

Attachment C

Clause 4.6 Height Variation Request
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26 July 2019

General Manager
City of Sydney Council
GPO Box 1591
SYDNEY NSW 2001

Dear Sir/Madam,

RE: DEVELOPMENT APPLICATION FOR PROPOSED DEMOLITION OF THE EXISTING WAREHOUSE STRUCTURE AND CONSTRUCTION OF A NEW PART FOUR (4) STOREY / PART FIVE (5) STOREY BOARDING HOUSE BUILDING AND USAGE FOR STUDENT ACCOMMODATION AT 385 WATTLE STREET, ULTIMO

REQUEST UNDER CLAUSE 4.6 OF SYDNEY LOCAL ENVIRONMENTAL PLAN 2012 TO VARY THE DEVELOPMENT STANDARD FOR HEIGHT OF BUILDINGS UNDER CLAUSE 4.3 SYDNEY LOCAL ENVIRONMENTAL PLAN 2012

INTRODUCTION

1. This letter has been prepared on behalf of the applicant TQK Pty Ltd (TQK) to further assist with the consideration of the Development Application (DA) for the proposed demolition of the existing warehouse structure and construction of a new part four (4) storey / part five (5) storey boarding house building and usage for student accommodation and the variation sought to Clause 4.3 of the *Sydney Local Environmental Plan 2012* (SLEP).
2. As detailed in the Statement of Environmental Effects (SEE) report which accompanies this DA, the design has had consideration of the Height of Building (HOB) standard contained in Clause 4.3 of the SLEP, the proposal will result in a variation to the HOB standards in Clause 4.3 of the SLEP Height of Building Mapping.
3. The permitted 18m HOB standard under Clause 4.3 of the SLEP applies as the land under the HOB Map, for the land at 385 Wattle Street, Ultimo.
4. Therefore, this request is to vary the SLEP HOB standards under the provisions of Clause 4.6 of the SLEP.
5. This Clause 4.6 variation request has been prepared having regard to:
 - The NSW Department of Planning & Environment's Guideline *Varying Development Standards: A Guide*, August 2011, and
 - has incorporated as relevant principles identified in the applicable Case law, (established tests) in the following judgements:
 - *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46
 - *Wehbe v Pittwater Council* [2007] NSWLEC 827
 - *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 ('Four2Five No 1')
 - *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90
 - *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 ('Four2Five No 3')

- *Moskovich v Waverley Council [2016] NSWLEC 1015*
- *Project Venture Developments v Pittwater Council [2005] NSWLEC 191*
- *Ex Gratia P/L v Dungog Council [2015] (NSWLEC 148)*

6. This letter explains how flexibility is justified in this case in accordance with the matters required to be considered and addressed under Clause 4.6 in a written request from the applicant. This letter also addresses where relevant other matters the consent authority is required to be satisfied when exercising the discretion of the assumed concurrence of the Secretary.

WHAT IS THE ENVIRONMENTAL PLANNING INSTRUMENT (EPI) APPLICABLE?

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

WHAT IS THE ZONING OF THE LAND?

8. In accordance with Clause 2.2 of the SLEP the site is zoned B4 Mixed Use.

WHAT ARE THE OBJECTIVES OF THE ZONE?

9. The land use table to Clause 2.2 of the SLEP provides the following objectives for the B4 Mixed Use zoning:

Zone B4 Mixed Use

1 Objectives of zone

- *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.*

WHAT IS THE DEVELOPMENT STANDARD BEING VARIED?

10. The development standard being varied is the "Height of Building" (HOB) standard shown in the SLEP HOB Map.

UNDER WHAT CLAUSE IS THE DEVELOPMENT STANDARD LISTED IN THE EPI?

11. The development standard being varied is prescribed under Clause 4.3 of the SLEP. Clause 4.3 is detailed below. The SLEP HOB Map identifies the subject site with the designation 'P = 18m', see Figure 1. The land is zoned B4 under the SLEP zoning map. Therefore, under Clause 4.3, the SLEP HOB Map and this clause apply.

4.3 Height of buildings

(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.

Note.

No maximum height is shown for land in Area 3 on the Height of Buildings Map. The maximum height for buildings on this land are determined by the sun access planes that are taken to extend over the land by clause 6.17.

