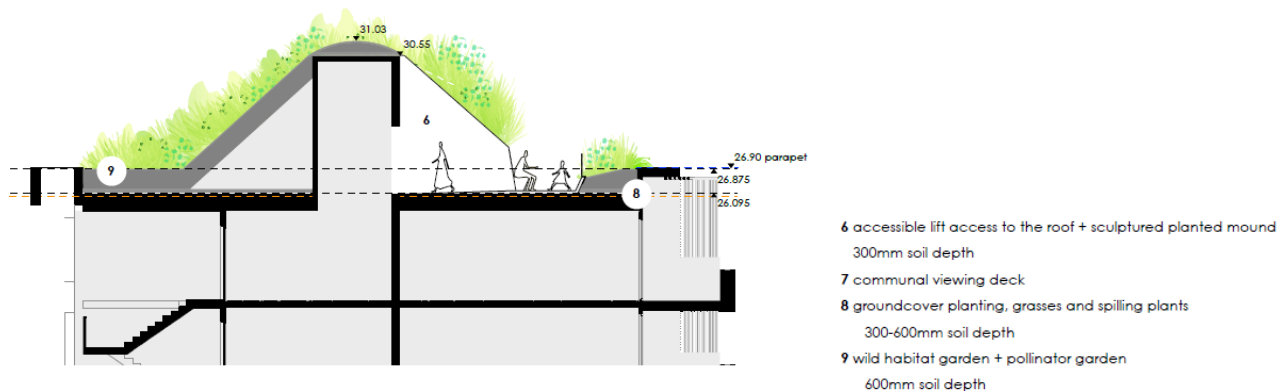


Figure 7 Architectural/landscape roof feature treatment (Euston Rd)

Source: Sue Barnsley Design

4.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Sydney LEP 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 Sydney LEP 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 and the NSW Court of Appeal in:

1. *Wehbe v Pittwater Council [2007] NSW LEC 827;*
2. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009;*

This clause 4.6 variation report also considers the following recent judgements. While the judgements for these hearing were only decided after the lodgement of the original DA, for the completeness, these have now been included within the clause 4.6 variation report and considered below:

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).*

The relevant matters contained in clause 4.6 of the Sydney LEP, with respect to the height of buildings development standard, are each addressed below, including with regard to these decisions.

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 two 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

4.1 **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.

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]).

As the language used in subclause 4.6(3)(a) of the Sydney LEP 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 methods outlined in *Wehbe* include:

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

Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary is the First Method (refer to **Section 4.1.1 and 4.1.2**) and Third Method (refer to **Section 4.1.3**).

4.1.1 **The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method)**

The objectives of the building height development standard contained in clause 4.3 of the Sydney LEP are:

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

4.1.2 Consistency with the Objectives of clause 4.3 under the Sydney LEP

The following sections demonstrate that the objectives (as presented in **Section 4.1.1** immediately above) are achieved notwithstanding the potential non-compliance.

Objective (a): to ensure the height of development is appropriate to the condition of the site and its context

As described in **Section 2.1**, the site has a unique setting, being located on the boundary of Sydney Park. The impact of built form (including height) when viewed from Sydney Park therefore plays an important role in determining the appropriateness of development on the site. It is noted that the existing light industrial warehouse development is visible behind the tree line, when viewed from Sydney Park (refer to **Figure 9**).

The proposed development, whilst exceeding the maximum building height, has been designed in detail to respond to the leafy setting of the immediate surroundings. The building expression to Sydney Park is a broken façade which reduces the dominance of built form on the surrounding landscape, particularly in comparison to the large building frontage of the existing development. The buildings facing Sydney Park have been specifically designed to provide significant tree planting at building edges (Level 5 and Level 5 mezzanine) and rooftop levels which acts to transition and continue the canopy and undulating topography of Sydney Park. The building materiality uses colours and tones (timber look colours) and landscaping to complement Sydney Park and allow the building to seamlessly integrate with the Park setting. The proposed development viewed from Sydney Park is presented in **Figure 9**.

