

# **Attachment C**

**Clause 4.6 Variation Request**

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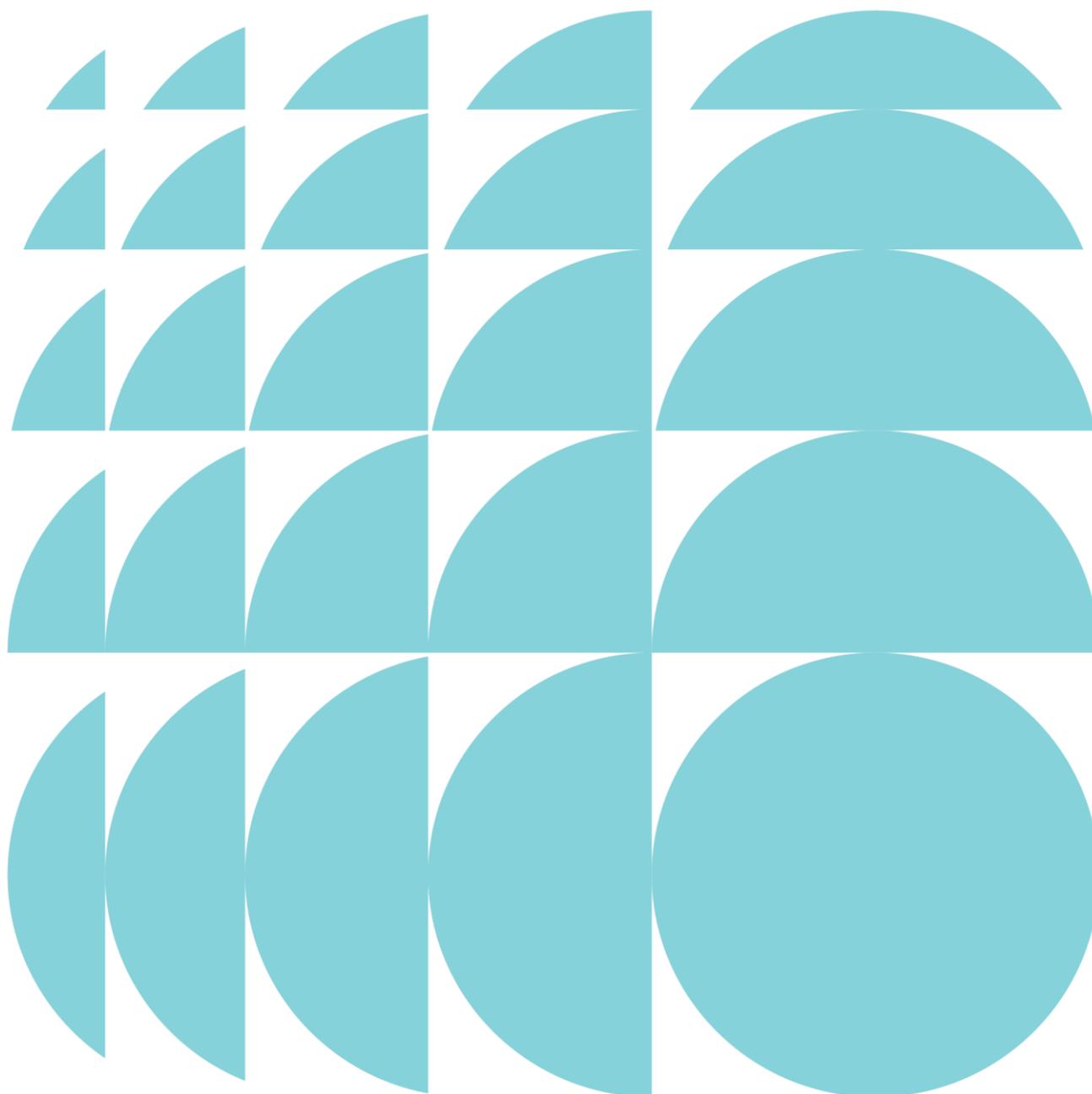
Height of Buildings

189-197 Kent Street, Sydney

Submitted to City of Sydney

On behalf of Barana Group

16 November 2020 | 2200082



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## 1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of Barana Group. It is submitted to City of Sydney (the Council) in support of a development application (DA) Council for a mixed-use development at 189-197 Kent Street, Sydney.

