

Attachment C

<p>Clause 4.6 Variation Request - Height of Buildings</p>
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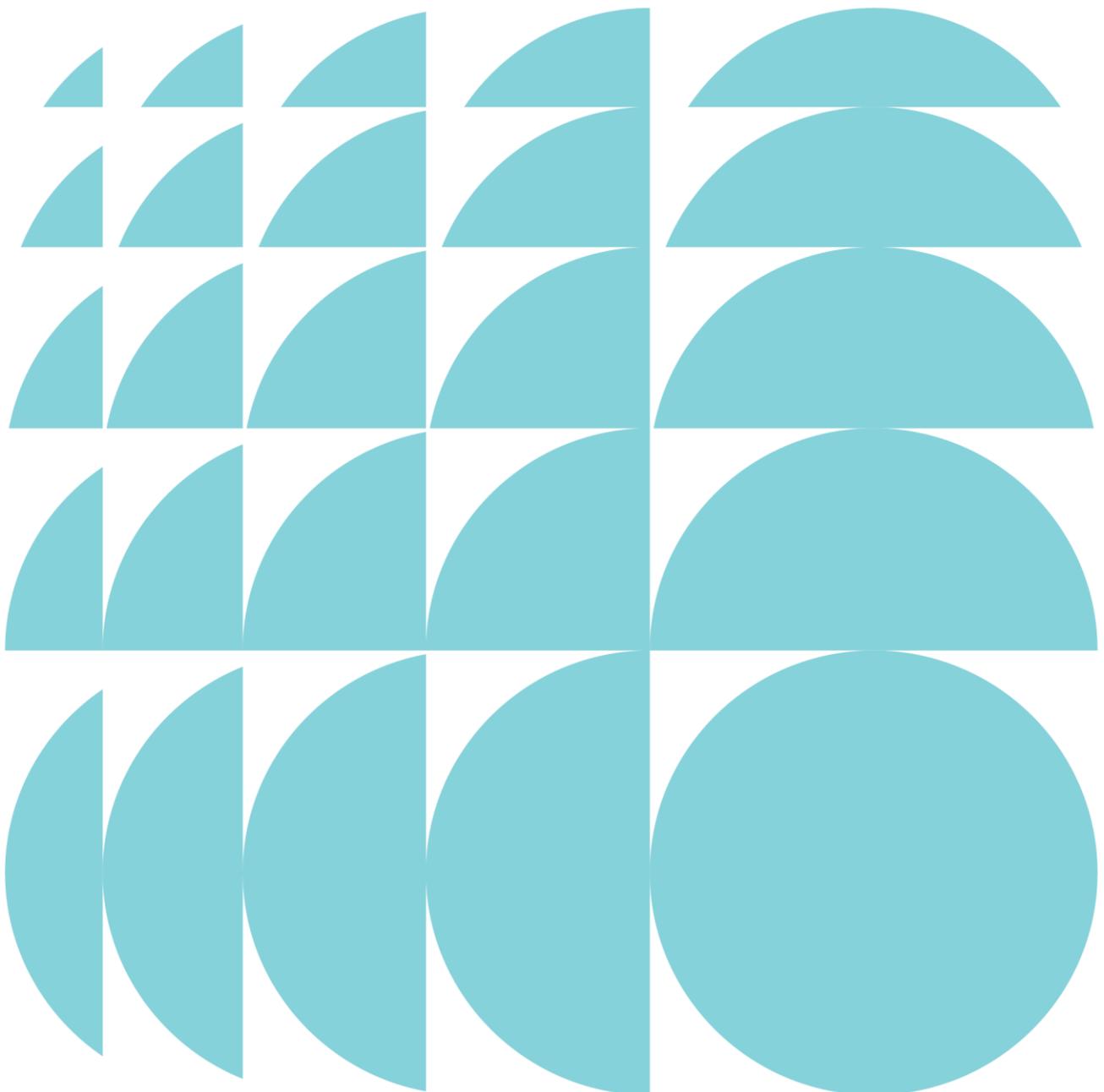
ETHOS URBAN

Clause 4.6 Variation Height of Building Development Standard

110-122 Oxford Street, Darlinghurst
Darlinghurst Collection – Group 3

Submitted to City of Sydney Council
On behalf of TOGA and Ashe Morgan Pty Ltd

10 September 2021 | 218981



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FJMT

1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of TOGA and Ashe Morgan Pty Ltd. It is submitted to the City of Sydney Council (the Council) in support of a development application (DA) for the redevelopment of 110-122 Oxford Street, Darlinghurst (the site). The site is also referred to as Group 3 of the ‘Darlinghurst Collection’, which comprises three groups of heritage listed buildings seeking to be renewed by the partnership of TOGA and Ashe Morgan Pty Ltd.

Clause 4.6 of the *Sydney Local Environmental Plan 2012* (Sydney LEP 2012) enables Council to grant consent for development even though the development contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for, and from, development.

This clause 4.6 variation request has been prepared to address the variation to the development standard for height of buildings under clause 4.3 of the Sydney LEP 2012 and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban dated 30 September 2020, as well as the SEE and Written Variation Request made under Clause 4.6 for the Group 1 and Group 2 proposal of the Darlinghurst Collection dated 10 September 2021.

