

Attachment C

<p>Clause 4.6 Variation Request – Building Height</p>
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Sydney Local Environmental Plan 2012 – Amended Clause 4.6: Exception to Development
Standards

Development Application for 18-32A Darlinghurst Road, Potts Point 2011

The Development Application

This report relates to a development application that seeks consent for construction of a mixed use development, located at 18-32A Darlinghurst Road, Potts Point (the *site*).

1. The development application (DA) seeks consent for partial demolition of the existing structures; retention of the front façade of Bourbon, Commodore and Lowestoft; construction of a mixed-use development comprising of commercial premises including three retail tenancies and two pubs, 52 residential apartments, 59 hotel rooms and a medical centre.
2. The Environmental Planning Instrument to which this variation relates is the Sydney Local Environmental Plan 2012 (the LEP).
3. The site is located in the B2 Local Centre Zone, pursuant to Clause 2.2 of the LEP and the proposed use of the site for mixed use purposes is permissible with development consent.
4. The purpose of this report is to seek a variation to the development standard at cl. 4.3 of the LEP, relating to Height of buildings, in accordance with cl. 4.6 and is to be read in conjunction with the Statement of Environmental Effects (SEE) accompanying the development application.

The Development Standard for Building Height

5. The Building Height map demonstrates that the site is affected by two maximum building height standards. An extract of the map is shown in Figure 1. The map prescribes a building height of 30m at 18-20 Darlinghurst Road; the remainder of the site is subject to a maximum building height of 22m.
6. The definition of *building height or height of building* is contained at the Dictionary to the LEP and states as follows:

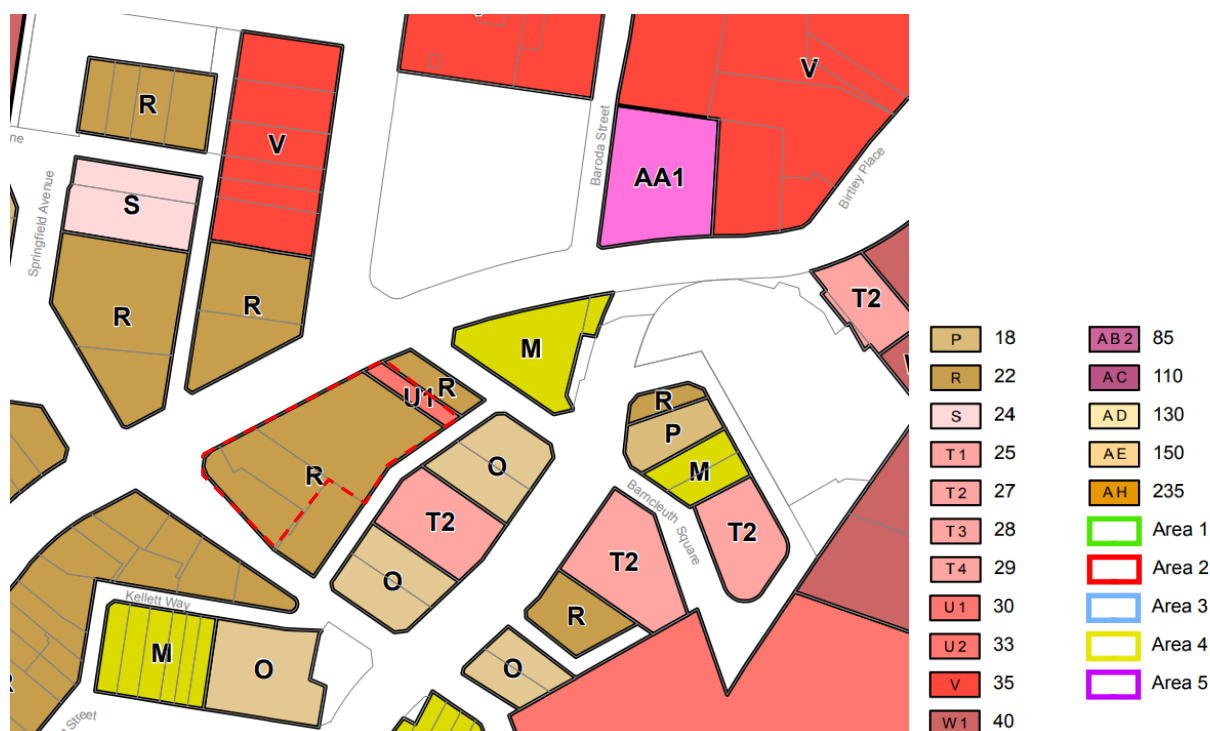
(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,

including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.