The proposed buildings are also set against the background of significantly taller and more noticeable developments throughout Mascot. This proposal offers a sympathetic transition between the Park setting and the horizon of built form to the southeast of the site. Furthermore, in considering the Stage 1 Concept DA, as outlined above, Council considered that the (now approved) building envelopes would have a relatively reduced building frontage to the Park, compared to the existing warehouses on the site.

It is therefore considered that the proposed building height is appropriate for the site in its context.



Figure 8 Existing development when viewed from Sydney Park

Source: *Richard Lamb & Associates*



Figure 9 Proposed development viewed from Sydney Park

Source: *Silvester Fuller MHNDU and Sue Barnsley Design*

Objective (b): to ensure height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas

The site is not a listed heritage item, situated within a conservation area or in the immediate vicinity of a heritage item. A group of heritage terraces at 2-34 Campbell Road (Item I12) are located approximately 150m south west of the site separate by Sydney Park. Approximately 550m north west of the site is the nominated heritage item of the Bedford Brickworks, including chimneys, kilns and grounds (Item I27).

There is sufficient separation and transition in built form from the site to the surrounding heritage items that the proposed exceedance of the maximum building height will have no impact on the readability of these items or any adverse shadowing impacts.

Objective (c): to promote the sharing of views

Given the isolated nature of the site, the proposed development does not adversely or substantially impact on existing private views. The massing of the development on the site enables the sharing of public views from Sydney Park by breaking up large massing and having slim building orientated at an angle to the park to limit the appearance of bulk (refer to **Figure 9**). The proposed built form ensures internal privacy and view sharing for the future residents of the development.

A detailed public view assessment is provided at Section 5.7 of the SEE.

Objective (d): to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas

The site is not located in the transition areas surrounding Central Sydney and Green Square Town Centre. This objective is not applicable.

4.1.3 The object or purpose would be defeated or thwarted if compliance was required (Third method)

The Alexandria area is a precinct which is currently undergoing a transition from historical industrial land uses to a mixed-use neighbourhood. This is evident in the B4 Mixed Use land use zone that applies to the site. The proposed development is consistent with this transition and has been specifically designed to respond to the unique site context (refer to **Section 4.3**).

It is also noteworthy that proposed scheme provides an FSR of 2.07:1, which is well below the maximum FSR standard of 2.5:1 afforded under the SLEP 2012. As such, the proposed building height enables efficient use of the land commensurate to the density envisaged for the site. The resulting height variation is a result of distributing the available GFA to the upper levels of the building. As such, the proposal offers an improved planning outcome for the site (as set out in **Section 4.1.3**) and therefore this outcome would be thwarted if compliance with the standard was required.

4.1.4 Conclusion on clause 4.6(3)(a)

Strict compliance with maximum building height prescribed under clause 4.3 of the Sydney LEP is considered unreasonable and unnecessary in the specific circumstances for the following reasons:

- The underlying objectives of the standard are achieved, notwithstanding the non-compliance with the numerical control;
- The proposed building height is considered suitable given the site's unique setting and the specific design response results in minimal visual impact when viewed from Sydney Park; and
- The proposal is not located in the vicinity of any items of heritage and will not impact on the understanding of heritage items located away from the site.

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 4.3, have been achieved by the proposed development notwithstanding a minor exceedance;

4.2 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 landscape roof feature and lift overruns 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.

4.2.1 Ground 1: Improved flood planning outcome

The exceedance of the maximum approved concept envelope height (being RL 21.7m) will allow for an improved flood planning outcome and minimise flood risk.

The flood planning level under the approved Concept DA was RL 4.3m. A detailed flood planning study was only undertaken after the Concept DA, which identified the need for a minimum FPL of RL 4.6m for both the Parkside buildings and the Euston Road Buildings.

The proposed envelope factors in the additional +300mm which has in turn pushed building heights. The exceedance of the approved concept envelope height and the maximum 19.8m SLEP height is justified on the basis that the proposal will allow for an improved flood planning outcome that will minimise flood risk.