1.1 The Proposed Development

The proposed development seeks consent for:

- Demolition of various building elements, including part of the existing roof, partial demolition of certain internal walls and columns, and façade amendments as required to the existing buildings.
- Adaption of the lower ground/basement level to accommodate:
 - building services and plant.
 - retail/food and beverage/café/bar and cultural/creative uses and tenancies with frontage to Foley Street including operating hours from 7:00am to 10:00pm, Monday to Sunday.
 - hotel back of house areas.
- Primary access to the lower ground hotel reception from Foley Street and secondary access from Oxford Street.
- Internal and External restoration and refitting of the existing heritage buildings for retail, food and beverage, cultural/creative spaces, and a hotel with 75 rooms.
- Retention of the ground level awnings and refurbishment as required.
- Construction of a new building addition on the rooftop of the heritage listed buildings to accommodate hotel rooms and an external pool area.
- Extension/augmentation of services and utilities to the development.

The maximum building height that applies to the site under clause 4.3 of the *Sydney Local Environmental Plan 2012* (Sydney LEP 2012) is 15 metres. A number of the existing heritage listed buildings on the site already exceed the 15 metre height limit, and therefore any meaningful addition to the existing heritage buildings would require a variation made under clause 4.6 of the Sydney LEP 2012. A compliant Floor Space Ratio (FSR) of 4:1 is sought to be delivered through the proposed development, but due to the height of the existing heritage listed buildings, the realisation of the permitted FSR requires a height variation.

A unique site-specific analysis has been undertaken throughout the design and planning phase of this project to determine appropriate rooftop forms which deliver the permissible floor space, while sensitively contributing a rooftop addition to the heritage buildings. This site-specific analysis has delivered the proposed development which contains a maximum vertical distance from existing ground level to the highest point of the proposed building of 21.9m, varying the maximum height control development standard in the Sydney LEP 2012 by up to 6.9m.

1.2 Oxford Street Cultural and Creative Precinct Planning Proposal

Council has prepared a Planning Proposal for the Oxford Street Cultural and Creative Precinct within which the site is located. This Planning Proposal is currently on exhibition and seeks to amend the Sydney LEP 2012, as it applies to the site to include a new site-specific clause allowing an alternative maximum building height and an alternative maximum floor space ratio, provided that existing floor space of cultural and creative uses will be maintained and an additional 10% of the total GFA is provided for cultural and creative uses and the development comprises uses that support the local centre role of Oxford Street. These uses include at least one of the following: *“entertainment facility, health services facility, information and education facilities, hotel and motel accommodation, community facility, education facility, light industry, commercial premises”*.

These amendments have been proposed by Council to facilitate the achievement of the strategic planning directions outlined within the Eastern City District Plan, Council’s Sustainable Sydney 2030 strategy and Council’s Local Strategic Planning Statement (the LSPS), including:

- Realising the vision of Oxford Street as the centrepiece of the Eastern Creative Precinct as identified in Council’s LSPS by encouraging cultural uses as a driver of creativity and enterprise, a source of job creation, and potential for place-making.
- Reinvigorating Oxford Street’s traditional character as a ‘high street’ with a diverse mix of land uses that serve both the day-to-day needs of the community and provide community infrastructure.
- Making space for culture, to close the substantial gap in cultural space and infrastructure that has widened as Sydney has grown and industrial areas have been redeveloped.
- Facilitating the creative and cultural community to diversify the day and night-time economies and attract tourists.

The maximum height of buildings standard that is proposed for the site is 24 metres, as shown in **Figure 1** below. The proposed development would be eligible for the site-specific height limit increase as the existing floor space of cultural and creative uses will be maintained and an additional 10% of the proposed GFA across the Darlinghurst Collection will be provided for cultural and creative uses, and the remainder of the development comprises office and hotel uses. While individually, the cultural and creative floor space increase may not ultimately equal 10% of each building within Groups 1, 2 and 3, an overall amount of at least an additional 10% of the total floor space will be delivered as cultural and creative floor space within the project, equating to over 10% of the entire floor space across Groups 1, 2 and 3. This strategy is in keeping with the intent of the Planning Proposal for the Oxford Street Cultural and Creative Precinct in that it will deliver purpose built and desirable cultural and creative space in the comprehensive renewal of these heritage listed building.

The draft height controls associated with the Planning Proposal have been the subject of extensive urban design analysis by Council and are intended to facilitate the provision of commercial and cultural and creative development to support and activate the local centre, and regulate built forms that protect heritage and manage environmental impact, consistent with the proposed development.

The proposed height of the development is consistent with the draft maximum height of buildings development standard of 24 metres.



Figure 1 Draft site-specific maximum height of building map

Source: City of Sydney

1.3 Summary of Variation Request

This variation request demonstrates that compliance with the height of buildings development standard of the Sydney LEP 2012 is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the standard. Notwithstanding the variation to the height of buildings development standard, the proposed development:

- Achieves the objectives of clause 4.3 of the Sydney LEP 2012 by:
 - Providing a contemporary and high-quality addition to the heritage listed buildings in a form and scale appropriate to the site.
 - Ensuring that the height of the development is in-keeping with the scale and character of neighbouring buildings, the locality and is of a form that will not result in any negative environmental impacts.
 - Respecting the character appearance and scale of nearby buildings within the heritage conservation area, including nearby and adjoining heritage items, and existing buildings adjacent to the site.
 - Ensuring an appropriate transition in height to neighbouring buildings given the varied surrounding height context, particularly along Oxford Street.
- Will deliver a compliant FSR of 4:1, consistent with the permitted FSR under the Sydney LEP 2012.
- Is consistent with the draft maximum height of buildings development standard as proposed in the Oxford Street Cultural and Creative Precinct Planning Proposal, and achieves the intended strategic objectives and outcomes to activate increased tourism and cultural and creative uses in the precinct while protecting heritage and managing environmental impact.
- Is in the public interest as it is consistent with the objectives of both the development standard and the B2 Local Centre zone, and will ensure the long-term conservation and revitalisation of the heritage buildings on the site.
- Is consistent with the Greater Sydney Regional Plan, the District Plan and the City of Sydney Council strategic planning policies such as City Plan 2036, and does not raise any matter of significance for State or regional planning.