Clause 4.6 of *Sydney Local Environmental Plan 2012* (SLEP 2012) enables the consent authority 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 development standard for height of buildings under clause 4.3 of SLEP 2012 and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban, dated 30 April 2020.

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 Height of Buildings development standard:

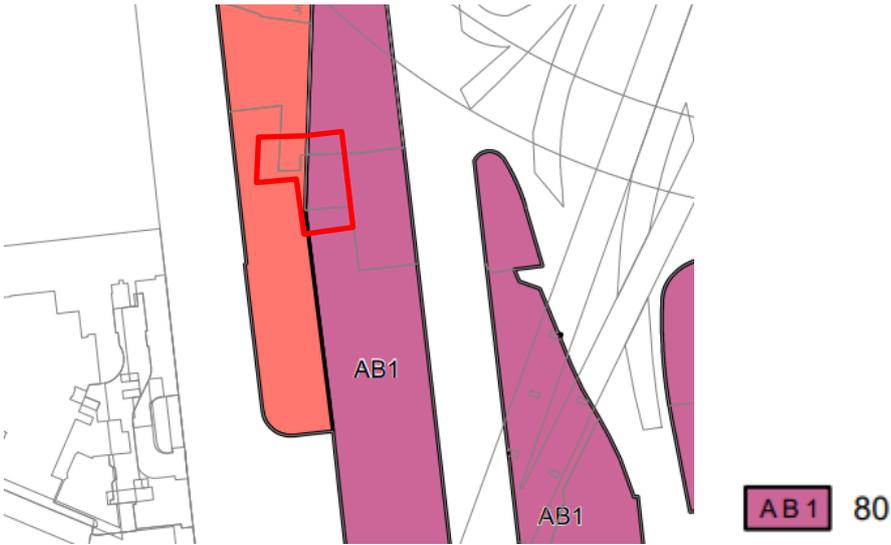
- the objectives of the standard are achieved, particularly in that the proposal is compatible with its context, given the number of tall buildings in the vicinity of the site;
- there are sufficient environmental planning grounds to justify the variation, as:
  - the height variation is largely driven by an architectural roof feature that significantly improves the form of the building and is a result of a competitive design process;
  - the height limit of the site is proposed to be increased from 80m to 110m as part of a soon-to-be-gazetted Council-led LEP amendment that is a matter for consideration under section 4.15 of the EP&A Act; and
  - the site has a significant slope; and
- the site provides substantial public benefit through the separation of the built form and the provision of a through-site link and is consistent with the objectives of the B8 zone.

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

## 2.0 Development Standard to be Varied

This clause 4.6 variation request seeks to justify contravention of the development standard set out in clause 4.3 of SLEP 2012. Clause 4.3 provides that the height of a building on any land is not to exceed the maximum shown for the land on the Height of Buildings Map. The Height of Buildings Map (sheet HOB\_014) shows the maximum building height as being 80m.

The maximum building height as per SLEP 2012 is shown in **Figure 1**.