Figure 1: Height of Building height map, site highlighted with red boundary



The Proposed Development & The Impact of the Non-Compliant Section of Building Height

7. The proposal provides a variable scale of five (5), seven (7) and eight (8) storeys, with varying street wall heights and interfaces with the surrounding frontages and laneway, which responds to the slope of the land, thus resulting in differential building heights that reinforce the character of the frontages and the wider Potts Point Heritage Conversation Area (HCA).
8. The maximum height of the proposed building for each portion of the site is detailed in the Table below. This demonstrates that:
 - a. The main areas of non-compliance relate to plant, equipment and communal open space areas attached to the proposal. They do not allow for additional density on the site, such that this space generates floor space (and thus return) at expense of the planning control. There is one exception to this for The Bourbon, where part of the habitable height of the development (2.2m) is above the development standard of 22m.
 - b. The only other variation is on The Commodore, where the existing building height exceeds the development standard of 22m. A change in form is proposed that will result in a varied outcome, with some components being lower than the existing height and others marginally exceeding (shown in blue). The form that is exceeding the height limit is of a more regularised form such that it does not dominate this frontage of the development.



Figure 2: A 3D model indicating what areas of the building that are above the height standard (Source: Tonkin Zulaikha Greer / Panov Scott Architects)

Table 1: Analysis of Building Height Compliance

Building Name	RL Level	Height (m)	Compliance
The Lowestoft (30m)(@Darlinghurst Road)			
Ground Level (RL)	40.800		
Plant, Equipment & Common Open Space (Parapet)(RL)	71.005	30.205	No
The Lowestoft (30m)(@Gridline 7-8)			
Ground Level (RL)	39.100		
Plant, Equipment & Common Open Space (Parapet)(RL)	71.050	31.950	No
The Bourbon (22m)(@Darlinghurst Road)			
Ground Level (RL)	41.000		
Upper Building Level (RL)	63.300	22.300	No
Plant, Equipment & Common Open Space (Parapet)(RL)	64.100	23.100	No
The Bourbon (22m)(@Gridline 6-7)			
Ground Level (RL)	39.100		
Upper Building Level (RL)	63.300	24.200	No
Plant, Equipment & Common Open Space (Parapet)(RL)	64.100	25.000	No
The Bourbon (22m)(@Gridline 8)			
Ground Level (RL)	39.100		
Upper Building Level (RL)	59.400	20.300	No
Plant, Equipment & Common Open Space (Parapet)(RL)	60.040	20.940	No
The Radnor (22m)			
Ground Level (RL)	41.000		
Upper Building Level (RL)	61.520	20.520	No
Plant, Equipment & Common Open Space (Parapet)(RL)	66.150	25.150	No
The Commodore (22m)			
Ground Level (RL)	40.900		
Upper Building Level (RL)	66.570	25.670	No
Plant, Equipment & Common Open Space (Parapet)(RL)	69.270	28.370	No
The Empire			
Ground Level (RL)	39.200		
Upper Building Level (RL)	61.650	22.450	No
Plant, Equipment & Common Open Space (Parapet)(RL)	62.750	23.550	No



9. Part of the non-compliant section of the Lowestoft sits flush with the levels below to ensure an architectural consistency and rhythm to the streetscape. This section of the building does not enclose habitable space, but instead screens building services. However, the consistency of this form, such that it marries harmoniously with the levels below, ensures that there is no visual impact from the street frontage. The photomontage below demonstrates the forms consistency with the reference point of the parapet of Kingsley Hall adjacent, such that the proposal sits subservient to the adjoining building and continues the vertical proportionality of the building.



**Figure 3: Artists
Impression of
proposed
development looking
south (Source:
Mogamma)**

10. While there is also a section of the building that is non-compliant (between Gridline 7 and 8 on the architectural plans), this is set well within the site, such that it has no impact on neighbouring properties, nor any visibility that would otherwise contribute to the bulk and scale of the building.
11. For The Bourbon, the non-compliant section of the building, at its closest point is 6m from the boundary ensuring that the dominant visual interest is created by the lower, heritage listed form, of the building. The detailing of this announces the character of this section of the site with the extension of the building vertically, being set back, as a contemporary design element that does not dominate the traditional elements which are to be preserved and enhanced to the streetscape. This is also evident in Figure 3.
12. All other non-compliant areas of the building are set recessive from the street frontages such that these are not visually present, nor do they dominate the principal form of the building, thus clearly retaining the visual dominance of the vertical proportions that are required by the DCP. The dominance of openings to these frontages ensure that there is a high degree of visibility from the

internal areas of the building towards the frontages to create a sense of activation, with otherwise unsightly elements set away from the building proper such that the eye is not drawn to these.

