

# **Attachment C**

<b>Clause 4.6 Height Variation Request</b>
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Clause 4.6 Variation Request  
Height of Buildings (Clause 4.3)  
Sydney LEP 2012

**5 - 11 Botany Road & 80 - 82 Cope Street, Waterloo**



**Prepared by Planning Lab  
Issued 12 November 2020**

## Introduction

This is a formal written request that has been prepared in accordance with Clause 4.6 (cl 4.6) of the Sydney Local Environmental Plan 2012 (SLEP 2012) to support a development application (DA) submitted to City of Sydney Council for the construction of a boarding house at 5 - 11 Botany Road & 80 - 82 Cope Street, Waterloo ("the site").

The purpose of this cl 4.6 variation request is to address a variation to Clause 4.3 Height of Buildings under the SLEP 2012. Specifically, this request seeks to vary the 18m height standard that applies to the site.

The objectives of cl 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

This request has been prepared having regard to the following considerations:

- The Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011);
- The objectives of Clause 4.3 of the City of Sydney LEP 2012, being the development standard to which a variation is sought;
- Relevant case law in the New South Wales Land and Environment Court and New South Wales Court of Appeal including *Wehbe v. Pittwater Council* [2007] NSWLEC 827.

This variation request provides an assessment of the development standard and the extent of variation proposed to the standard. The variation is then assessed in accordance with the principles set out in the *Wehbe*.

## Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the Sydney Local Environmental Plan 2012 provides that development consent may be granted for development even though the development would contravene a development standard imposed by the Sydney Local Environmental Plan 2012, or any other environmental planning instrument.

However, clause 4.6(3) states that 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 circumstance of the case, and*
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.*

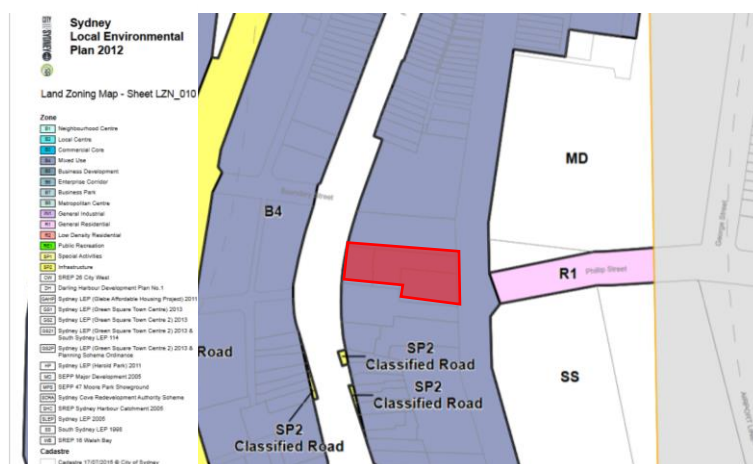
In accordance with clause 4.6(3) the applicant requests that the height of building development standard be varied.

## What is the Environmental Planning Instrument (EPI) that applies to the land?

The Environmental Planning Instrument (EPI) to which this variation relates is the City of Sydney Local Environmental Plan 2012 (SLEP).

## What is the zoning of the land?

The site is zoned B4 – Mixed Use pursuant to the SLEP. Refer to **Figure 1**. Boarding Houses are permissible in the B4 zone with development consent.



**Figure 1:** Extract of SLEP 2015 Zoning Map (subject site shaded in red) Source: NSW Legislation

## What is the development standard being varied?

Clause 4.3(2) of the SLEP provides that the maximum height for a building on any land is not to exceed the maximum shown on the Height of Building Map. The site is within area 'P' on the Height of Building Map and accordingly, an Height of 18 m applies as shown in Figure 2.