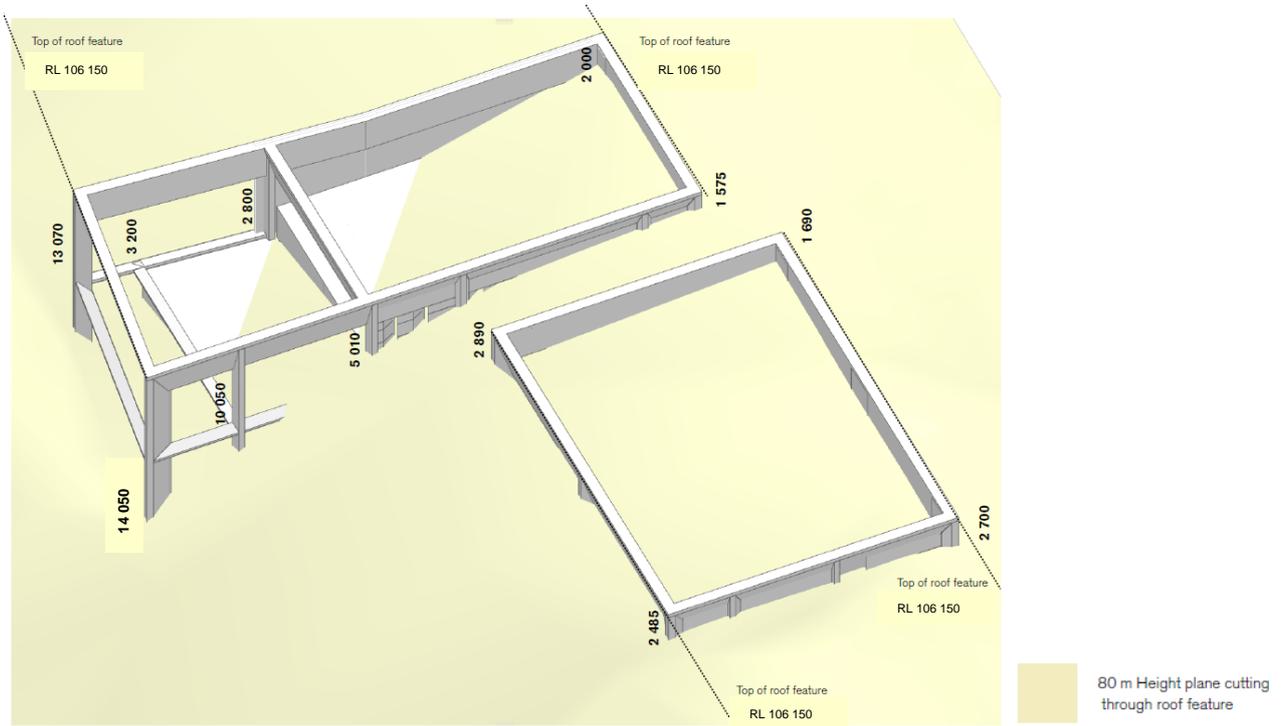


**Figure 1** Maximum building height as per SLEP 2012 (site outlined in red)

Source: Sydney Local Environmental Plan 2012

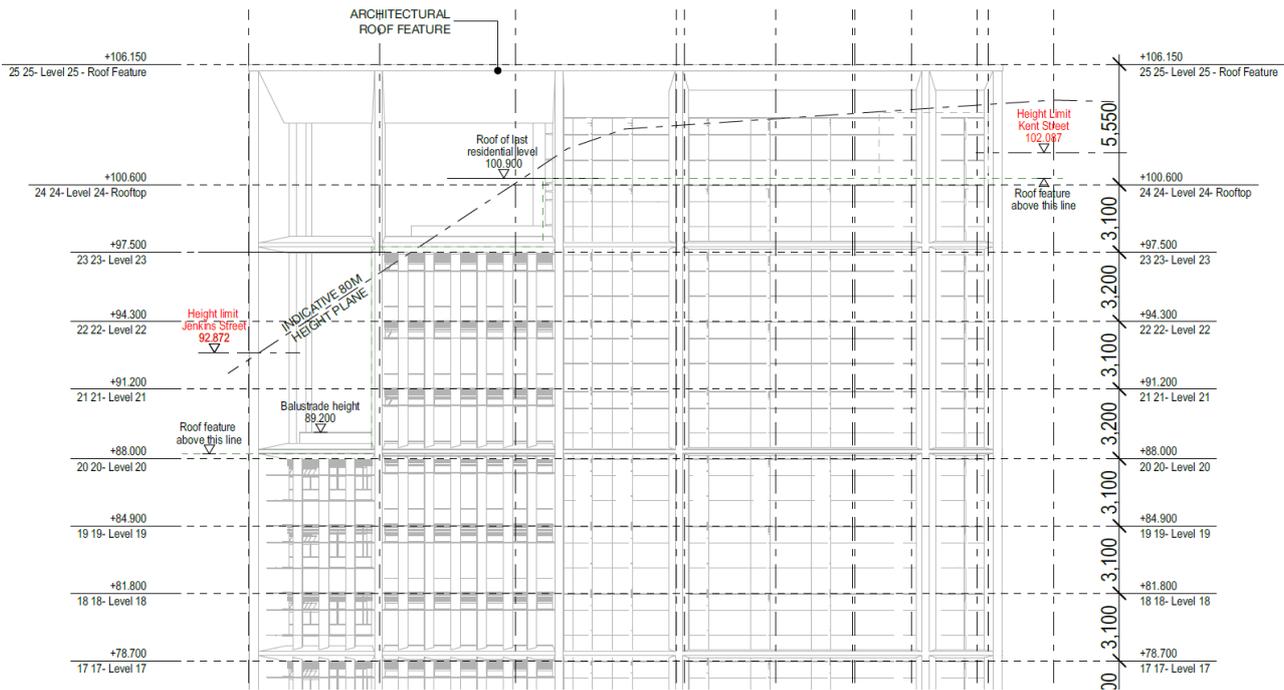
The proposed development includes certain elements, predominantly comprising an architectural roof feature, that exceed the 80m height plane for the site.