13. Aside from visual bulk is potential adverse solar impact. As demonstrated in the Statement of Environmental Effects, the additional height proposed does not cause any increased solar impact below the thresholds of the ADG such that the amenity of neighbouring properties would be otherwise compromised. It is acknowledged that there is one apartment on the adjoining property at 25/9 Ward Avenue where the threshold of sunlight will decrease below that permitted under the ADG; however, this occurs regardless of compliance with the height of building standard and it is not the non-compliant section of the building that is causing the impact.
14. In addition, the requirements of the ADG are achieved in terms of solar access to individual apartments and relevant spaces that are above the building height. Further, the non-compliant component of the building does not cause adverse impact to compliant sections of the building.
15. A minor non-compliance also occurs for the Empire, the outcome of which allows for the creation of communal open space on the top floor of the building, thus improving the amenity provided to the development. This outcome does not generate additional density on the site that attracts additional revenue, but instead enhances the amenity and opportunities for communal interaction, for residents of the development.
16. As demonstrated in the Statement of Environmental Effects, there is no adverse impact in terms of view loss as a result of the non-compliant section of the proposed building height, having regard to the height of buildings surrounding the subject site. The survey plans demonstrate that, when looking from the adjoining properties along Ward Avenue:
 - the existing building height precludes any view in a westerly direction from 3 Ward Avenue, thus the additional building height above the development standard does not cause any additional adverse impact
 - the existing height of the Lido precludes any view from 9-11 Ward Avenue, across the subject site, before the non-compliance section of the building has any direct impact
 - views from 7 Ward Avenue are generally impacted by the existing form on the site. This has an existing parapet height of RL55.72 on the Darlinghurst Road frontage. From an assumed eye height (1.6m) within that building, the resulting RL would be RL56.95. However, the view enjoyed is across the top of the existing building and views are unlikely to be available to any iconic elements within the vicinity of the site. Further, the slim building design of the non-compliant section of the building will also ensure that views are retained above the existing buildings that are required to be preserved as part of the proposal.



17. Therefore, the that section of the building which does not comply with the development standard will have no impact in terms of view loss to any iconic.

The Context and Future Character

18. The site is located at 18-32A Darlinghurst Road, Potts Point and comprises of five amalgamated sites with a total area of 2,518m². The site is an irregular shaped allotment and is surrounded by Darlinghurst Road (primary frontage) to the west, Roslyn Street to the south and Barncleuth Lane to the east.
19. The site's western boundary fronts Darlinghurst Road (primary frontage) and is approximately 63.17m in length and the southern boundary fronts Roslyn Street and is 34.355m. The eastern boundary of site fronts Barncleuth Lane for a length of 34.805m in length. The remaining section of the eastern boundary adjoins the Lido Suites and is 23.325m. The south-western corner of the site has a dimension of 9.855m. The northern boundary is 25.4m.
20. The site has an approximate fall of 2.15m towards the south of the site, with the high point being Darlinghurst Road and the low point along Barncleuth Lane, where the site terminates at the Lido Suites.

What is the desired character of the locality?

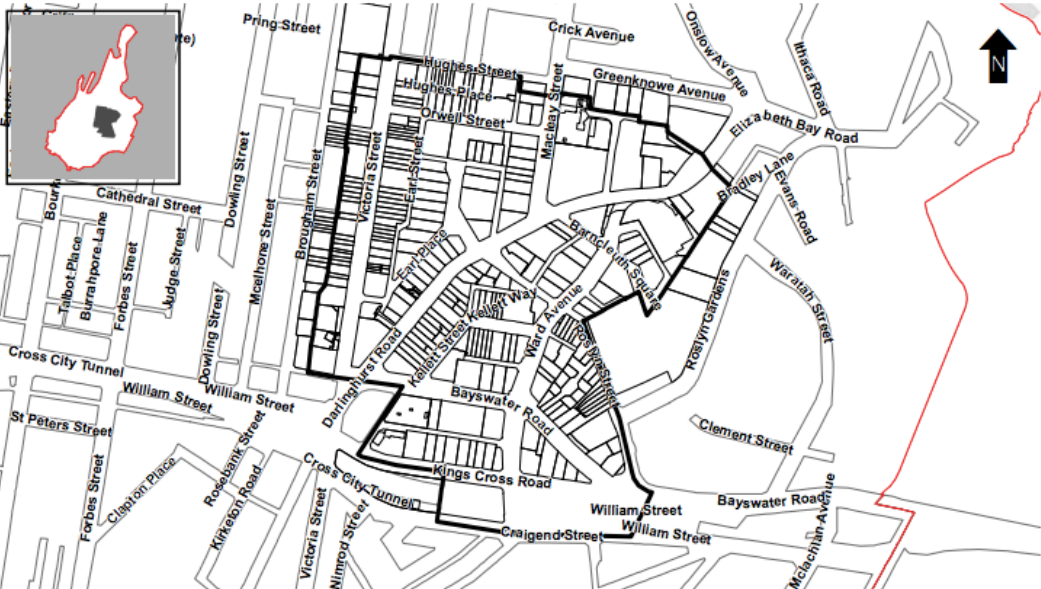
21. Character is what makes a neighbourhood distinctive and represents the identity of a place. To this end, Section 2.4.7 of the Sydney Development Control Plan 2012 (the DCP) provides the locality statement for the Kings Cross Precinct. Most importantly, Section 6.2.12 Darlinghurst Road, Potts Point of the DCP outlines the desired development outcomes for the site as envisaged by the City of Sydney (the Council).

Is the proposal consistent/compatible with the locality statement/character of the Kings Cross?

22. The table below provide an assessment of the proposal having regard to the character of the locality as set out in the DCP.