*Figure 2: Extract of SLEP 2015 Height of Building Map (subject site shaded in red) Source: NSW Legislation*

## Is the development standard excluded from the operation of Clause 4.6 of the EPI?

Cl 4.6(2) states that development consent may be granted for development even though the development would contravene a development standard. However, this does not apply to a development standard that is expressly excluded under cl 4.6(8) of the SLEP 2012. Given the maximum height development standard is not identified under subclause 4.6(8), it is therefore not specifically excluded from the operation of cl 4.6 of SLEP 2012.

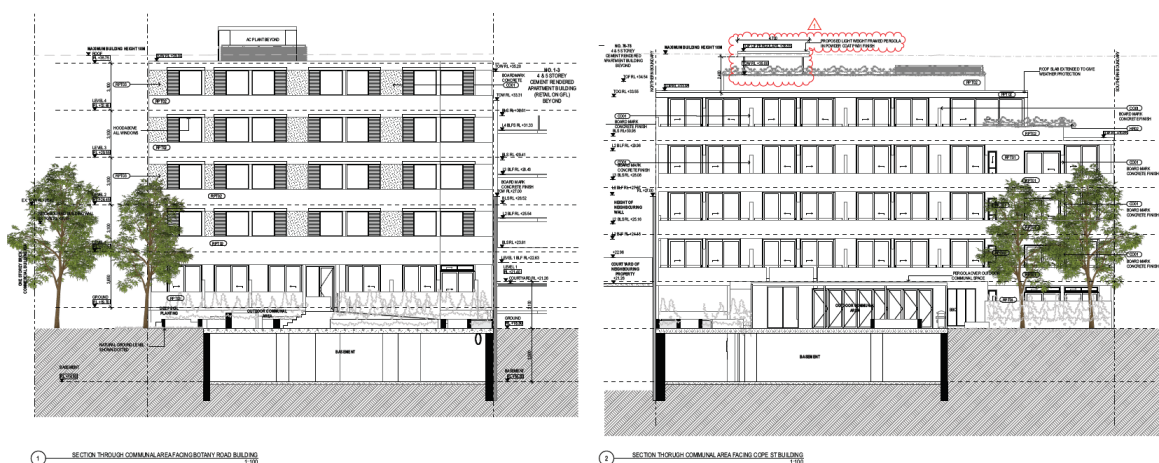
## The site and its context

The proposal relates to 5-11 Botany Road & 80-82 Cope Street, Waterloo ('the site') which is described by NSW Land and Property Information as SP22032, Lot 2 of DP632406 and Lots 1-2 of DP996766 comprising a total area of 1,812.3m<sup>2</sup>. The site is an irregular shape located between Botany Road and Cope Street with frontages to both. The site is located in a high-density mixed-use area containing large commercial, retail and residential developments and is within walking distance of the Redfern railway station.