Figure 2 and Figure 3 show the extent of the proposed development that exceeds the 80m height plane.



**Figure 2** Components of the proposed development exceeding the 80m height plane

Source: FJMT



**Figure 3 Section showing height plane and proposed development**

Source: FJMT

As shown, the maximum height of the building is RL106.150. This results in an extent of variation from between 1.575-14.050m, given the existing ground level is sloping, creating a sloping height plane across the site. The maximum extent of the variation is at the Jenkins Street frontage, where the top of the proposed architectural roof feature is at a height of 94.05m above ground level (measured at RL 12.1), exceeding the height limit by 14.050m.

As shown, the elements of the building that exceed the height limit largely comprise an architectural roof feature, noting that clause 5.6(2) of SLEP 2012 provides that:

*(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.*

### 3.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of 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 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; and
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.

The relevant matters contained in clause 4.6 of SLEP 2012, with respect to the Height of Buildings development standard, are each addressed below, including with regard to these 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.

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 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 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.

#### **3.1.1 The underlying objectives or purposes of the development standard**

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

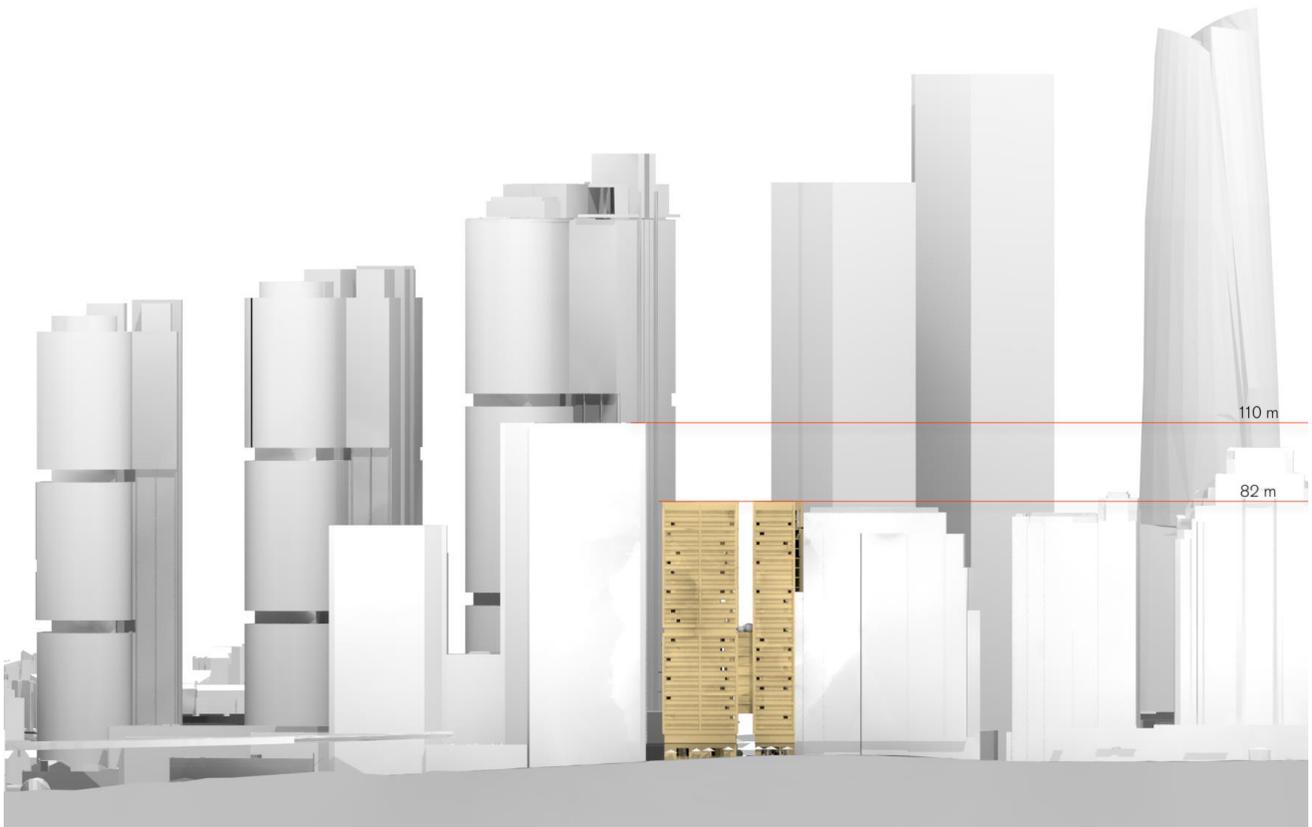
- (a) to ensure the height of development is appropriate to the condition of the site and its context,
- (b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,
- (c) to promote the sharing of views,