(2A) Despite any other provision of this Plan, the maximum height of a building on land shown as Area 1 or Area 2 on the Height of Buildings Map is the height of the building on the land as at the commencement of this Plan.

The SLEP Height of Buildings mapping designation 'P = 18m' is shown in extract from the Height of Building Mapping in **Figure 1** below.

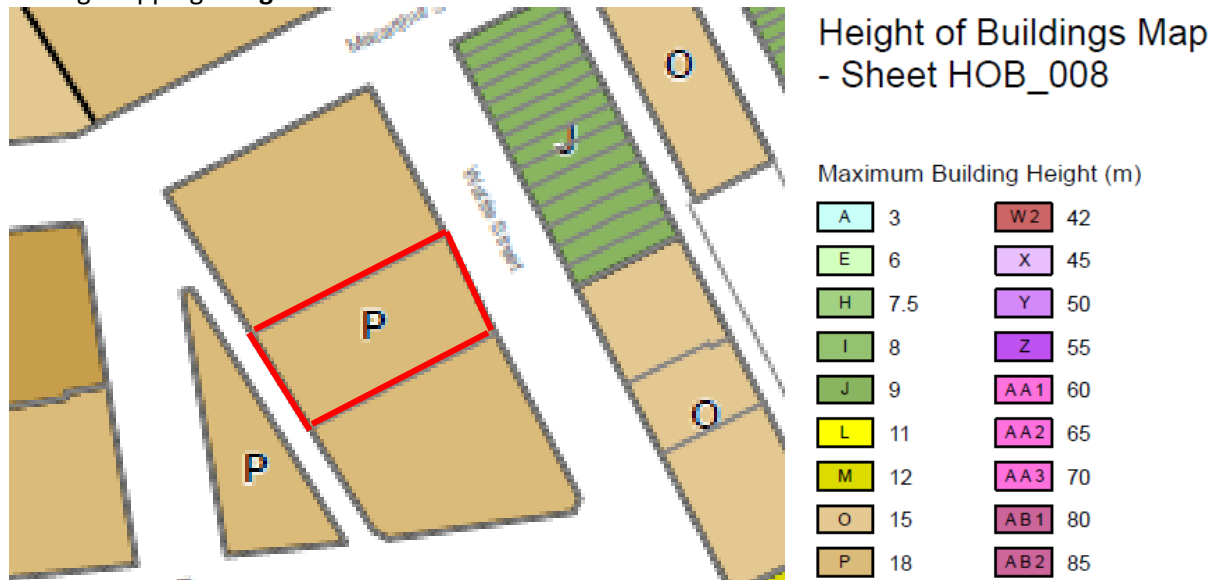


Figure 1: SLEP Height of Building Map extract (site outlined in red)

Source: NSW Legislation

This development standard relates to the maximum permitted height of a building, as Clause 4.3 of the SLEP falls within the scope of a “development standard” as defined under Section 4 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).

WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?

12. The objectives in Clause 4.3 of the SLEP, 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.

WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE EPI?

13. An extract of the SLEP HOB map is shown in **Figure 1**. The map prescribes the site being within 'P = 18m' for the subject site.

WHAT IS THE PROPOSED NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE DA AND THE VARIATION PROPOSED?

14. The DA seeks a minor variation to the HOB mapping. This is shown with the "blue dashed line" in the extract from architectural design in Appendix B, as shown in **Figure 2** below.



Figure 2: DA Architectural drawing DA2.01 Rev 8 showing 18m as a "blue dashed line" relative to existing ground levels through the proposed development

Source: h3 Architects

15. As can be seen in **Figure 2** above, the portions of the DA of the building which projects through the 18m Height of Building control under Clause 4.3 of the SLEP can be described as involving:

- a) The ground floor level has been raised compared to the existing built form on the site, in order to be compliant with the minimum required flood level (inclusive of allowing for the minimum freeboard). As a result the ground level is RL6.3 which is 1.75m above the Wattle Street existing footpath / existing ground level which is generally RL4.55. If the ground level did not account for the flood level and freeboard, the design would comply with the Height of Building control;
- b) The design includes lift access to the rooftop communal private open space with the top of the lift overrun proposed to have a finished RL23.5; and
- c) The extent of the breach associated with the lift overrun is 0.95m or a 5.3% variation, which is considered to be minor.