## Extent of Variation to the Development Standard

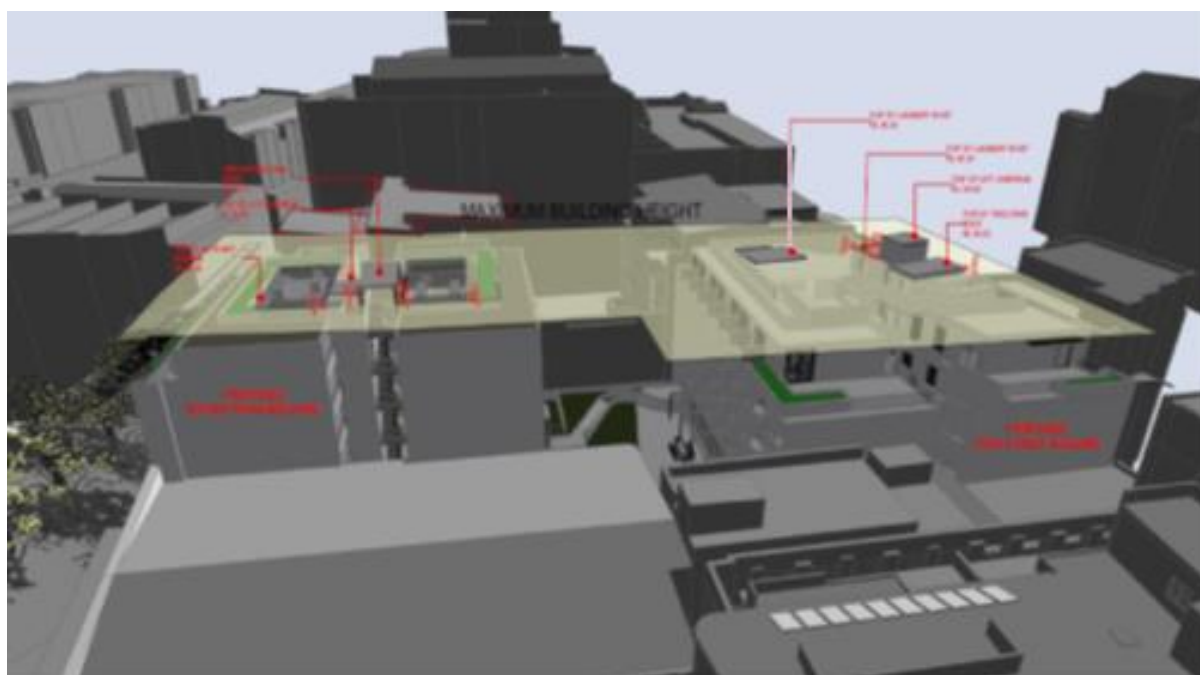
The vast majority of the proposed building envelope is below or in line with the 18 m height limit. However, the maximum building height, as measured from the 'existing' ground level, is 20.1 metres (RL 38.00) at the topmost point of the lift overrun of the Cope Street building as indicated in the architectural drawings prepared by Mostaghim & Associates (**Figure 3 & Figure 4**).

Therefore, the proposed development breaches the height standard by a maximum of 2.1 m (10.4%).



**Figure 3:** Sections through communal area

The exceedance, being the portion of the building above the 18 m height limit, is attributed to the lift overrun located at the Cope Street building and also to additional roof elements such as the top of the fire stairs (RL 36.20 or 18.38 m), the roof over the laundry area (RL 36.20 or 18.21 m) and a pergola over a section of the rooftop terrace (RL 36.55 or 18.20 m) at the Cope Street building, the roof over the fire stairs (RL 38.15 or 19.63 m), top of the lift overrun (RL 36.83 or 18.2m) and the top of the screens to the AC plant area (RL36.95 or 18.27m) at the Botany Road building. The extent of the height breach is shown in **Figures 4** below.



**Figure 4:** Maximum Building Height – 18 m Height Plan (Source: Mostaghim & Associates)

The height variation, as shown in **Figures 4**, is due to the following factors:

- Providing equitable access to the rooftop communal outdoor terrace and laundry facilities located at the Cope Street Building which provides additional amenity for the future occupants as required by 26(g) in Council's RFI dated 7 March 2020;
- Providing stair access to the roof of the Botany Road building for servicing and maintenance of the mechanical plants, solar panel array and other equipment located on the rooftop;
- Providing adequate screening to the AC units and chillers located on the roof of the Botany Road building;
- The topographical fall across the site.

It is noted that the habitable floor space is fully contained below the maximum building height line with the encroachment being limited to portions of the building containing structures which are



necessary building elements being plant and equipment enclosures and stair access to the rooftop area.

The variation is not a means of achieving additional development yield on the site or an additional floor level, as demonstrated by the proposed number of storeys, being 5 in total, which is consistent with the Height in Storey Control in the Sydney Development Control Plan 2012 and is in line with other recent developments in the surrounding 18 m height limit area.

The encroachment will have a negligible shadow and amenity impact on surrounding properties such as 86-90 Cope Street and the public domain as the height breach is, for the most part, limited to elements of the building located centrally to the roof area and appropriately set back from the buildings' principal frontages to Botany Road and Cope Street.

The proposed encroachments will also not be highly visible from street level and as such, the overall bulk and scale of the building is considered to be consistent with a compliant development.