In light of the above, the consent authority can be satisfied that there is sufficient justification for the variation to the height of buildings development standard, as proposed in accordance with the flexibility allowed under Clause 4.6 of the Sydney LEP 2012.

2.0 Development Standard to be Varied

2.1 Is the Planning Control in Question a Development Standard?

The height of buildings control in clause 4.3 of the Sydney LEP 2012 is a development standard.

2.2 Relevant Development Standard

This written variation request made under clause 4.6 seeks to justify a proposed contravention of the height of buildings development standard set out in the Sydney LEP 2012. Under clause 4.3 of the Sydney LEP 2012, the site is mapped with a height of 15 metres as shown on the Height of Buildings Map (sheet 015) (refer to **Figure 2**).



Figure 2 Height of Buildings Map (site outlined in red)

Source: City of Sydney, Ethos Urban

2.3 Variation Sought

The maximum height of buildings development standard established for the site under the Sydney LEP 2012 is 15 metres. The existing heritage listed buildings on the site already exceed the maximum height of building, as illustrated in **Figure 3**. The proposed contemporary addition above the heritage buildings to be refurbished will result in a maximum height of 21.9m which varies the height of buildings standard by 6.9m, as illustrated in **Figure 4**. Contributing to the variation being sought is the natural ground level of the site which varies, declining from south to north away from Oxford Street.

The variation to the height of buildings development standard is largely contained to the new contemporary addition, as well as the continued variation associated with the heritage listed buildings which will remain on the site. The height of the heritage buildings themselves is not proposed to be increased, rather the new addition will extend above the heritage buildings as further illustrating in the Architectural Drawings prepared by FJMT (refer to **Appendix A**).

This variation is assessed against the current in-force controls, but it is important to note that the proposed development is consistent with the maximum height of building development standard under the draft Planning Proposal controls for the site, which are a matter for consideration.



Figure 3 Existing heritage buildings and the 15m height plane

Source: FJMT



Figure 4 Proposed new addition and the 15m height plane

Source: FJMT

3.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Sydney LEP 2012 provides that:

4.6 Exceptions to development standards

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

Furthermore, clause 4.6(4)(a) of the Sydney LEP 2012 provides that:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
- (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Secretary has been obtained.*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827.
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.
3. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (Initial Action).
4. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (Al Maha).

3.1 Role of the consent authority

The role of the consent authority in considering this written request for a clause 4.6 variation has been recently explained by the NSW Court of Appeal in *Initial Action* and in *Al Maha* to require that the consent authority needs to be satisfied in relation to two matters:

- That the applicant's request has adequately addressed the matters in in clause 4.6(4)(a)(i).
- That the proposed development will be in the public interest because of its consistence with the objectives of the development standard and the zone objectives.

The consent authority is required to form these two opinions first before it considers the merits of the DA, and it can only consider the merits of the DA if it forms the required satisfaction in relation to the matters. In particular, the consent authority needs to be satisfied that there are proper planning grounds to grant consent and that the contravention of the standard is justified.

This report provides the basis for the consent authority to reach the required level of satisfaction.

The relevant matters contained in clause 4.6 of the Sydney LEP 2012, with respect to the height of buildings development standard, are each addressed below, including with regard to the above decisions.

3.2 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class, i.e. there may be other ways.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of recently repealed SEPP 1 (see *Four2Five* at [61] and [62]; *Initial Action* at [16]).

As the language used in subclause 4.6(3)(a) of the Sydney LEP 2012 is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request. The five ways outlined in *Wehbe* are:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Way**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Way**).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Way**).
- The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (**Fourth Way**).
- The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Way**).

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances because the objectives of the height of buildings development standard are achieved notwithstanding the non-compliance with the standard (the First Way).

3.2.1 The underlying objectives or purposes of the development standard

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

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

The proposal's consistency with these objectives is set out in the following section.

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

Objective 4.3 (1)(a) is “*to ensure the height of development is appropriate to the condition of the site and its context*”.

The site is located in a highly mixed-use area with an irregular pattern of buildings with differing heights and densities. The surrounding built form context can be characterised by a variety of mid-rise, high-rise and terrace buildings, reflecting the eclectic and historic nature of the Oxford Street precinct.

The existing heritage listed buildings contribute to this streetscape, but already exceed the prescribed height of buildings development standard in certain locations along the Oxford Street frontage (refer to **Figure 3** above). Due to their historic nature, these buildings have long provided a datum along Oxford Street, while the building forms along Oxford Street have evolved over time.

Taller buildings are now distributed throughout the surrounding context, with a clustering of very tall buildings up to 25 storeys in height located closer to Hyde Park. Along Oxford Street there is a variety of building typologies and heights, contributing to a diverse landscape. The new contemporary addition will necessitate a variation to the height of buildings standard, but is appropriate to the condition of the site and its context as it will contribute to the variety of buildings heights in the Oxford Street precinct, and does not disrupt the reading of the existing datum line along Oxford Street set by the existing heritage listed buildings on the site.