Table 2: Assessment of the proposed development having regard to the locality statements

Provisions	Comments	Compliance
Section 2.4 City East		
2.4.7 Kings Cross		
Development along Darlinghurst Road will contribute to and enhance the area's fun, vibrant and eccentric identity by appropriately responding to its existing 'human scale', including the fine grain and established built form	The proposed development has been designed in accordance with the site specific DCP which provides building envelope and setback controls based on heritage and urban design investigations carried out for the block. In terms of land use, the proposed development provides an appropriate	Yes

<p>patterns of the street. Development should also achieve a balance and diversity of activities and experiences to support the liveliness and vitality of Darlinghurst Road, which is to continue to fulfil its key economic, social, and cultural role within the locality.</p>	<p>combination of uses by providing a balance between residential and non-residential uses and, most importantly, retains Darlinghurst Road's primary function as a main street that serves local residents, workers, and visitors.</p>	
		
<p>Principles: Development must achieve and satisfy the outcomes expressed in the character statement and supporting principles.</p>	<p>The proposal is consistent with the character statement as highlighted and the supporting principles as addressed below.</p>	
<ul style="list-style-type: none"> • Development is to respond to and complement subdivision, heritage items and contributory buildings within heritage conservation areas, including streetscapes and lanes. • Maintain the built form structure of the neighbourhood with taller buildings located predominantly along the ridge line and at the crossing of Victoria Street and Darlinghurst Road. • Reinforce the urban form of Darlinghurst Road including its fine grain, varied, high quality architectural character, and avoid building design that reduces diversity and grain. 	<p>The proposed development has been designed in accordance with the site specific DCP controls. The proposal responds to surrounding development and its heritage character which is achieved through appropriate street wall heights and setbacks at upper levels to ensure a recessive built form, which is also dictated by the required retention of various significant elements identified on the site.</p>	<p>Yes</p>



<ul style="list-style-type: none"> Retain Darlinghurst Road and Bayswater Road as a precinct which supports a mix of daytime and night time commercial and retail uses. Increase uses that provide all day activity, particularly those that serve the broader community's social, cultural, and entertainment needs. 	<p>The proposal provides a diversity of uses such as retail premises, pubs, hotel and medical centre in the lower levels of the building which provides a mix of activity at all times.</p>	Yes
<ul style="list-style-type: none"> Encourage employment opportunities and provide a range of non-residential uses on Darlinghurst Road that support the existing high population density of Kings Cross and serve its international, regional, and local function including retail, business, entertainment, food and drink, cultural, and community uses. 	<p>The proposed development will result in employment generation during the construction and occupation phase of the development, having positive economic outcomes for the community through localised spending.</p> <p>The creation of an <i>in situ</i> population will also create an inherent community in its own right, particularly with the proposed through site link within the development, as well as the outdoor seating area that is afforded at the ground level, both of which will allow for interaction between residents within the development, as well as the broader community. This is also fostered through communal open spaces within the development itself.</p>	Yes
<ul style="list-style-type: none"> Encourage interesting development that references the socio-historic significance of Darlinghurst Road and supports community diversity and harmony. 	<p>The proposal involves retention of the existing heritage fabric and reinstatement of the 'Les Girls' element, in an interpretive form, which is intended to pay homage to The Empire's social, cultural and historical significance.</p> <p>The proposal ensures that Darlinghurst Road's unique, diverse, socially inclusive community is maintained. The proposed redevelopment integrates the existing local character of the area by conserving local heritage in terms of physical fabric, social and cultural significance and preserving commercial floor space for a variety of non-residential uses at the lower levels of the building.</p>	Yes



Is the proposal consistent/compatible with the objectives of the site specific DCP?

23. The table below provide an assessment of the proposal having regard to the character of the locality as set out in the DCP. The DCP provides the following significant characteristics in relation to the site:

Table 3: Assessment of the proposed development against objectives of Darlinghurst Road, Potts Point

Provisions	Comments	Compliance
6.2.12 Darlinghurst Road, Potts Point		
Objectives:		
<p>Ensure development achieves the objectives of the B2 Local Centre zone and contributes to the role of Darlinghurst Road and environs as a local centre by:</p> <ul style="list-style-type: none"> o providing a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area; and o including appropriate residential uses so as to support the economic and business vitality of the high street and local centre and ensure development takes place within the height and floor space ratio development standards set by Sydney LEP 2012. 	<p>Compliance with the zoning objectives is addressed in the Statement of Environmental Effects.</p> <p>The proposed development will provide a range of uses that serve the needs of those living within the development itself, as well as the broader community.</p> <p>The proposed residential use, derived from a permanent population of 52 apartments will ensure that the economic and business vitality of Darlinghurst Road and the local centre is enhanced.</p> <p>The proposed development complies with the permitted floor space controls and the height is generally compliant other than where constrained in terms of existing building form, and for building services, or otherwise the provision of communal open space.</p>	Yes
<p>Ensure that new development maintains the diverse and active street frontages that contribute to the vibrancy, diversity and function of the high street and local centre.</p>	<p>The ground floor level provides a sound urban design response by retaining the varied and fine grain nature of tenancies and by providing a diversity of uses that caters to local needs. The proposal incorporates a through site link to ensure that the degree of vibrancy is promoted and the extensive openings of the retail tenancies to the laneway will also reinforce the activity associated with this space. The proposal maximises opportunities for passive surveillance over the surrounding street frontages, which is a substantial improvement over the existing situation.</p> <p>The public open space area proposed to Barncleuth Lane will also encourage the sense of place to this precinct and encourage</p>	Yes