### **Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?**

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was the satisfaction of the first test of the five-set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In *Wehbe v Pittwater Council* [2007] 156 LGERA 446 [42] – [51] (“Wehbe”) and repeated in *Initial Action* [17]-[21] the Chief Judge identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established.

Although *Wehbe* concerned a SEPP 1 objection, it remains relevant to requests under clause 4.6 as confirmed by Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, notwithstanding that if the first and most commonly applied way is used, it must also be considered in 4.6(4)(a)(ii).

The 5 ways in *Wehbe* are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's actions in granting consents departing from the standard and hence the standard is unreason
5. The zoning of the land is unreasonable or inappropriate. The five ways are not exhaustive, and it may be sufficient to establish only one.

For completeness, this request addresses the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

Compliance with the Height of Buildings development standard is unreasonable or unnecessary in the circumstances of this case because, as explained in Table 1 (below), the objectives of the development standard are achieved, notwithstanding non-compliance with the standard.

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34], the Chief Justice held, “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

Demonstrating that there will be no adverse amenity impacts is, therefore, one way of showing consistency with the objectives of a development standard.

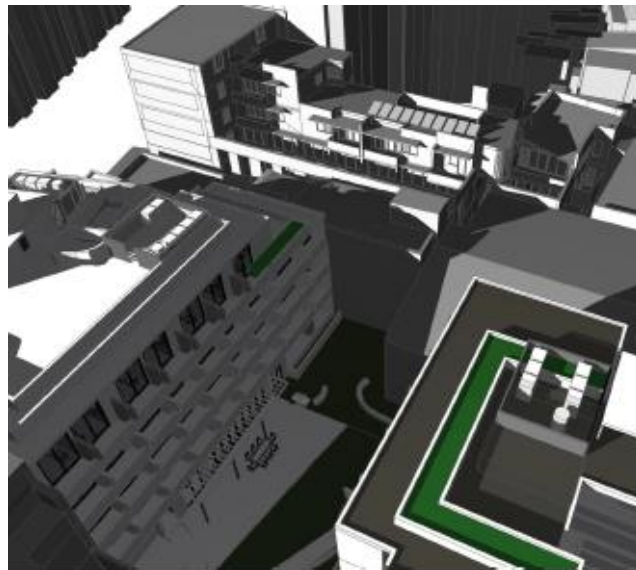
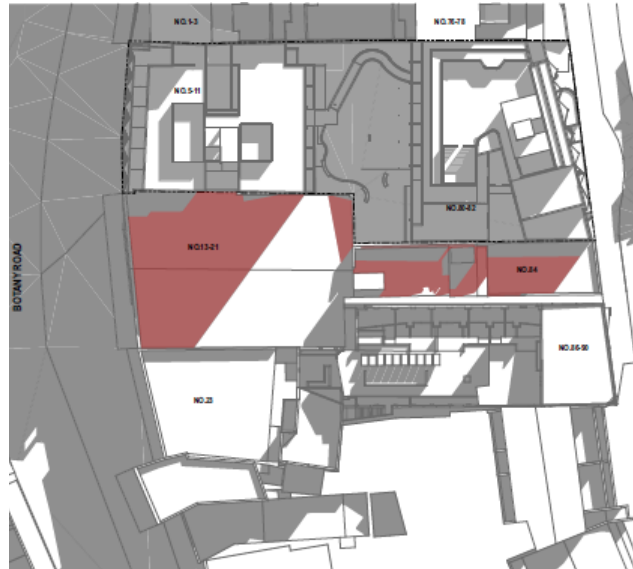
*Table 1: Achievement of Development Standard Objectives*