The overall height sought by the new contemporary addition is in keeping with the broader context of Oxford Street, including a number of key sites along Oxford Street where greater height is provided such as 1 Oxford Street which is a (25 storeys), 2- 8 Brisbane Street (6- 10 storeys), 2-4 Poplar Street (15 storeys), 6-18 Poplar Street (11 Storeys) and 1-7 Pelican Street (11 storeys). **Figure 5** illustrates the mix of surrounding building heights in the context of the site.

It is considered that notwithstanding the non-compliance with the height of buildings standard, the proposal meets the aims of objective 4.3(1)(a).



Figure 5 Building context and surrounding building heights

Source: FJMT

Objective 4.3 (1)(b) is “to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas”

The site is located within a heritage conservation area and the existing buildings on the site are locally listed heritage items. As such, the proposal comprises a hybrid fusion of new development and heritage, with consideration required for the transition both within the site and to the broader context. The overall scale and height of the proposal has been shaped by the existing opportunity provided by the heritage buildings, as well as the topography of the site and surrounding context which falls significantly away from Oxford Street to the north.

The new addition has been sensitively scaled and massed to appropriately sit above the existing heritage listed buildings, providing a transition in scale internally within the site which is readable along Oxford Street. The setback and sculptured addition on the rooftop of the heritage buildings ensure that the existing datum along Oxford Street is continued to be legible in the streetscape, with a transition of height from the street frontage to the new addition setback from the street. Due to the location of Group 3 part way within a block of existing buildings, the new addition is setback and scaled in height to the edges of the block, resulting in a transition in height when viewing the addition from the east or west along Oxford Street.

More broadly to the surrounding context, the proposed contemporary addition creates an appropriate transition of building forms along Oxford Street from the east to west, and away from Oxford Street to the north. The new addition provides a form and height scaled down from the much taller buildings to the east along Oxford Street, transitioning the scale of building heights to more predominately lower height contexts such as Taylor Square and further along to Paddington. The topography of the site dropping away from Oxford Street to the north ensures that the new addition creates an edge to the B2 local centre zone, and initiates a transition to the more predominant residential context to the north of the site compared to the more prevalent tall buildings to the south of Oxford Street.

Moreover, the proposed additions are consistent with the draft maximum height limit proposed in the Oxford Street Cultural and Creative Precinct Planning Proposal, which is currently on exhibition. As these draft height controls have been the subject of extensive urban design analysis by Council, the height of the new additions are accordingly contextually appropriate to the surrounding locality and heritage precinct.

Overall, the proposed addition takes cues from the height and scale of the existing heritage listed buildings on the site and neighbouring properties so as to ensure an appropriate height and scale is achieved that positively contributes to the character or appearance of the Oxford Street precinct and heritage conservation area. The proposal in turn meets the aims of objective 4.3(1)(b).

Objective 4.3 (1)(c) is “to promote the sharing of views”.

Given the immediate dense context of the site, and the presence of the existing heritage listed buildings on the site, the proposed addition will not obscure any views across the site. The upper portions of the proposal, which exceed the height of buildings development standard, do not significantly impact existing public or private views, as:

- The site is not positioned within any significant view corridors identified in the planning framework.
- The existing heritage listed buildings on the site already inhibit any significant views across the site from the surrounding public realm.
- The additional built form proposed on the site in the form of the rooftop addition will not block any significant south or south westerly views for residents to the north given the sloping nature of the land away from Oxford Street.

Furthermore, the view study provided with the Design Report (refer to Appendix C of the SEE) illustrates that the rooftop addition sits well within the context of Oxford Street when viewed from various points along the ground plane. The overall height and scale of the new addition is in keeping with the heritage buildings below, and they do not overpower the existing buildings when viewed from the surrounding public realm.

Objective 4.3 (1)(d) is not applicable since the site is not located in Central Sydney or Green Square Town Centre.

Objective 4.3 (1)(e) is not relevant since the site is not within Green Square Town Centre.

3.2.2.1 Conclusion on Clause 4.6(3)(a)

The above section has demonstrated that compliance with the height of buildings development standard is unreasonable or unnecessary in the circumstances of the case. The objectives of the height of buildings development standard, set out in clause 4.3, have been achieved by the proposed development notwithstanding the exceedance resulting from both the existing heritage listed buildings and the new contemporary addition extended above the heritage buildings.

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

Clause 4.6(3)(b) of the Sydney LEP 2012 requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* at [24]).

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site at [60]. In this instance the relevant aspect of the development is the contemporary addition proposed above the existing heritage listed buildings on the site.

There are sufficient environmental planning grounds to justify contravention of the height of buildings development standard in this specific instance, as described under the relevant headings below.

Built Form and Land Use Context

As outlined above, the proposed contravention of the height of buildings development standard is largely caused by the new contemporary addition. This new addition is appropriate to the site and is in keeping with the broader context of Oxford Street as discussed above. The Oxford Street precinct provides a diverse and eclectic array of building forms and heights, and it is further anticipated that this context will evolve as Council seeks to make changes to the existing regulatory framework to encourage a creative and cultural precinct around Oxford Street as identified in the City of Sydney Local Strategic Planning Statement (City Plan 2036). The proposal will contribute to this built form diversity through appropriately scaled and massed building addition at a maximum height consistent with the spread of heights along Oxford Street, and likely consistent with the prevailing built form opportunities arising from changes to encourage floor space within the precinct.