	the use of laneway spaces that otherwise lack amenity and safety.	
Ensure that new development fits in with the existing fine-grain pattern of Darlinghurst Road, surrounding streets and laneways and reflects the historical subdivision pattern.	The proposed retention of significant facades and architectural expression and conservation of the desired character through the implementation of site specific DCP controls including heritage conservation, architectural character, articulation and materials, awnings, and public domain are achieved within this application.	Yes
Ensure new development responds to and contributes to heritage and contributory items and conserves their significance and the significance of the conservation area.	Refer to discussions under the LEP and Section 6.2.12.8 in the Statement of Environmental Effects.	Yes
<p>Ensure new development reinforces the architectural character of and is compatible with the existing built form of Darlinghurst Road, and respects heritage items and contributory buildings at 18-32A Darlinghurst Road and in the immediate context of the site through:</p> <ul style="list-style-type: none"> ○ Appropriate scale, massing, and modulation that respects the existing built fabric of the high street; ○ Defining maximum building envelopes for future development at 18-32A Darlinghurst Road to deliver a high quality built form that ensures an appropriate level of amenity within the site and to surrounding properties; ○ Facade articulation, materials, and architectural detailing that contribute and respond to the highest quality heritage and contributory buildings in the surrounding context. 	<p>The proposal has been designed in accordance with the controls and seeks to provide an integrated response. It is highly responsive to existing buildings within the immediate character, particularly those that bookend the site. The design retains the distinct architectural character of the area.</p> <p>The proposal complies with all the controls pertaining to urban grain, architectural character, articulation, and materials.</p> <p>The proposed development will make a significant contribution and improvement to the public domain by providing a pedestrian through site link between Darlinghurst Road and Barncleuth Lane.</p> <p>The design also provides a clear response in terms of amenity as demonstrated in Section 5 of the CDAP report.</p>	Yes
Provide publicly accessible open space to complement the public domain and enhance amenity.	The proposed development will make a significant contribution and improvement to the public domain by providing a pedestrian through site link between Darlinghurst Road	Yes



	<p>and Barncleuth Lane. This will be complemented by a public open space at the conclusion of the site, interfacing directly with Barncleuth Lane.</p> <p>This degree of connectivity that is created along this laneway will enhance the site's relationship with Darlinghurst Road and onto the public open space of Fitzroy Gardens.</p> <p>The description of this area is provided in the CDAP report as follows;</p> <p><i>The Through Site Link is activated via three diverse retail tenancies, secondary entrances to the Bourbon venue and entrances to two residential buildings.</i></p> <p><i>A subtle differentiation of paving, a half-storey change in level and an overhead gantry structure give the link a unique urban character, while a significant piece of public art will be the focal point of the Barncleuth Lane open space.</i></p> <p><i>Soft landscape is provided along the through site link, along with an inaccessible landscaped terrace at the rear of the Bourbon, which provides a green buffer between the hotel rooms and the buildings across Barncleuth Lane, along with a visual connection to the green fingers of the podium garden above</i></p>	
<p>Ensure the architectural character of development at 18-32A Darlinghurst Road is compatible with original fabric retained on the site and responds to the existing development at Kingsley Hall at 1A Elizabeth Bay Road, the Lowestoft at 18-20 Darlinghurst Road, the facade of The Bourbon at 22-24 Darlinghurst Road, and the Commodore at 30-30B Darlinghurst Road.</p>	<p>The proposal has been designed in accordance with the site specific DCP provisions for the site and responds accordingly.</p> <p>This is affirmed in the HIS, which states as follows:</p> <p><i>The proposal retains the character of the setting while enhancing the significance of the Potts Point Heritage Conservation Area.</i></p> <p><i>Conservation and repair works are proposed to the heritage significant facade of The Bourbon and the facades of the Contributory buildings of The Lowestoft and The Commodore. The reinstatement of the original bay window on all three levels of The Bourbon,</i></p>	Yes



	<p><i>including all architectural bay window details; decorative key stone and arch details; decorative cornice and finials, will enhance the street presentation of the building and the character of the local area.</i></p> <p><i>The vitality of Darlinghurst Road as an entertainment and commercial strip will be improved by the new curved corner form and curved awning that will feature interpretive artwork referencing the past use and character of the site and its historical and social significance to the LGBTQI community.</i></p>	
Establish a design excellence strategy for a competitive design process in accordance with Sydney LEP 2012 and the City of Sydney Competitive Design Policy	A CDAP was conducted for the site. The design the subject of this application has been prepared by the Winning Architect. The design's response to the CDAP recommendations accompanies this application.	Yes

24. In summary, the proposal will include substantial setbacks above the street frontage heights to reduce any perceived impact on adjoining properties. Notwithstanding the exceedance of the height controls, the development will provide a much needed, mixed-use development that demonstrates design excellence and which will contribute to the immediate urban context of the neighbourhood and the desired future character of the locality.