MATTERS TO BE CONSIDERED UNDER CLAUSE 4.6

16. Clause 4.6 of the SLEP states:

4.6 Exceptions to development standards

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

- (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.*

(2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

(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.*

(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 Director-General has been obtained.*

(5) *In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

(6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary*

Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
 - (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*
- (7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- (8) This clause does not allow development consent to be granted for development that would contravene any of the following:*
- (a) a development standard for complying development,*
 - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
 - (c) clause 5.4,*
 - (ca) clause 4.3 (Height of buildings), but only in relation to land shown as being in Area 1 or Area 2 on the Height of Buildings Map,*
 - (cab) clause 4.5A (Balconies on certain residential flat buildings),*
 - (cb) clause 5.3A (Development below ground level in Zone RE1),*
 - (cc) clause 6.10 (Heritage floor space),*
 - (cd) clause 6.11 (Utilisation of certain additional floor space requires allocation of heritage floor space),*
 - (cda) clause 6.11A (Temporary alternative heritage arrangements in relation to allocation of heritage floor space),*
 - (ce) clause 6.17 (Sun access planes),*
 - (cf) clause 6.18 (Exceptions to sun access planes),*
 - (cg) clause 6.19 (1) (d)–(h) and (j), unless the additional overshadowing is caused by playground equipment, a shade structure, an awning, a sculpture or artwork, or a community notice or public information sign,*
 - (cga) clause 6.26 (AMP Circular Quay precinct),*
 - (cgb) clause 6.29 (58–60 Martin Place, Sydney),*
 - (cgc) clause 6.33 (230–238 Sussex Street, Sydney),*
 - (cgd) clause 6.35 (45 Murray Street, Pyrmont), but only if the development is an alteration or addition to an existing building,*
 - (cge) clause 6.36 (12–20 Rosebery Avenue, 22–40 Rosebery Avenue and 108 Dalmeny Avenue, Rosebery),*
 - (cgf) clause 6.37 (296–298 Botany Road and 284 Wyndham Street, Alexandria),*
 - (cgg) clause 6.41 (7–15 Randle Street, Surry Hills),*
 - (cgh) clause 6.42 (102–106 Dunning Avenue, Rosebery),*
 - (cgh) clause 6.40 (2–32 Junction Street, Forest Lodge),*
 - (ch) Division 1 of Part 7 (Car parking ancillary to other development).*

17. Each of the matters for consideration under Clause 4.6 of the SLEP and response to each consideration as detailed below:

4.6 Exceptions to development standards

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

- (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 objectives of this clause expressly indicate a degree of flexibility should be applied “in particular circumstances”. This is such a circumstance to enable a flexible approach to the outcome sought by this DA.

- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

The Height of Building (HOB) standard is not excluded from operation of this clause.

- (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.*

The Statement of Environmental Effects submitted with the DA indicates a specific request is included with the application to seek a variation of the HOB development standard. This letter is the applicant’s formal written request.

Refer to **table 1** below for an assessment under Clause 4.6(3)(a) and (b).

- (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 Director-General has been obtained.*

This written request addresses all requirements of subclause (3).

As set out in **table 1** of this written request, the proposed development will be in the public interest because it is consistent with the objectives of the HOB standard (refer to **table 1**) and the objectives for the zone (refer to **table 2**).

Concurrence may be assumed but is a matter to be determined by the Consent Authority.

- (5) *In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.

Potential matters of significance for State or regional environmental planning is addressed in paragraphs 39 and 40 and **table 3**.

The minor non-compliances with the development standard does not raise any matters of significance for State or regional planning as the development meets the stated objectives of the development standard.

Consideration of whether there is any public benefit in maintaining the development standard is considered in paragraphs 42, 43 and 44.

As the development is consistent with the stated objectives of the development standard, and as such requiring strict compliance with the development standard is unreasonable and unnecessary. There is no public benefit of maintaining the development standard in this instance.