The transformation of the existing heritage listed buildings on the site will also be directly facilitated by the new addition which seeks to contravene the height of buildings standard. The adaptive re-use of the existing buildings and the new hotel rooms delivered through the height variation will assist in further cultivating the locality as a tourism destination and vibrant area for people to visit during the day and enjoy after dark and on weekends as a premier place for food, drink and entertainment. Overall, the new addition will unlock the site to deliver hotel capacity and a variety of uses anticipated under City Plan 2036 for City fringe areas such as Oxford Street.

The height variation sought through the proposal contributes to the holistic vision for the Oxford Street precinct, and by providing the new contemporary addition, the overall project is capable of being delivered to achieve the vision of City Plan 2036. When delivered, the proposal will importantly have the following benefits for the surrounding context:

- Creation of a new, high quality destination that will increase the daily number of visitors in the area.
- Positive contribution to the Sydney City fringe area providing a real catalyst for change for the neighbourhood.
- Achieving a permanent visitor population base through strong activation with the introduction of multiple diverse users and uses.
- Enrichment and growth of the visitor community so it becomes alive with people at all times of the day and night – not shutting down after 5:00pm and on weekends.
- A sympathetic response to the area's rich cultural heritage.
- A provider of real public benefit and job opportunities.
- Creation of an ecosystem that integrates creative and cultural start-ups that can contribute to the wider activation of the Oxford Street precinct.

The revitalisation and economic viability of Oxford Street and its surrounding context is dependent on a critical mass of community working and visiting daily. The proposal, and importantly the height variation, has the potential to deliver the required scale of amenity that revitalisation of the area requires.

Consistency with Oxford Street Creative and Cultural Precinct Planning Proposal

The proposed development is consistent with the draft site-specific height of buildings development standard proposed in the Oxford Street Creative and Cultural Precinct Planning Proposal which is currently on exhibition. The proposal's consistency with this draft amendment to the Sydney LEP 2012 is a relevant environmental planning ground as the consent authority is to take into consideration the provisions of any proposed instrument that is or has been the subject of public consultation under the EP&A Act and that has been notified to the consent authority (cl 4.15 of the EP&A Act).

As outlined above, under the draft controls, the site is eligible for an alternative site-specific height limit of 24m as existing floor space of cultural and creative uses will be maintained and an additional 10% of the total GFA is provided for cultural and creative uses across the Darlinghurst Collection, and the remainder of the development comprises hotel accommodation, which is a land use identified by Council to support the role of Oxford Street.

Under the Planning Proposal, the objective of the proposed clause is:

To provide for additional floor space on certain land to encourage the cultural and creative, entertainment, education, commercial and tourism sectors and associated industries in the Oxford Street area and support the role of Oxford Street as a local centre.

As the additional height enabled by the Planning Proposal will facilitate the expansion of tourism floor space and cultural and creative floorspace, the above objective is achieved. Moreover, the proposed expansion of tourism uses will increase the permanent visitor base to the precinct to support its role as local centre, further achieving the objective.

The new addition serves a two-pronged role in achieving Council’s vision for Oxford Street as the focal point of Sydney’s creative and cultural industry and reactivate the precinct as a vibrant and sustainable local centre. The new addition will facilitate the commercial viability of the proposed hotel redevelopment to allow a quantum of cultural and creative space to be provided on the lower levels which achieve Council’s vision for a strong cultural life, a diverse and safe night-time economy, and a thriving live music and performance industry in the Oxford Street Creative and Cultural Precinct. The new addition also facilitates the achievement of the permissible floorspace, to maximise hotel accommodation and tourism uses which is an identified need by Council.

Moreover, the proposed development is consistent with the objectives of the Oxford Street Creative and Cultural Precinct Planning Proposal which underpin the draft controls. The relevant objectives and the proposal’s achievement of those objectives is summarised in **Table 1** below.

Table 1 Summary of proposed development’s consistency with the planning proposal objectives

Objective	Consistency
Encourage the provision of uses that support Oxford Street’s role as a local centre and an activity street.	The new addition maximises hotel accommodation floorspace on the site that will generate job opportunities and increase the number of visitors in the area to support Oxford Street’s role as a local centre and high street and increase patronage to the prospective cultural and creative establishments in the precinct.
<p>Facilitate the provision of floor space for a cultural and creative purpose in the Oxford Street cultural and creative precinct to:</p> <ul style="list-style-type: none"> • Encourage the cultural and creative, entertainment, education, commercial and tourism sectors and associated industries in the precinct; • Support the existing cluster of creative uses in the area, anchored by the educational facilities in the area consistent with District Plan actions for the Harbour CBD; • Enhance the local area’s cultural and night-time offering including supporting Oxford Street’s role in the Eastern Creative Precinct and Harbour CBD; and • Prevent the loss of arts, cultural and creative floor space in the precinct. 	The new addition will maximise the number of visitors and tourists in the precinct leading to increased patronage to and sustainability of cultural and creative land uses in the precinct. The new addition also facilitates the viable refurbishment of the existing buildings on the site and delivery of cultural and creative uses which will further the cultural and creative purpose of the Oxford Street precinct.
Support the local centre role of Oxford Street and facilitate the provision of cultural and creative space in the precinct by allowing for additional floor space and additional building height. The additional floor space and building height will only be available if development provides uses that are strategically important to the local centre and cultural and creative floor space on the site.	The proposal provides uses that are strategically important to the local centre role of Oxford Street, being hotel accommodation and ground level retail uses, as well as providing for cultural and creative space. The delivery of new uses within Group 3 will directly contribute to the vibrancy and role of Oxford Street as a local centre.