Clause 4.6 of the LEP

25. Clause 4.6 of RELP provides, so far as relevant:
- (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 Secretary has been obtained.*
- (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.*

Is height a development standard?

26. Clause 4.6 can only be used to vary a control that is a development standard. Development standards are relevantly defined in s1.4 of the EP & A Act as follows:

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (a) *the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
 - (b) *.....*
 - (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
 - (d) *– (o)*
27. Being a provision of the LEP in relation to the carrying out of development, under which a requirement is fixed in respect to the maximum height of buildings, clause 4.3 of the LEP is a development standard. Accordingly, clause 4.6 can be used to approve a variation of the standard.
28. As noted by the Chief Judge of the Land & Environment Court of NSW in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, [**Initial Action**], clause 4.6 is facultative in permitting a consent authority to grant consent for development even though that development



would contravene a development standard imposed by an environmental planning instrument. However, clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.

Clause 4.6(4)

29. In order for the consent authority to grant a variation to the development standard under clause 4.6, it must be satisfied:

- That this clause 4.6 Request adequately addresses the matters required by clause 4.6(3), namely that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case and secondly that there are sufficient environmental planning grounds to justify contravening the development standard; and
- That the proposed development will be in the public interest because it is consistent with the objectives of the standard and zone; and
- That the concurrence of the Secretary has been obtained.

Clause 4.6(4)(a)(i) - Whether request adequately addresses requirements

30. This request is comprehensive in its discussion of whether compliance with the zone and objectives of the standard is unreasonable or unnecessary because the development will comply with the zone and height standard objectives and whether there are sufficient environment planning grounds for varying the standard. Both issues are discussed below.

Clause 4.6(3)(a) Unnecessary or unreasonable

31. The common approaches for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. Cases such as *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, *Randwick Council v Micaul Holdings Pty Ltd* [2017] NSWLEC 7 and, most recently, *Initial Action*, have confirmed that adopting the *Wehbe* principles remains an appropriate approach.
32. The first option and the applicable in this case, is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.
33. Set out below is an extract from the judgement in *Wehbe* that explains the rationale for adopting this approach in the context of clause 4.6.

The rationale is that development standards are not ends in themselves but means of achieving ends...The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an



alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)

Assessment of the Proposed Variation

Consistency with objectives of the standard (clause 4.6.4(a)(ii))

34. The proposed variation is assessed having regard to the development standard as set out in the below table.

Table 4: Assessment of the proposal having regard to the objectives of the development standard for the building height

Objective of the Development Standard	Comment
(a) to ensure the height of development is appropriate to the condition of the site and its context,	<p>The design directly responds to the existing site constraints and character of the locality by providing a variable scale of five (5), seven (7) and eight (8) storeys which responds to the differential building heights that characterise the streetscape of Darlinghurst Road and the wider Potts Point conversation area.</p> <p>The height of the development is appropriate for the site conditions and context as:</p> <ul style="list-style-type: none"> • It responds to the height of the existing heritage items and contributory buildings, which is to be retained in part. • It responds and transitions to the adjoining contributory building at 1A Barncleuth Square (Kingsley House). • It maintains a variable height across the site, which is characteristic of built form along Darlinghurst Road and the wider locality of Potts Point. • It creates a transition to the residential development to the south and minimises visual, overshadowing and amenity impacts to these apartments. <p>The non-compliant section of the building is setback from the public domain and, most importantly, Darlinghurst Road, so as not to visually dominate the heritage conservation area as it relates to Darlinghurst Road. The location of these non-compliant elements ensures that they do not contribute to any perceivable bulk when viewed from the surrounding street frontages and associated public domain, while maintaining a scale that is consistent with the locality. In addition, outdoor spaces are maximised in a convenient and accessible location within the development. Further, the design is sensitive to maintaining the amenity of the future neighbouring developments by providing a built form which enables adequate building separation, placement of windows and private open space. The proposed variation of the standard does not affect achievement or consistency with this objective.</p>



Objective of the Development Standard	Comment
(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,	<p>The subject site contains heritage items, contributory items and is located within a heritage conservation area. In addition, the site is located adjacent to, and in the vicinity of, a number of heritage items in the locality.</p> <p>As evidenced in the location of heritage items within the vicinity of the site, the part of the proposal that breaches the development standard has been setback from the edges of the building. From the public domain, this non-compliance will have no visibility, in particular from Darlinghurst Road, such that it would dominate the heritage streetscape.</p> <p>The proposal maintains appropriate height transitions to the adjacent heritage items, being Kingsley Hall (1A Barnceluth Square) as well as the buildings within the site. The façade of the existing heritage items and contributory buildings has been incorporated into the design and used as a reference point for the height, rhythm and fenestration pattern of the proposed fabric to Darlinghurst Road, that integrates traditional features, with more contemporary elements.</p> <p>Therefore, despite non-compliance the proposal achieves this objective.</p>
(c) to promote the sharing of views,	The proposed additional height does not result in any impacts to existing views enjoyed within the vicinity of the site.
(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,	Not applicable; the site is located within Potts Point and does not impact on height transitions from the Central Sydney or Green Square.
(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	

Objective of the Development Standard	Comment
street network and public spaces.	