All matters required to be considered by the Secretary (formerly Director-General) before granting concurrence have been addressed as part of this Clause 4.6 variation request.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note. When this Plan was made it did not include all of these zones.

The provisions of Clause 4.6(6) do not apply to the subject site and proposed development in this DA.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

The Consent Authority must keep a record after determining this DA.

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

- (a) a development standard for complying development,*
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
- (c) clause 5.4,*
- (ca) clause 4.3 (Height of buildings), but only in relation to land shown as being in Area 1 or Area 2 on the Height of Buildings Map,*
- (cab) clause 4.5A (Balconies on certain residential flat buildings),*
- (cb) clause 5.3A (Development below ground level in Zone RE1),*
- (cc) clause 6.10 (Heritage floor space),*
- (cd) clause 6.11 (Utilisation of certain additional floor space requires allocation of heritage floor space),*
- (cda) clause 6.11A (Temporary alternative heritage arrangements in relation to allocation of heritage floor space),*

- (ce) clause 6.17 (Sun access planes),
- (cf) clause 6.18 (Exceptions to sun access planes),
- (cg) clause 6.19 (1) (d)–(h) and (j), unless the additional overshadowing is caused by playground equipment, a shade structure, an awning, a sculpture or artwork, or a community notice or public information sign,
- (cga) clause 6.26 (AMP Circular Quay precinct),
- (cgb) clause 6.29 (58–60 Martin Place, Sydney),
- (cgc) clause 6.33 (230–238 Sussex Street, Sydney),
- (cgd) clause 6.35 (45 Murray Street, Pyrmont), but only if the development is an alteration or addition to an existing building,
- (cge) clause 6.36 (12–20 Rosebery Avenue, 22–40 Rosebery Avenue and 108 Dalmeny Avenue, Rosebery),
- (cgf) clause 6.37 (296–298 Botany Road and 284 Wyndham Street, Alexandria),
- (cgg) clause 6.41 (7–15 Randle Street, Surry Hills),
- (cgh) clause 6.42 (102–106 Dunning Avenue, Rosebery),
- (cgh) clause 6.40 (2–32 Junction Street, Forest Lodge),
- (ch) Division 1 of Part 7 (Car parking ancillary to other development).

These subclauses do not affect the site.

18. **Table 1** below provides an assessment against Clause 4.6(3):

Table 1: Clause 4.6(3) assessment

Objective	Comment
(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case	<p>Strict application of the development standard is considered to be unreasonable and unnecessary as the proposed development will be consistent with the stated objectives of Clause 4.3 of the SLEP:</p> <p>(a) to ensure the height of development is appropriate to the condition of the site and its context,</p> <p>(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,</p> <p>(c) to promote the sharing of views,</p> <p>(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,</p> <p>(e) in respect of Green Square:</p> <p>(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and</p> <p>(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.</p> <p>In light of the objectives above, which encourage a flexible approach to compliance with design principles where the design of the development responds to the site and its form, strict compliance with the standard under Clause 4.3 is unnecessary because:</p> <ul style="list-style-type: none"> The design of the building results in a better urban design outcome particularly as the building allows for disabled access throughout without resulting in unacceptable streetscape presentations and does not propose to unacceptably alter the existing site topography while creating a sense of address to each frontage, appropriate proportion and access to the