Objective	Consistency
Ensure that the scale and massing of the height and floor space ratio controls is appropriate in response to its context within the Oxford Street and Victoria Street, East Sydney, Oxford Street, Paddington Urban and Victoria Barracks Heritage Conservation Areas, setting of the surrounding heritage items, streetscapes and the surrounding low scale residential and commercial development.	The new addition has been sensitively scaled to respond to the surrounding built form context and appropriately sit above the existing heritage listed buildings. The setback and sculptured addition ensures that the existing datum along Oxford Street is continued to be legible in the streetscape, with a transition of height from the street frontage to the new addition setback from the street. The current permissible floor space is to be delivered through the proposal.
Ensure that additional floor space and additional building height is only permitted if it is demonstrated that it does not adversely affect heritage fabric or the structural stability of heritage items or contributory buildings.	As explained below, impacts to internal heritage fabric have been minimised to the furthest extent, and are considered acceptable by Urbis Heritage in the context of the transformative impact of the proposal. Robert Bird Group have concluded that the proposed structural interventions are capable of being designed to ensure that there is no impact on the existing heritage structure (refer to Appendix M of the SEE).
Retain and encourage other business, office, retail and education uses in the local centre, including shops, food and drink premises and educational facilities.	The new addition will maximise the proposed hotel's capacity to attract increased tourists and visitors to the precinct which will support the sustainability and retention or local businesses and encouragement their expansion. Lower level retail uses will also continue to operate on the site.
Ensure that all new development protects and prevents the loss of existing entertainment and creative and cultural floor space within the precinct.	The proposed development will increase the amount of cultural and creative floorspace in the precinct.
Ensure that new development provides the diverse and activated street frontages that attract pedestrian traffic and contribute to the vibrancy, diversity and function of the high street, local centre, laneways and cultural and creative precinct.	The proposed development includes the retention of retail stores and shopfronts along Oxford Street, and proposes a through-site link and activation and upgrade of the Foley Street laneway. Specifically, the new addition will increase the tourist and visitor patronage within the precinct to contribute to the precinct's vibrancy.
Facilitate the increased certainty, viability and activation of the NAS with additional uses that support its primary education use and cultural and creative purpose.	The proposal does not relate to the NAS, therefore this objective is not relevant.

The proposal not only demonstrates compliance with the draft height of buildings development standard, but also fulfills the strategic intent and objectives of Council's Planning Proposal which is currently on exhibition. Taking into account the proposed development's consistency with Council's carefully considered future and desired planning framework for the site and precinct, the proposed variation of the existing height of buildings standard is justified and appropriate.

Heritage

Group 3 comprises locally heritage listed buildings which are to be retained on the site. A Conservation Management Plan has been prepared by Urbis Heritage to guide the refurbishment of these buildings, and also to provide guidance on works associated with the proposal as a whole (refer to Appendix D of the SEE). Urbis Heritage has also completed a Statement of Heritage Impact considering the proposal, and in particular the new rooftop addition above the heritage listed buildings which will contravene the height of buildings standard (refer to Appendix J of the SEE).

In the Statement of Heritage Impact, Urbis Heritage has determined that the design of the new contemporary addition has merit from a heritage perspective. Moreover, it has been determined by Urbis Heritage that the overall height, form and materiality are sympathetic to the heritage items, in particular, the upper level setback of the contemporary addition and sloped form.

While Urbis Heritage note there are some impacts to internal heritage fabric in order to create hotel rooms, they have concluded that these impacts are outweighed by the transformative impact of the proposal, including the new rooftop addition, which will create vital contemporary hotel rooms and ensure the continued use of the site.

Moreover, the new addition has been designed and engineered to sympathetically address the structural stability of the heritage buildings below. Robert Bird Group conclude that the proposed structural interventions are capable of being designed to ensure that there is no impact on the existing heritage structure (refer to Appendix M of the SEE).

Design Excellence

The proposal provides a unique, once-in-a-generation opportunity to achieve the holistic regeneration of a major heritage streetscape, and the architectural response of the new addition is integral to the overall vision and aims of the redevelopment. The new addition, while contravening the height of buildings development standard, contributes greatly to the design proposition on the site and is fundamental to the delivery of an integrated design outcome.

Specific to the portion of the proposal contravening the height of building standard, the new rooftop addition will be contemporary and architecturally interesting, achieving design excellence through its form, materiality, heritage relationship and overall design. The design strategy for the new addition ensures the rooftop form relates positively to the heritage buildings below, providing a sculpted and undulating ridgeline, with a materiality that is expressive and unique to the heritage qualities of the existing buildings.

While visually present in the streetscape, the addition contributes to the streetscape in a positive manner while minimising any other environmental impacts as discussed below. The proposed addition will provide a far improved built form outcome for the site and utilises deliberate design methods to modulate the proposed forms, contributing a high-quality and architecturally unique proposal which will add a rich layer of activation and interest along Oxford Street. The quality of the new rooftop addition and its relationship to the heritage listed buildings on the site and the broader context is illustrated in **Figure 6**.