- (d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,
- (e) in respect of Green Square—
  - (i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and
  - (ii) to ensure the built form contributes to the physical definition of the street network and public spaces.

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

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

189 Kent Street is located in the Sydney CBD, one of the highest density centres in Australia. The site also sits within a cluster of height that has primarily been driven by the development of Barangaroo. **Figure 4** shows the context of the site.



**Figure 4 Height context of the site**

Source: FJMT

As shown, the development is relatively diminutive when compared with the surrounding development. In the immediate context, the proposed development is approximately equivalent in height to the Stamford on Kent building to the north and around 28m lower than the Maritime Trade Towers to the south.

In the broader context, the proposed development is less than half the height of International Tower One, the approved Barangaroo residential towers and the Crown Resort. The building is also west of the CBD core, which contains numerous towers that are significantly taller than the proposed development.

**Figure 5** shows the proposed development from the west. As shown, the proposed architectural roof feature complements the scale and form of the adjacent Stamford on Kent. Further, the architectural roof feature serves to frame and complete the sculptural form of the development while ensuring that any gross floor area remains below the 80m height limit.



**Figure 5** Photomontage of proposed development from the west

Source: FJMT

It is also noted that the Central Sydney Planning Proposal (CSPP), which at the time of writing has been placed on statutory exhibition, proposes to increase the height limit for the site to 110m. As such, there is an acknowledgement by Council that increased height is appropriate and desirable in the context. Give the CSPP has been the subject of public consultation it is therefore a matter for consideration under section 4.15 of the Environmental Planning and Assessment Act 1979 (EP&A Act).

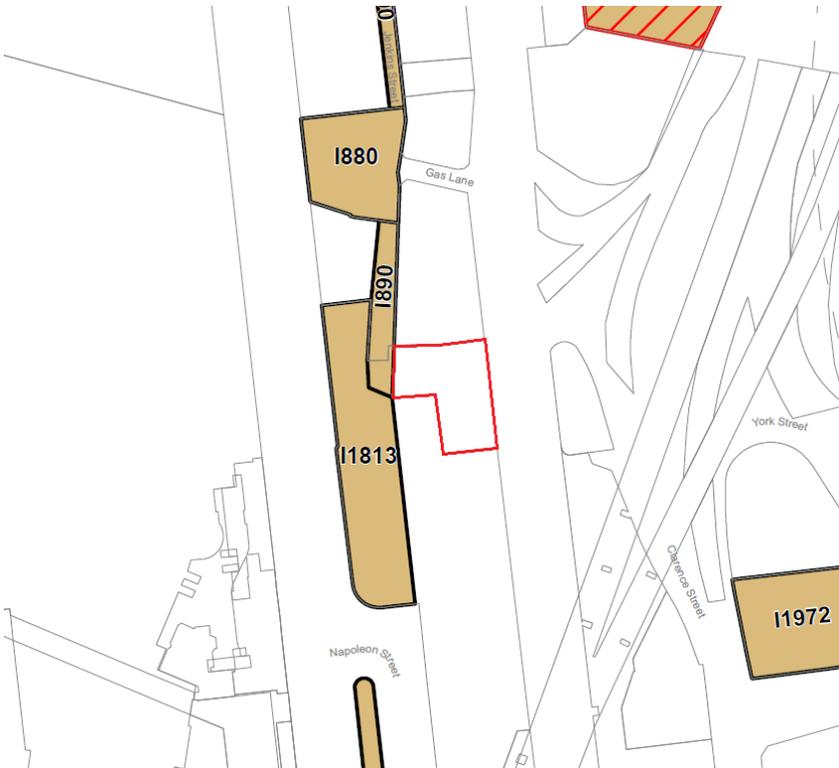
In conclusion, the proposed development:

- matches the height of the adjoining Stamford on Kent building;
- is significantly lower in height than the adjacent Maritime Trade Towers;
- is significantly lower in height than the Barangaroo and Crown Resort developments to the west;
- sits within a broader context of taller buildings; and
- is subject to a planning proposal by Council to increase the height limit on the site to 110m, which would be significantly taller than the height of the proposed development.

For these reasons, the height of the proposed development is considered to be appropriate to the condition of the site and its context.

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

There are several heritage items in the vicinity of the site, including the Grafton Bond Building and adjoining sandstone wall to the west of the site and Jenkins Street to the west and north-west of the site. These items are shown in **Figure 6**.



**Figure 6** Heritage items in the vicinity of the site

Source: Sydney LEP 2012

It is first noted that there is an existing commercial building on the site. This building has a relatively dated and inactive façade facing west. This interface is shown in **Figure 7**.



**Figure 7** Interface with Jenkins Street and the Grafton Bond building

Source: Ethos Urban

The proposed development significantly improves on this heritage interface by creating a new public through-site link, as well as by improving activation and materiality along the western façade of the building. The proposed western elevation is shown at **Figure 7**.



**Figure 8** Proposed western elevation

Source: FJMT

Finally, it is noted that the inclusion of the architectural roof feature does not significantly change the interface of the building with surrounding heritage items. Indeed, it is unlikely that the roof feature will be immediately read as a backdrop to the heritage items when viewed up close, and from a longer distance, the roof feature will improve the overall form and compatibility of the building with its surrounds.

Further, it is noted that the roof feature will result in little to no additional overshadowing of the heritage items, given its location, scale and the transparency of the frame.

Overall, it is considered that that the proposed variation continues to maintain appropriate height transitions between new development and the surrounding heritage items.

**Objective (c): to promote the sharing of views**

The proposed variation will not result in any significant impacts to views from surrounding buildings or public places. Again, it is also noted that the CSPP envisages a building with a height 30m taller than the current height limit; any potential view sharing should be considered in the context that the site will be capable of achieving a significantly taller development within the near future.

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

The site is located in the heart of Central Sydney and is not considered to be within an area important to achieving a transition between Central Sydney and surrounding areas. As such, this objective is not considered to be directly relevant to the proposed variation.

**(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.**

This objective is not relevant to the proposal.

**3.1.3 Architectural roof feature**

Clause 5.6 of SLEP 2012 provides that architectural roof features are able to exceed the height limit for the site, provided certain criteria are met:

*(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.*

These criteria are addressed below.

**(i) comprises a decorative element on the uppermost portion of a building**

The architectural roof feature is a decorative element and is designed to give the proposed development a strong profile against the sky and a better relationship with Stamford on Kent.

**(ii) is not an advertising structure**

The proposed architectural roof feature is not an advertising structure and is not proposed to be used as such at any time in the future.

**(iii) does not include floor space area and is not reasonably capable of modification to include floor space area**

The proposed architectural roof feature does not include any floor space. As shown in **Figure 2**, two minor areas of habitable area protrude beyond the 80m height plane. However, no accessible slabs protrude beyond the height plane, and the proposed architectural roof feature itself is simply a frame that could not be reasonably modified to include floor space.

**(iv) will cause minimal overshadowing**

The proposed architectural roof feature will not add any significant overshadowing, particularly given it is a frame that will allow sun to permeate between the structural members that comprise the feature. Sun eye diagrams are included in **Attachment A** that demonstrate that the impact will be minimal.