Objective	Comment
	<p>proposed commercial premises to create an active street frontage to Wattle Street in character with the existing and desired streetscape character, which is considered to be consistent with objective (a);</p> <ul style="list-style-type: none"> • The design incorporates flood management measures where the existing site development has none, and as a result of the flood level the ground floor level has been raised 1.75m which as a result the lift overrun has a minor project. The incorporation of flood management by raised the ground floor level is an appropriate response to the existing site context as envisaged in objective (a); • The design despite the minor breach of the height control associated with the lift overrun will ensure an appropriate transition in height between the proposed development and the nearby heritage item opposite at 430-440 Wattle Street and the heritage conservation area as discussed in the Statement of Heritage Impact at Appendix M, and drawings "Built Form & Height Study" DA0.05 and "Streetscape Study" DA0.06 at Appendix B, consistent with objective (b); • The DA is accompanied by "plane view" Shadow Diagrams in Drawings DA5.01 and 5.02 prepared by h3 Architects included in the architectural drawings at Appendix B of the DA package, which demonstrates: <ul style="list-style-type: none"> ○ The proposed design and the solar access to adjoining properties will not be adversely affected by the shadow cast associated with the projection of the lift overrun above the HOB control. ○ The shadow diagrams delineate at hourly intervals between 9am to 3pm on 21 June (winter solstice) indicate that the DA design will cast a minor amount of additional shadowing as a result of the lift overrun. ○ Therefore, based on these diagrams in the architectural drawings, the shadow analysis demonstrates that the minor breaches of the building height control will not result in an unacceptable impact on the amount of solar access available to the south. • The design will adequately maintain privacy for residents of existing and future dwellings and promotes privacy for the existing and future residents which is consistent with the objective of the building height control in Clause 4.3. • The proposed development will not result in an unacceptable adverse impact in terms of loss of solar access, loss of privacy or loss of views to or from adjoining properties. The proposed development is of a compatible design with its context and is of a scale and density as envisaged with the future character of the area. Therefore, strict compliance with the development standard is unnecessary as the development will still achieve the environmental and planning objective of Clause 4.3, as discussed above. <p>For reasons outlined above a development which is made to comply with the planning control is unreasonable in the circumstances.</p> <p>A development that strictly complies with the 18m height standard is unreasonable or unnecessary in the circumstance for the following reasons:</p> <ul style="list-style-type: none"> • The non-compliance with the height limit does not result in a building that will be out of scale with surrounding future development. Removing the non-compliance would not significantly alter the perceived height of the building as viewed from the public domain or from other surrounding development. • There is no discernible difference in the environmental impacts between a building that strictly complies with the height control in terms of: <ul style="list-style-type: none"> — <u>Visual and acoustic privacy impacts</u>

Objective	Comment
	<p>The non-compliant levels of the building do not generate any privacy impacts over or above those that exist with a fully compliant building height. This is the same for acoustic privacy;</p> <p>– <u>Visual impacts</u></p> <p>There is a nominal difference in visual impacts between the proposed building and a complying building. When viewed from Rowe Street as demonstrated in the perspective views; and</p> <p>– <u>Overshadowing impacts</u></p> <p>There is a negligible difference in shadow impacts of a compliant building and the proposed building.</p> <ul style="list-style-type: none"> • Strict compliance with the development standard is unnecessary as the DA will still achieve the environmental and planning objectives of Clause 4.3, as discussed above. • Strict compliance is unreasonable as no environmental or planning purpose would be served by enforcing the development standard and would not bring about a good planning outcome, on the following grounds: <ul style="list-style-type: none"> I. An assessment of the proposal demonstrates it is consistent with the desired future character of the B4 zone; II. The design is considered to be compatible with the streetscape along Wattle Street; III. The design will not create any unreasonable overshadowing, result in loss of privacy or create an adverse visual impact upon the streetscape or the environment given the areas of non-compliance is in a portion of the site which does not dominate the streetscape; and IV. The scale of the desired future surrounding development has been considered carefully and the design is considered to be compatible. <p>In summary the design in its current form with the breach of the HOB control can be supported because:</p> <ul style="list-style-type: none"> a. the majority of the building complies with the HOB mapping control except the portion of the building which breaches the control being the lift overrun to Level 5 which affords universal and equitable lift access to the roof private communal open space; b. it is not possible to lower the building, due to the minimum required freeboard above the flood level; c. if forced to comply with the height standard, this will result in the loss of the rooftop communal open space; d. the portion of the design which exceeds the Height of Building control will not create any unreasonable overshadowing; e. the portion of the design which exceeds the Height of Building control will not result in loss of privacy; f. the portion of the design which exceeds the Height of Building control will not result in an unacceptable adverse visual impact upon the streetscape; g. the portion of the design which exceeds the Height of Building control will not result in an unacceptable amenity impact; and h. the proposal is considered to be consistent with the objectives of the control. <p>For these reasons it is considered that strict application of the HOB control in Clause 4.3 is unreasonable and unnecessary in this circumstance, particularly given that the non-compliance</p>