4.2.2 Ground 2: Reduced visual impact

The proposed development has been specifically designed to respond to the immediate site context and minimise the impact of the development on the adjoining Sydney Park. As set out in **Section 4.1.2** and **Figure 6** above, the proposed built form, whilst visible from Sydney Park presents as a continuation of landscape cover including significant vegetation. The built form has been optimised, refer to **Figure 7** above, to minimise the bulk and scale of the proposed development when viewed from Sydney Park. The extent of visual impact as a result of the height variation sought under this application is not of discernible scale. The building has been appropriately modulated (by recessing the upper levels) at the park edge interface. This will minimise visual bulk and scale when viewed from the park. Further, the building materiality and landscaping will serve to screen the upper levels and reduce visual prominence. Overall, the proposed development results in a reduced visual impact when viewed from Sydney Park in comparison to the existing development on the site.

A detailed public view assessment is provided at Section 5.7 of the SEE.

4.2.3 Ground 3: Increased amenity to the public plaza and residential development

The proposed massing on the site has been revised from the massing approved in the Concept DA and through the competitive design process to increase the level of solar access to both the public plaza within the development and maximise the number of apartments receiving at least two hours of direct sunlight. Overall, the proposed development achieves 2 hours direct sunlight to 74% of apartments within the development on 21 June.

This is achieved by redistributing the bulk away from the building edges and towards the centre of the building form as an additional mezzanine level. The stepping provides a more sympathetic interface to the Park while maximising amenity along the public plaza and open space areas within the site. Council also considered as part of the approval of the Stage 1 Concept DA for the building envelopes that strict compliance with the height standard could result in sub-optimal site permeability, landscaped spaces and building separation.

4.2.4 Ground 4: Provision of energy generation and additional canopy cover

The proposed development provides 27% of the total roof area covered with PhotoVoltaic (PV) solar electricity panels to provide for on-site electricity generation. The development also provides 59% of the roof area as landscaped area, reducing the overall energy load of the development. In order to achieve both of these environmental aspects, the roofline must be staggered to ensure that the PV array is located above vegetation in order to maximise the generation potential. This is also enabled by the minor increase in building height from that prescribed in clause 4.3 of the Sydney LEP and that considered as part of the Concept DA.

4.2.5 Ground 5: The development is provided at an appropriate intensity of the site

The assessment of the variation to the maximum building height assessed in the Concept DA considered that the exceedance in height was supportable as the development was compliant with the maximum floor space ratio applied to the site. The development, as proposed, provides a floor space ratio of 2.07:1, well below the maximum permitted on the site being 2.5:1. This demonstrates that although the proposed development exceeds the maximum building height, overall the proposal does not relate to an increased intensity of development to that desired under the planning controls.

4.2.6 Ground 6: Rooftop landscaping and screening of rooftop services

The landscaping at upper levels accommodate a variety of soil depths (300mm – 1000mm) that can support a mix of planting species and habitats that in turn will complement the overall urban ecology of the locality and improve the ecological relationship of the site to the park.

A number of landscape structures integrated with the architectural roof form, act to screen building plant including lift overruns (refer to **Figure 8**). The inclusion of these landscaping features, whilst contributing to the exceedance of the maximum building height, results in an improved visual impact and increased environmental performance of the development.

4.2.7 Conclusion on clause 4.6(3)(b)

Overall, there are significant environmental benefits of the proposed development, notwithstanding the proposed variation to the maximum building height, including:

- Superior planning outcome for the site;
- Reduced visual impact on Sydney Park;
- Increased amenity to the public plaza and residential apartments within the development;
- Provision of on-site power generation (by way of rooftop solar) and landscape roof areas resulting in a 'carbon smart' development;
- The proposed development is below the permissible maximum floor space ratio, demonstrating that it is at a desirable intensity for the site; and
- The rooftop landscaping features screen building services and lift overruns resulting in an improved visual outcome whilst also contributing to an improved environmental performance of the development.

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).

4.4 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.

4.4.1 Consistency with objectives of the development standard

The proposed development is consistent with the objectives of the height of buildings development standard, for the reasons discussed in **Section 4.1.2** of this report.