**(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 architectural roof feature does not contain any visible plant or equipment, nor does it contain any signage. The feature appears as a sculptural, integrated form that is purely designed to enhance the appearance of the development.

There are also several objectives relevant to the clause. These are addressed below.

**Objective (a): to allow minor architectural roof features to exceed height limits**

The height exceedance is primarily the result of a minor and lightweight architectural roof feature, consistent with the scale and built form of the site's surrounds.

**Objective (b): 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 a critical part of the design language of the building and is considered to significantly improve the visual appearance of the proposed development. The architectural roof feature does not overshadow or otherwise affect the amenity of any neighbouring premises, nor does it result in any substantive visual impacts.

**Objective (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**

The architectural roof feature has been an integral part of the building design from its inception in a competitive design process that was run in 2018. The FJMT design was the winning entry, and the architectural roof feature was a key part of the winning scheme.

**3.1.4 Conclusion on clause 4.6(3)(a)**

In summary, the proposed development and architectural roof feature:

- is consistent with its context in terms of height;
- responds appropriately to surrounding development and heritage;
- is of a high architectural quality and has been integrated into the design since its inception; and
- complies with clause 5.6 (Architectural roof features) of SLEP 2012.

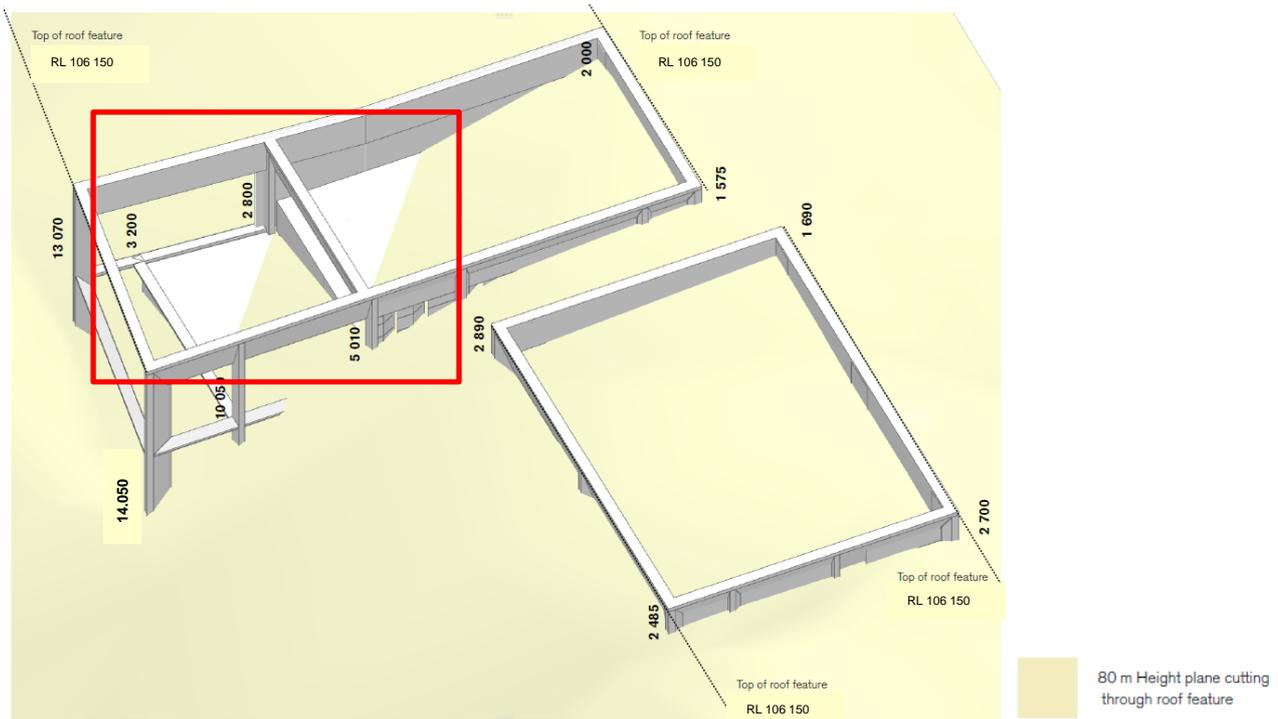
**3.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard**

**3.2.1 Ground 1: The site has a sloping topography**

The site has a sloping topography, with Jenkins Street sitting some 12m below the level of Kent Street. This has resulted in some minor protrusions, notwithstanding the architectural roof feature, which exceeds the height limit by virtue of clause 5.6 of SLEP 2012.