Objective	Discussion
<b>1(a)</b> to ensure the height of development is appropriate to the condition of the site and its context,	<p>As discussed above, whilst the maximum height of the building as measured to the top of the lift overrun is 20.1 m, it is noteworthy that vast majority of the structure of the proposed boarding house comply with the 18 m height limit (see <b>Figure 4</b>).</p> <p>The breach in the height control is confined to small portions of the building containing structures which are necessary building elements being the plant / equipment enclosures and the stair / lift access to the rooftop area.</p> <p>Most importantly, the non-compliant components of the building do not cause any impact on the surrounding public domain or/and neighbouring properties in terms of overshadowing, bulk and scale and privacy, as demonstrated in the below assessment:</p> <p><u>Overshadowing Impacts</u></p> <p>The shadow study prepared by Mostaghim &amp; Associates reveals that most of the shadows generated by the development (Note: inclusive of the shadow produced by the non-compliant elements of the building) falls onto the roof of the adjacent property at 84 Cope Street (IGA Site).</p> <p>Specifically, the proposed development results in negligible additional overshadowing of windows and private open space of</p>

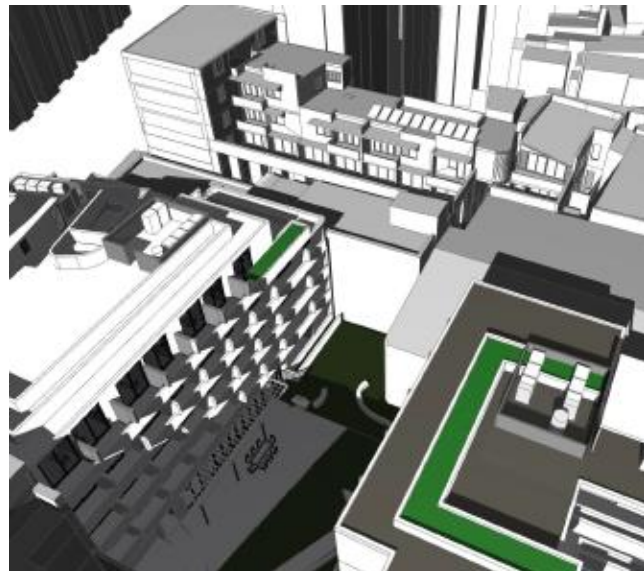


the north-facing residential apartments at 86 – 90 Cope Street which retain more than the required hours of daylight access under Part 4A - ADG and Clause 4.2.3.1 - SDCP 2012, as demonstrated in the below solar analysis.

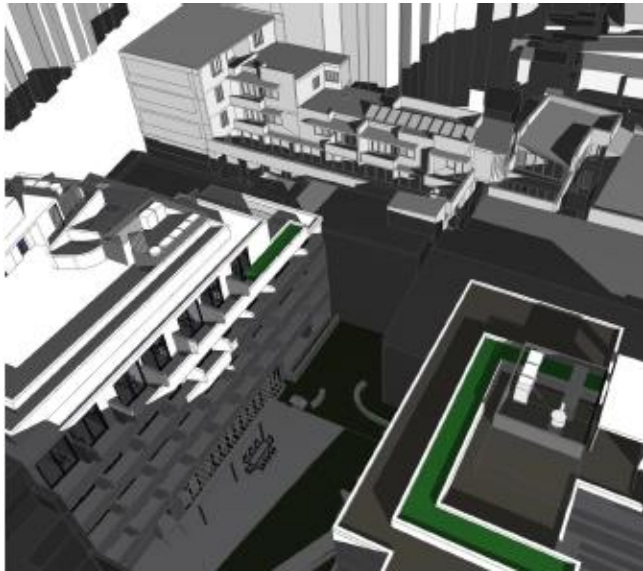
*Overshadowing Assessment – Proposed Development*



*Overshadowing at 9.00 am – June 21*



*Overshadowing at 12.00 pm – June 21*




*Overshadowing at 15.00 pm – June 21*

#### Visual Bulk

Careful consideration has been given to the location, size and design of the proposed development to ensure that a high quality outcome will be achieved which will sit comfortably within the streetscape of Botany Road and Cope Street and be consistent with the emerging character of development within the vicinity of the site.