Figure 6 Surrounding building heights

Source: FJMT

Environmental Sustainability

While the comprehensive redevelopment of the site will achieve a 4.5-star NABERS rating, the contemporary new addition above the heritage listed buildings which contravene the height of buildings development standard will be designed and constructed as compliant with Section J of the 2019 National Construction Code (NCC 2019). This performance standard is recognised as being equivalent to NABERS Energy 5.5-star equivalent, and therefore in excess of Councils target of a 5-Star rating under the Sydney DCP 2012. If the redevelopment proposal were limited to a refurbishment of the existing heritage buildings on the site, this standard of sustainability would not be achievable due to cost and heritage constraints, therefore the proposed rooftop addition will deliver higher sustainability outcomes.

Employment Generation

The anticipated development needs for the Darlinghurst locality in the foreseeable future will be guided by population and job growth which are:

- A population increase to 340,000 residents by 2036 (compared to 225,000 in 2016), contributing to a total increase of approximately 115,000 residents at an average annual growth rate of 5.75%.

- A large portion of the predicted total population growth (31.5%) is expected to be in the working age cohorts between 20 and 64 years of age.
- An increase in the total number of jobs (between 2016 and 2036) by around 200,000 positions at an average annual growth rate of 10%. This increase in employment in Surry Hills is projected to be concentrated in industries such as Professional, Scientific and Technical Services, Education and Training, and Health Care and Social Assistance.

The proposed development, facilitated by the new addition, will achieve a viable height and floorspace to contribute to the employment generating floor space and employment requirements and expectations of Darlinghurst. A compliant FSR of 4:1 will be delivered in the new addition, with the height variation facilitating the achievement of the permissible floor space ratio on the site and at the same time delivering a mixture of non-residential land uses consistent with the strategic planning framework of Council.

The proposed development will assist in providing employment generating floor space to meet needs arising from the broader population increase within the Eastern Sydney District (from 2016 to 2036) by 325,000 people, and the targeted 97,000 of additional jobs within the City of Sydney by 2032. In this respect, the height exceedance (required by the new addition) will have a direct bearing on the sites critical contribution to meeting new employment generating floor space and jobs targets for Darlinghurst and East Sydney.

Environmental Impacts

The proposed development, despite the contravention of the height of buildings development standard, does not cause significant additional environmental impact which would render it incompatible with its surrounding land uses and ensures the proposal is appropriate for the context of the site. In particular:

- There will be no significant additional overshadowing impacts to the surrounding public realm or existing residential receivers surrounding the site.
- There will be no significant additional impacts to the existing residential receivers surrounding the site in terms of overlooking and privacy.
- The Traffic Impact Assessment (Appendix N of the SEE) has determined that the traffic generation (nil) from the proposal will not have a significant adverse impact on the surrounding road network and intersections.
- A Conservation Management Plan (Appendix D of the SEE) has been prepared to guide the refurbishment works and the ongoing conservation and maintenance of the heritage buildings, ensuring their longevity and contribution to the precinct.
- The proposed development will provide a far improved built form outcome for the site and utilises deliberate design methods to modulate the proposed new addition and reduce its perceived bulk and scale.

It follows that there would be no significant adverse environmental impacts as a result of the portion of the development that is to exceed the height control.

Consistency with Objects of the EP&A Act

In *Initial Action*, the Court stated that the phrase “*environmental planning grounds*” is not defined but would refer grounds that relate to the subject matter, scope and purpose of the EP&A Act, including the objects in section 1.3 of the Act. While this does not necessarily require that the proposed development should be consistent with the objects of the Act, nevertheless, as set out in **Table 2** we consider the proposal is broadly consistent with each object, notwithstanding the proposed variation of the height development standard.

Table 2 Assessment of consistency of the proposed development with the Objects of the EP&A Act

Object	Comment
(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State’s natural and other resources	The proposal will promote the economic and social welfare of the community by improving the quality and contribution of the existing heritage listed buildings along Oxford Street, rejuvenating the site which has grown to have a poor condition over time. The collection of uses, including cultural/creative, food and beverage, retail, and hotel rooms, will ensure that a mass of activity is created on the site which directly supports the viability, vitality and welfare of the area and community.

Object	Comment
(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment	The proposal will promote ecologically sustainable development by achieving an equivalent of a 5.5-star rating for the new addition, and an overall 4.5-star NABERS rating for the entire development. The proposal seeks to provide visitor accommodation in a prime position serviced by existing facilities, services and public transportation, with no car parking proposed on-site.
(c) to promote the orderly and economic use and development of land	<p>The proposal promotes the orderly and economic use and development of land by refurbishing existing heritage listed buildings, and providing a contemporary addition which contributes to the quality of the buildings and provides an appropriate densification of the land consistent with the current floor space ratio standard. This proposal will provide a mix of land uses and increase the density of the site commensurate to its location close to Central Sydney, nearby transportation linkages, and a wide variety of services and facilities. The height variation will not provide for additional GFA or intensification of the proposed use, with the proposal complying with the maximum floor space ratio standard.</p> <p>The orderly use of land is also achieved by scaling the proposed development in accordance with the draft planning controls for the site which provide for an increased height limit to encourage greater floor space to be delivered in accordance with the strategic direction of the locality as a cultural and creative precinct and vibrant local centre.</p>
(d) to promote the delivery and maintenance of affordable housing	The proposal relates to non-residential uses, and therefore this object is not relevant.
(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats	The proposal will not have any impact on threatened species or ecological communities.
(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)	The proposal will directly facilitate the conservation and refurbishment of existing locally heritage listed buildings on the site. The existing heritage listed buildings in part exceed the maximum height of buildings development standard, but are being retained and celebrated through refurbishment and contemporary addition. The contemporary addition will support the viability of the project and will allow a critical mass of non-residential floor space to be delivered on the site to ensure the long-term use and conservation of the heritage listed buildings.
(g) to promote good design and amenity of the built environment	The proposal will promote good design and amenity of the built environment by exhibiting a high quality and sculptured design which supports the quality of the heritage buildings below, and contributes to the vibrancy and evolution of Oxford Street.
(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants	The proposal, inclusive of the new contemporary addition, which requires a variation, will comply with the relevant provisions of the BCA and will promote the health and safety of occupants.
(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State	This object is not relevant to this proposal, however, the proposal has adhered to the required planning processes for the site and scale of development, and implements the strategic planning priorities for employment growth in well-serviced locations close to Central Sydney.
(j) to provide increased opportunity for community participation in environmental planning and assessment	The proposed development will be publicly exhibited in accordance with the requirements of Council's Community Participation Plan.