4.4.2 Consistency with objectives of the zone

The proposed development is consistent with the objectives for the B4 - Mixed use zone for the following reasons:

- The proposed development, notwithstanding the variation to the maximum building height, will provide a range of uses which complement existing residential, business, recreation and retail uses in the local area;
- The proposed development will facilitate the revitalisation of Euston Road and activate the ground floor retail/commercial uses by improving the accessibility across the site;
- The proposed development includes the provision of additional services and amenities to the users of Sydney Park that will promote cycling and active transport in the local area; and
- The site is located within proximity to available public transport services providing connection to the Sydney CBD, Sydney Airport and other destinations within the Sydney metropolitan region – encouraging visitors to utilise public transport.

4.4.3 Overall public interest

The proposed development is considered to be in the public interest as the proposed development:

- Will contribute to the local community by providing additional services and amenities to the users of Sydney Park;
- Includes a number of community uses such as performance and workshop spaces for Sydney Fringe;
- Provides an exemplary sustainable design which incorporates on-site power generation, water capture and reuse, and the reinstatement of local ecological communities;
- The proposed development will complement the current transition of the Alexandria precinct from a historical industrial area to a mixed use neighbourhood by providing local services and new homes with a high level of amenity;
- Contribute and enhance the local urban ecology by introducing a variety of diverse plantings and fauna habitats that will improve the site's ecological relationship with Sydney Park; and
- Will undertake remediation of former industrial site to future proof the land for sensitive land uses.

4.5 Other Matters for Consideration

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

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

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

These matters are addressed below.

4.5.1 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 height of buildings 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, *A Metropolis of Three Cities* in that it:

- Provides accommodation and services to meet the needs of the local population, both at the present time and in the future as Sydney's population grows and ages;
- Allows for the use of the site to continue to provide local employment opportunities;
- Will provide for an exemplary environmental outcome for the site through carbon and water sensitive design;
- Will provide increased services and amenities to users of Sydney Park, including services that will encourage cycling and active transport within the local area; and
- Does not affect any heritage items or conservation areas.

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

As demonstrated above, there is no public benefit in maintaining the development standard in terms of State and regional planning objectives. As noted in the preceding sections, the proposed variation would not give rise to any adverse environmental impacts.

The site is unique in its context and the proposed development has been specifically designed to respond to the Sydney Park setting. It is not considered that there would be any public benefit for the proposed building height to be reduced, particularly where key planning issues deriving from height, such as visual impact, have been resolved through architectural design and given that the site proposes an FSR of 2.07:1 which is already well below its maximum development capacity and a further reduction in floorspace to reduce height would impact on the supply of housing and the delivery of key sustainability initiatives including the rooftop landscaping and mounding.

4.5.3 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 relevant matters.

5.0 Conclusion

The assessment above demonstrates that compliance with the height of buildings development standard contained in clause 4.3 of the Sydney LEP is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst also allows for a better outcome in planning terms.

This clause 4.6 variation demonstrates that, notwithstanding the non-compliance with the height of building development standard, the proposed development:

- Achieves the objectives of the height of buildings development standard;
- Achieves the objectives of the B4 Mixed Use land use zone;
- Building height is considered suitable given the site's unique setting and the specific design response results in minimal visual impact when viewed from Sydney Park;
- Is not located in the vicinity of any items of heritage and will not impact on the understanding of heritage items located away from the site;
- Results in a superior planning outcome for the site and provides enhanced amenity to the public plaza and residential apartments within the development;
- Provides for on-site power generation (by way of rooftop solar) and landscape roof areas resulting in a 'carbon smart' development;
- Offers to improve the site's ecology and habitat relationship with the adjoining Park;
- Appropriately manages the site's sensitivities and constraints through innovative urban design and architectural solutions;
- Increase housing supply in a locality with growing housing demand;
- Facilitates remediation of a previously industrial site, future proofing it for a variety of sensitive land uses;
- Has high sustainability goals and strives to achieve ESD targets above the standard industry benchmark;
- Is below the permissible maximum floor space ratio, demonstrating that it is at a desirable intensity for the site; and
- Is in the public interest in light of the numerous positive social, ecological, design and economic impacts it will deliver for the site.

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