At the Botany Road building, the proposed minor breach of the height control will not cause any impact on the streetscape as the non-complying structures will be visually imperceptible when viewed from the public domain given the minor projection above the height limit and their location away from the edges of the street wall.

At the Cope Street frontage of the development, the lift overrun will be visible from parts of the Cope Street public domain an in

	<p>particular along the footpath on the opposite side of the street, however given its small footprint and its setback from the building alignment to Cope Street, the lift structure will not add to the scale and bulk of the building nor will be a dominating element in the context of the local streetscape, as illustrated in the below 3d perspective.</p>  <p style="text-align: center;"><i>Cope Street Frontage</i></p> <p><u>Visual and Acoustic Privacy</u></p> <p>The variation of the height standard does not result in any additional overlooking of neighbouring residential properties or potential noise disruption as the breach relates to non-trafficable building's elements such as roofed areas, plant enclosures and a lift overrun.</p> <p>Further, the minor variation of the height control is not a means of achieving additional development yield on the site or an additional floor level. For instance, the proposed number of storeys, being 5 in total, is consistent with Clause 4.2.1 Building Height in SDCP 2012 and the character of existing and future development in the surrounding area.</p> <p>The breach of the standard does not affect consistency with this objective. In fact, the breach of the standard allows for a building that achieves a built form which is consistent with the one anticipated by the planning instruments that apply to the site.</p>
<p><b>1(b)</b> to ensure appropriate height transitions between new development and heritage items and buildings in</p>	<p>The site is not a heritage item, nor is it located within a heritage conservation area or a special character area. It is, however, adjacent to a heritage conservation area.</p> <p>As detailed above the proposed height is compatible within its context, and is satisfactory in terms of visual impact and solar access. In fact, the</p>

<i>heritage conservation areas or special character areas,</i>	breach of the standard allows for a building that achieves an improved built form providing better amenity for the future occupants (i.e. Access to rooftop communal terrace).
<b>1(c)</b> <i>to promote the sharing of views,</i>	There will be no adverse amenity impacts to the properties located in the surrounding area in terms of views.
<b>1(d)</b> <i>to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,</i>	Not applicable
<b>1(e)</b> <i>in respect of Green Square:</i> <i>(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and</i> <i>(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.</i>	Not applicable

Compliance with the maximum height development standard is unreasonable or unnecessary in the circumstances of this case because the objective of the standard is achieved notwithstanding the non-compliance.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The underlying objective or purpose of the height standard is relevant. However, the proposed development is consistent with those objectives on the basis that the proposed height is compatible with the existing and future scale of the surrounding buildings and will sit comfortably with the context of the site with no adverse impacts to adjacent properties.

3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The underlying objective of the height control is to achieve an appropriate height on the site which is compatible with the context of the site and maintains or improves views across the site, provides a transition to adjacent properties and preserves the privacy of adjacent properties. Due to the design, location and configuration of the proposed building envelope, the proposal successfully achieves these objectives. Strict compliance with the height control would not reduce the impact of the development on the streetscape or neighbouring properties and would provide reduced amenity to occupants of the development. Accordingly, it is considered that strict compliance would likely result in the defeat of the underlying object and purpose of the height control because it would encourage a less desirable outcome for the site.

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;

Council has historically adopted a relatively flexible approach to the implementation of the height control in circumstances where the objectives of the control are achieved, particularly where the variation is minor.

5. 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.

The proposed zoning of the land is considered to be reasonable and appropriate.

Strict compliance with the height of building development standard is unreasonable and unnecessary in the circumstances of the case in that:

- The proposal is consistent with the objectives of the standard as detailed above.