Consistency with Zone Objectives – clause 4.6(4)(a)(ii)

35. In relation to whether a proposal is consistent with the objectives of a zone, the test for consistency is set out in *Coffs Harbour Environment Centre v Coffs Harbour City Council* (1991) 74 LGRA 185 (the Coffs Harbour case). The principles for determining what is meant by consistent are as follows:
- a development that is consistent with zone objectives does not need to promote the objective concerned strictly, but also encompasses development which may be complementary or ancillary to development and promotes the objective concerned; and
 - a development is not consistent with zone objectives if it is antipathetic development to those objectives, irrespective of whether efforts have been made to minimise the extent to which it is antipathetic
36. Thus, development will be consistent with zone objectives if it is not antipathetic to them. It is not necessary to show that the development promotes, or is ancillary to those objectives, nor even show it is compatible, *Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21.
37. The building height above the development standard is consistent with the objectives of the B2 Local Centre zone objectives as set out in the Table below.

Table 5: Assessment of the proposal having regard to the B2 zone objectives

Zone Objective	Comment
To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.	<p>The proposal involves a mixed-use development that provides a range of facilities and services that cater for the needs of the community in accordance with this objective.</p> <p>The uses include a medical centre, retail premises, two (2) pubs, 59 hotel rooms and 52 residential units, thus representing a range of uses that will serve the needs of people who live in, work in and visit the local area. The proposed uses are specifically identified as being permitted with consent in the B2 zone and will allow for the creation of a genuine mixed-use development.</p>
To encourage employment opportunities in accessible locations.	As outlined previously, the proposal will provide increased employment opportunities during



Zone Objective	Comment
	<p>construction and through the operation of the premises. The proposal essentially responds to meeting Sydney's growing needs and provides housing options in inner city locations while supporting the economic functions of the Sydney CBD.</p> <p>In terms of employment, during the construction phase, the proposal will supply both direct and indirect jobs in the supply of materials and additional spend generated by construction workers in local shops and services. Once the development is operational, additional jobs are created for the purposes of management, staffing and security, as well as cleaning and maintenance.</p>
<p>To maximise public transport patronage and encourage walking and cycling</p>	<p>The proposed development provides a range of permissible uses within close proximity to public transport facilities. The development also includes 54 residential bicycle parking space to encourage alternative transport modes to avoid private car use associated with the residential component of the development.</p> <p>Given the proximity of the site to other general commercial and retail facilities in the locality, the opportunity for walking and cycling is easily maximised in association with this development. This will be enhanced by the provision of 32 bicycle parking spaces associated with the non-residential use of the development.</p> <p>Direct and proximate access to Kings Cross station and bus routes will further reinforce the use of alternative transport modes as set out in the Parking & Traffic Assessment. This integration results in a very high degree of accessibility for future residents, employees and visitors of this development.</p>
<p>To allow appropriate residential uses so as to support the vitality of local centres.</p>	<p>The <i>in-situ</i> residential population, which will be achieved through the diversity of apartment sizes to accommodate a diverse population group will support the creation of new jobs in the locality, driven by additional demand for goods and services in the immediately surrounding vicinity. The development will support the creation of an enhanced night-time economy, with improved amenity and food offering particularly focused around the Darlinghurst Road frontage of the site,</p>



Zone Objective	Comment
	while continuing to active surrounding laneways to enhance the public domain areas proximate to the site.

38. Given the circumstances of the case, the provision of a strict numerical compliance in accordance with Council's interpretation would be unreasonable on the basis that the proposed development achieves compliance with the objectives of the zone and the standard.

Environmental Planning Grounds to Justify Contravening the Development Standards (clause 4.6(3)(b))?

39. The second element of clause 4.6(3) on which the Court must be satisfied is that there are sufficient environmental planning grounds to justify contravening the development standard. The environmental planning grounds relate to the subject matter, scope and purpose of the *Environmental Planning & Assessment Act [EP&A Act]* including the objects of the EP&A Act (*Wehbe* para 23).
40. As Preston CJ explains in *Wehbe*:

".. the focus of clause 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole. Second the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under clause 4.6(a)(i) that the written request has adequately addressed the matter."

41. The environmental planning grounds which support departure from the development standards are as follows:
- The proposal satisfies the objectives of the B2 Local Centre zone and the objectives of the building height standards.
 - The proposal provides a diversity of uses such as shops, retail uses, food and drinks premises, healthcare, hotel and residential accommodation that attract residents and visitors to the Potts Point area.
 - The height variations deliver a superior architectural and urban design outcome across the site, than if a more uniform building, that complies with the height limit for the site, was provided, simply for the sake of achieving compliance.
 - The non-compliant sections of the building will not be out of context with the streetscape and surrounding built form, as these elements are well recessed, and do not contribute to any



distinguishable bulk, scale or density of the building given the limited visibility from the public domain.