The development has been carefully designed to step down with the slope of the site; however, the topography has necessitated two protrusions on the northern side of the site. These protrusions are minor in nature (less than floor) and are consistent with the height of the adjacent Stamford on Kent building. Further, the protrusions do not result in any significant additional overshadowing or any other impacts to the amenity of the surrounding buildings or public domain.

The protrusions are highlighted in the diagram below.



**Figure 9** Components of the proposed development exceeding the 80m height plane

Source: FJMT

### 3.2.2 Ground 2: The development complies with the maximum floor space ratio.

The proposed development complies with the maximum FSR for the site of 12.06:1. As such, the height variation has not been driven by an overdevelopment of the site, but by the spatial constraints of the site and the massing of the buildings (including the provision of a significant through-site link and building separation between the two towers).

### 3.2.3 Ground 3: The height limit of the site is proposed to be increased as part of a Council-led LEP amendment.

As previously mentioned, the CSPP proposes to amend the height limit of the site from 80m to 110m. As such, the proposed development is entirely consistent with Council’s future desired character for the area. The site is also identified as being within a tower cluster, which are sites designated as potentially being capable of achieving significant additional height beyond the mandated height limit. As such, the proposed variation is considered minor in the context of the current and potential future character of the site.

### 3.2.4 Conclusion on clause 4.6(3)(b)

There are considered to be sufficient environmental planning grounds to justify contravening the development standard, as:

- the site has a significant slope; it is not uncommon or unreasonable to expect some minor height variations such situations;
- the building complies with the maximum floor space ratio and does not represent an overdevelopment of the site; and
- the site’s height limit is proposed to be increased under a soon-to-be-gazetted LEP amendment.

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

#### **3.3.1 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 3.1.2 of this report.

#### **3.3.2 Consistency with objectives of the zone**

The proposed development is consistent with the objectives of the B8 Zone, as it:

- provides for a development that is of an intensity consistent with the site's location in the Sydney CBD;
- provides for a diversity of land uses complementary to Sydney's global status;
- facilitates significant public benefit in the form of a public through-site link that will serve the workforce, visitors and wider community;
- encourages walking through the provision of a through-site link that increase connectivity between Barangaroo and Central Sydney; and
- maximises active frontages and pedestrian traffic in and around the building.

#### **3.3.3 Overall public interest**

The proposed development represents an innovative and responsive approach to the street environment and the overall streetscape. It seeks to replace an ageing commercial building that contributes little in terms of public domain with a development that adds significant public benefit in the form of a public through-site link from Kent Street to Jenkins Street.

Further, the proposed development improves the built form outcome on the site by establishing an envelope that responds to its surrounding context and the heights set by the adjoining Stamford on Kent and Maritime Trade Towers.

### **3.4 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.

#### **3.4.1 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.

### **3.4.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard**

There is no public benefit to maintaining the development standard. The proposed architectural roof feature adds significant public benefit by establishing the presence of the development against the sky and responding to the adjoining buildings. Maintaining the development standard would also result in a mismatch of heights between the approved development and the future desired character of the Western Corridor, given the height limit is proposed to be increased as part of the CSPP.

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

Nil.

## **4.0 Conclusion**

The assessment above demonstrates that compliance with the Height of Buildings development standard contained in clause 4.3 of SLEP 2012 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 Buildings development standard:

- the objectives of the standard are achieved, particularly in that the proposal is compatible with its context, given the number of tall buildings in the vicinity of the site;
- there are sufficient environmental planning grounds to justify the variation, as:
  - the height variation is largely driven by an architectural roof feature that significantly improves the form of the building and is a result of a competitive design process;
  - the height limit of the site is proposed to be increased from 80m to 110m as part of a soon-to-be-gazetted Council-led LEP amendment is a matter for consideration under section 4.15 of the EP&A Act; and
  - the site has a significant slope; and
- the site provides substantial public benefit through the separation of the built form and the provision of a through-site link and is consistent with the objectives of the B8 zone.

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