Objective	Comment
	is minimal and there are no unacceptable impacts flowing from the non-compliance.
(b) that there are sufficient environmental planning grounds to justify contravening the development standard	<p>The exceedance of the development standard for the lift is a very minor part of the proposed built form, as the design seeks the inclusion of lift access to allow accessibility throughout the existing building and land. The minor non-compliance with the development standard is far outweighed by the design achieving the aims in Clause 4.3 in promoting the principles outlined in the Greater Sydney Region Plan – A Metropolis of Three Cities. For example, the development promotes a use in an urban area which supports:</p> <ul style="list-style-type: none"> • a mix of uses with a focus on the nearby education precinct; and • Increasing jobs and better utilising land already zoned B4 Mixed Use which permits this form of development under the SLEP. <p>In this regard, the DA is consistent with the State and regional objectives.</p>

19. The requirement for consideration and justification of a Clause 4.6 variation necessitates an assessment of the criteria. It is recognised that it is not merely sufficient to demonstrate a minimisation of environmental harm to justify a Clause 4.6 variation, although in the circumstance of this case, the absence of any environmental impact, the request is of considerable merit.
20. The proposed variation from the development standard is assessed below against the accepted "5 Ways" for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe v Pittwater Council [2007] NSWLEC 827* and the principles outlined in *Winten Developments Pty Ltd v North Sydney Council [2001] NSWLEC 46*. Whilst the principle applied to SEPP 1, it has been generally applied in the consideration of a request under Clause 4.6 of the SLEP, as confirmed in *Four2Five*.

HOW IS STRICT COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THIS PARTICULAR CASE?

21. The NSW Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council [2007] NSW LEC 827*. Under *Wehbe*, the most common way of demonstrating that compliance is unreasonable or unnecessary, was whether the proposal met the objectives of the standard regardless of the variation. Under *Four2Five*, whilst this can still be considered under this heading, it is also necessary to consider it under Clause 4.6(3)(a) (see below).
22. The five ways described in *Wehbe* are therefore appropriately considered in this context, as follows:

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

23. Clause 4.3 does have stated objectives, and it is considered that the variation still achieves the stated objectives of the development standard as detailed previously in Table 1 above:

- (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.

- 24. The DA achieves the above stated objectives for the reasons stated in Table 1, notwithstanding the minor increase in the non-compliances with the HOB standard.
- 25. The breach of the HOB standard does not cause inconsistency with these objectives, and therefore the intents of clause 4.3 of the SLEP is also achieved.

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

- 26. There are stated objectives of the standard in Clause 4.3 and as discussed above, the objectives of Clause 4.3 are relevant to the DA and can be maintained by the architectural design.

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

- 27. As the stated previously the objectives of the standard can still be maintained, and therefore the purpose will not be defeated or thwarted by the variation requested and strict compliance is unreasonable.

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;

- 28. It is noted that Council has varied the HOB standard from time to time based on the merits of each case.

5. The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

- 29. Not applicable.

SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY THE CONTRAVENTION

- 30. The Statement of Environmental Effects (SEE) prepared for this DA provides a comprehensive environmental planning assessment of the architectural design and concludes that subject to adopting a range of reasonable mitigation measures, there are sufficient environmental planning grounds to support the DA.
- 31. There are robust justifications throughout the SEE accompanying documentation to support the proposed student accommodation given the overall bulk and scale of the development is compatible and will not adversely impact nearby residential development or heritage consideration, and therefore the proposed building is consistent with the desired future outcome and is appropriate on environmental planning grounds.
- 32. The particular circumstances of this case distinguish it from others as detailed in Table 2 above.

IS THE VARIATION IN THE PUBLIC INTEREST?

- 33. Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless 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.

34. The objectives of the standard have been addressed in **table 1** and are demonstrated to be satisfied. The proposal is consistent with the zone objectives and permissible in the zone. Each of the objectives of the zone are addressed in **Table 2** below.