- The basis for the increase in height is to provide access to the rooftop areas of the building for recreational use as well as maintenance purposes.
- If compliance was required with the height of building standard, the access to the rooftop communal terrace and laundry area would become more onerous in particular for people with reduced mobility and inconsistent with Council's DCP – Accessible Design objectives.
- The proposed development complies with the floor space standard and the height in storeys control. As such, the scale of the building is consistent with the desired character of the locality notwithstanding a small variation is proposed to the height of buildings standard.
- Most of the elements of the development which exceed 18 metres are unlikely to be visible from the public domain because they are setback from the edges of the street wall.
- A solar analysis prepared by Mostaghim & Associates accompanies the subject application and demonstrates that the proposed areas of non-compliance do not result in any meaningful difference compared to a compliant height.
- There are no unreasonable impacts in terms of overshadowing, views, visual and acoustic privacy impacts to adjacent sites resulting from the proposed variation to the height development standard which would warrant strict compliance.
- As the proposal is consistent with the objectives of the height of buildings standard, compliance with the development standard is considered to be unreasonable and unnecessary in the circumstances of the case.
- The proposed variation allows for the most efficient and economic use of the land.
- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- Having regard to the planning principle established in the matter of *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191 most observers would not find the proposed development offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context.

### Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?

The proposed massing of the building across the site is the result of a considered analysis of the site and surrounding context and the desire to deliver a positive design outcome with a high level of architectural merit and residential amenity.

The proposed development has been specifically designed as a robust architectural solution for the site which will result in a high-quality development that will sit comfortably within the streetscapes of Botany Road and Cope Street.

The scale of the proposed development does not result in any unreasonable impacts on the surrounding properties in terms of loss of solar access, loss of privacy or visual impact. The

architectural package includes a solar access analysis which demonstrates that the proposed scale of the development will not unreasonably overshadow development on surrounding properties.

The scale of the building will not be perceived as jarring or antipathetic in the existing urban design context of the site and represents a scale which is reasonably contemplated by the planning controls which apply to the site, particularly given the minor nature of the non-compliance.

Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public and in this particular circumstance there are sufficient environmental planning grounds to warrant the proposed variation to the height of buildings standard as the proposal will deliver a superior outcome with a higher level of amenity within the development ( i.e. equitable and dignified access for all the residents of the boarding house to rooftop common area) and without any significant adverse impact to adjacent sites.

#### Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

#### Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is 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 in which the development is proposed to be carried out.

##### Objective of the Development Standard

The consistency of the proposed development with the specific objectives of the height of buildings development standard is addressed above.

## Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the B4 - Mixed Use. The objectives of the zone are:

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

The proposed development includes residential (i.e. boarding house), commercial (i.e. co-working tenancy) and retail (i.e retail tenancy) uses which are all permissible uses within a B4 – Mixed Use zone. The site is suitably located near transport and other services. It is located approximately 400 m from Redfern Train Station and 200 m from the currently under construction Waterloo Metro Station. It is also in the vicinity of a bus stop on Botany Road serviced by numerous bus routes.

The proposed development will assist in activating Botany Road and will positively contribute to the vitality of the area producing positive social and economic impacts.

For the reasons given the proposal is consistent with the objectives of the B4 – Mixed Uses zone.

## Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

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

The architectural package prepared by Mostaghim & Associates which accompanies the subject application illustrates the relationship of the proposed development within the context of the site. It demonstrates a high-quality outcome for the site which will result in the delivery of a mixed-use development which is compatible with the emerging character of development in this location.

Requiring strict compliance with the height of buildings development standard on the subject site would result in an inferior built form that would contextually be essentially no different from the proposed development and would not result in any benefit to the streetscape or the amenity of adjoining properties. In addition, if compliance was required and the lift access to the rooftop was deleted, the accessibility to the communal area served by the lift would become more onerous in particular for people with reduced mobility.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the floor space ratio development standard will achieve a better outcome in this instance in accordance with objective 1(b).

## Conclusion

Strict compliance with the height of buildings development standard contained within clause 4.3 of the Sydney Local Environmental Plan 2012 has been found to be unreasonable and unnecessary in the circumstances of the case. In addition, there are sufficient environmental planning grounds to justify the proposed variation. In this regard, it is reasonable and appropriate to vary the height of buildings development standard to the extent proposed.