- Non-compliance, as proposed, facilitates both short- and long-term accommodation, at the density envisaged under the relevant planning controls for the site in a manner that does not result in adverse environmental impacts to neighbouring properties, particularly in terms of bulk, scale and overshadowing, as demonstrated in the solar access assessment.
- The proposal, including the non-compliant sections of the buildings, is of a high-quality design that is responsive to, and compatible with, the surrounding environment, heritage character including the various architectural styles, and building forms and density that dominate the locality.
- The site specific DCP controls have been utilised to introduce a form and scale of development on the land that is massaged within the confines of the site constraints and the building retention requirements. In doing so, the proposed development achieves an aesthetically cohesive relationship between the existing fabric and the proposed built form. The proposal provides an appropriate form of development with the new built form positioned such that the design is responsive to the established built form patterns of the street, the historical elements of the facades and neighbouring properties.
- The proposed outcome provides a streetscape presentation generally consistent with the existing situation that will not be compromised due to the location of the proposed works and therefore providing a complimentary relationship with adjoining properties. In terms of the potential effects on the heritage significance of the building in terms of the conservation area, this HIS provides the following:

The proposed development generally complies with the heritage requirements of the Brief and Council Controls including the site specific clauses of Sydney DCP 2012 and will have minimal impact on the significance of the Potts Point Heritage Conservation Area (C51), Heritage Items and Contributory buildings, both on the site and in the immediate vicinity.¹

42. As such, there are sufficient environmental planning grounds for justifying contravention of the development standard in this case.

Matters of state or regional significance (cl. 4.6(5)(a))

43. There is no prejudice to planning matters of Regional significance resulting from varying the development standard as proposed by this application. The contravention of the development standard in this case does not raise an issue of State or regional planning significance as it relates to local and contextual conditions. The variation sought is responding to the nature of a controls applied

¹ Statement of Heritage Impact, Tonkin Zulaikha Greer Architects, July 2020, Page 136



across an area that supports a variety of built forms that are reflective of different zones and are a function of their use.

Is the proposed variation in the public interest?

Clause 4.6(a)(ii) – Public Interest

44. The fourth element that the Council needs to be satisfied with in order to vary the development standard is that the proposed development will be in the public interest if the standard is varied because it is consistent with the standard's and zone's objectives. Preston CJ in Initial Action (para 27) described the relevant test for this requirement as follows:

"The matter in cl 4.6(a)(ii) with which the consent authority or the Court on appeal must be satisfied is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purpose of clause 4.6(4)(a)(ii)."

45. As demonstrated in this Request, the proposed development will comprehensively achieve the objectives of the development standards for height of building, as well as the objectives of the B2 zone.
46. The proposed development will retain the historical elements of the site, both physical fabric and social significance, which are the desired future character of Darlinghurst Road and the community's expectations.
47. A key aspect of the proposed development is the provision of a highly activated pedestrianised through-site link which will provide a highly sought-after connection between Darlinghurst Road and Barncleuth Lane, which will enhance the laneway system surrounding the site.
48. There is public interest in maintaining a degree of flexibility in specific circumstances. In this case, strict compliance with the height control would result in a poorer urban design outcome in respect to the presentation of the building to, and its relationship with, other buildings in the locality including the adjoining building at 1A Barncleuth Square (Kingsley Hall) to the north-east and 2 Roslyn Street to the south-west.
49. In design terms, the proposed development displays design excellence by implementing a sound heritage interpretation strategy, maintaining the fine grain and established built form patterns of the street, as well as the architectural form of the building itself. The built form on the subject site has been set back from the existing facade allowing the principle form to breath with sympathetic



new elements. The building will be visually appreciable for those within the site from various vantage points. In addition, the building form has achieved adequate separation between the buildings within the site, as well as within the public domain as one enters the site as a pedestrian without being dominant in terms of its height nor density.

50. The proposal does not place undue pressure on existing infrastructure, in particular the road network which can satisfactorily accommodate the development and retain existing levels of service at surrounding intersections.
51. There is no adverse consequence as a result of the non-compliant sections of the building from the public domain and most importantly, the proposal will not compromise the heritage integrity of the Potts Point HCA.
52. Therefore, the proposed development, at the height and density proposed is well within the public interest and will open the site up to broader public opportunity and interest, given its historical attributes, over the existing situation. While a private development, the opportunities afford a high degree of public accessibility to the site to appreciate these elements.
53. Accordingly, the Council can be satisfied that, it is in the public interest to vary the standard for the purpose of this development application.

Secretary's Concurrence

54. By Planning Circular dated 21 February 2018, the Secretary of the Department of Planning & Environment advised that consent authorities can assume concurrence to clause 4.6 requests except in the circumstances set out below:
 1. Lot size standards for rural dwellings
 2. Variations exceeding 10%; and
 3. Variations to non-numerical development standards
55. Concurrence of the Secretary can therefore be assumed in this case.