Table 2: Assessment of the DA against the zone objectives – B4 Mixed Use under the SLEP

B4 Mixed Use zone - objectives	Comment
<ul style="list-style-type: none"> <i>To provide a mixture of compatible land uses.</i> 	As discussed previously in relation to the consideration of Clause 30A of the ARHSEPP within the SEE report, the site will provide a new use which is compatible with the mix of uses in the existing locality. and is consistent with this objective.
<ul style="list-style-type: none"> <i>To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.</i> 	The proposal involves a “boarding house” which is a form of residential accommodation which is integrated with an inhouse café at the ground floor Wattle Street frontage, and the design while providing on-site car parking, (being less than the number of spaces specified by the ARHSEPP) the site is located in an accessible location, includes the provision of 36 bicycle spaces in three locations on-site and seeks to encourage walking and cycle to local facilities and infrastructure.
<ul style="list-style-type: none"> <i>To ensure uses support the viability of centres.</i> 	The site is located within 400m walking distance of Broadway shopping centre, and within 800m of Central Park shopping centre.

35. The objectives of the zone, as demonstrated above, as well as the objectives for the standard have been adequately satisfied, where relevant. Therefore, the variation to the HOB standard is in the public interest.

MATTERS OF STATE OR REGIONAL SIGNIFICANCE (CL.4.6(5)(A))

36. Clause 4.6(5) of the SLEP states:

(5) *In deciding whether to grant concurrence, the Director-General 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 Director- General before granting concurrence.*

37. The matters for consideration in Clause 4.6(5) have been addressed in **Table 3** below.

Table 3: Clause 4.6(5) assessment

Matter of Consideration	Comment
<i>(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning</i>	The minor non-compliance with the development standard does not raise any matters of significance for State or regional planning as the development meets the underlying objectives of the development standard.

Matter of Consideration	Comment
<i>(b) the public benefit of maintaining the development standard</i>	As the DA substantially complies with the stated objectives of the development standards, there is little utility in requiring strict compliance with the development standard for an otherwise compliant development. There is no public benefit of maintaining the development standard in this circumstance.
<i>(c) any other matters required to be taken into consideration by the Director-General before granting concurrence</i>	It is considered that all matters required to be taken into account by the Director-General before granting concurrence have been adequately addressed as part of this Clause 4.6 variation request.

38. There is no prejudice to planning matters of State or Regional significance resulting from varying the development standard as proposed by this application.

THE PUBLIC BENEFIT OF MAINTAINING THE STANDARD (CL.4.6(5)(B))

39. Pursuant to *Ex Gratia P/L v Dungog Council (NSWLEC 148)*, the question that needs to be answered is “whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development”.
40. There is no public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the maximum height of buildings standards, whilst better planning outcomes are achieved.
41. We therefore conclude that the benefits of the proposal outweigh any disadvantage and as such the proposal will be in the public interest.

IS THE VARIATION WELL FOUNDED?

42. This Clause 4.6 variation request is well founded as it demonstrates, as required by Clause 4.3 of the SLEP, that:
- a) Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
 - b) There are sufficient environmental planning grounds to justify the contravention, which results in a better planning outcome than a strictly compliant development in the circumstances of this case;
 - c) The DA meets the objectives of the development standard and where relevant, the objectives of the B4 zone, notwithstanding the variation;
 - d) The DA is in the public interest and there is no public benefit in maintaining the standard;
 - e) The non-compliance with the HOB does not result in any unreasonable environmental impact or unacceptable adverse impacts on adjoining owners and/or occupiers;
 - f) It is considered the proposed height is appropriate for the orderly and economic use of the land and is consistent with character of this location; and
 - g) The contravention does not raise any matter of State or Regional significance.

CONCLUSIONS

43. This Clause 4.6 variation request to Clause 4.3 of SLEP should be supported on the basis that the strict application of the development standard to the DA is both unreasonable and unnecessary given the variation is well founded and detailed in paragraphs 43(a) to (g) above and Table 1, and will provide for an affordable housing building with improved access and choice for student housing which is in the public interest.
44. For the reasons set out above, the development should be approved with the minor exception to the numerical HOB standard in Clause 4.3. Importantly, the development as proposed achieves the stated objectives of the standard and zone despite the minor numerical non-compliance with the development standard.

Should you have any queries or require clarification on any matters please do not hesitate to contact the undersigned on (02) 9929 4044.

Yours faithfully,



Marian Higgins
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