3.3.1 Conclusion on clause 4.6(3)(b)

For these reasons, there are sufficient environmental planning grounds to justify the contravention of the maximum building height development standard, as it promotes good design and amenity of the built environment.

3.4 **Clause 4.6(4)(a)(i): The applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3)**

This written request adequately and comprehensively addresses the matters required to be demonstrated by subclause (3).

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

In *Initial Action* at [27], it was held that it is the proposed development’s consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. The proposal is in the public interest because it is consistent with the objectives of the development standard and the objectives of the zone.

Consistency Caselaw

Consistency has been defined throughout caselaw including the following Land and Environment Court cases:

- *Addenbrooke v Woollahra Municipal Council* [2008] NSWLEC 190
- *Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21
- *Raassis v Randwick City Council* [2019] NSWLEC 1040
- *Abrams v Council of City of Sydney* [2018] NSWLEC 1648
- *Kingsland Developments v Parramatta Council* [2018] NSWLEC 1241
- *Dem Gillespies v Warringah Council* (2002) 124 LGERA 147

In these cases, consistency is considered to be different to that of ‘achievement’. The term ‘consistent’ has been considered in a judgements of the Court in relation to zone objectives and has been interpreted to mean “compatible” or “capable of existing together in harmony” (*Dem Gillespies v Warringah Council* (2002) 124 LGERA 147; *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190) or “not being antipathetic” (*Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21). Whichever interpretation is adopted the test of “consistency”, is less onerous than that of “achievement”.

3.5.1 Consistency with objectives of the development standard

The proposed development is consistent with the objectives of the height of buildings development standard, for the reasons discussed in **Section 3.2.2** of this report.

3.5.2 Consistency with objectives of the zone

The proposed development is consistent with the objectives of the B2 Local Centre Zone, as demonstrated below.

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

The proposal provides a range of cultural/creative, food and beverage, retail uses and hotel rooms which will directly service the needs of the community who live, work, and visit the Oxford Street precinct. The diversity of uses to be delivered are reflective of the pattern of development in the Oxford Street precinct, and the lower level cultural/creative, food and beverage and retail uses will be important in servicing the local population and activating the frontages of Oxford Street and Foley Street. The new addition which requires a variation of the height of buildings development standard, will support the renewal of the heritage buildings below, ensuring a viable renewal project to deliver a mix of uses at the lower levels.

To encourage employment opportunities in accessible locations

The proposal seeks to deliver increased employment opportunities across a range of job types, with the mix of cultural/creative, food and beverage, retail floor space and hotel rooms providing a variety of employment opportunities. The new addition, which requires a variation of the height of buildings development standard, above the heritage listed buildings will deliver new, high quality hotel rooms equating to new jobs.

This mix of employment opportunities is provided on a highly accessible site, in close proximity to a variety of public transport linkages, and existing services and facilities in the Oxford Street precinct. The Oxford Street precinct is a recognised hub of activity in a city-fringe location, ensuring the site is one of the most accessible outside of Central Sydney.

To maximise public transport patronage and encourage walking and cycling

The proposal, inclusive of the height variation which will facilitate new hotel rooms, provides new jobs and visitor accommodation in a location well-served by public transport. There are several bus stops and bus services that are accessible to and from the site, which service the Eastern Suburbs, North Shore, Sydney CBD and Inner West. Other modes of public transport, including the Museum Train Station is located 800m north-west of the site, is within a comfortable walking distance, and provides a direct connection for visitors to and from the Sydney International and Domestic Airports.

To allow appropriate residential uses so as to support the vitality of local centres

The proposal does not include residential uses, with a continuation of the historic non-residential uses on the site, consistent with the objectives of the Conservation Management Plan prepared for the site (refer to Appendix D of the SEE). The proposal does not restrict or impact residential uses in close proximity to the site, with a sculptured building form ensuring no adverse amenity impacts to surrounding residences.

3.6 Other Matters for Consideration

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

- (5) *In deciding whether to grant concurrence, the Secretary must consider:*
- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

These matters are addressed in detail below.

3.6.1 Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation of the height of buildings development standard does not raise any matter of significance for State or regional planning. As relevant to State and regional planning, the proposal is consistent with the Greater Sydney Regional Plan – A Metropolis of three Cities and the Eastern City District Plan in that it:

- Contributes to the healthy, creative, culturally rich and socially connected community of the City of Sydney local government area through a holistic redevelopment project which renews and conserves heritage, provides a contemporary new addition which contributes to the vibrancy of Oxford Street, and enables a mix of uses to be delivered including cultural/creative, food and beverage, retail, and hotel rooms.
- Supports and contributes to renewing Oxford Street as a great place and viable local centre in the City of Sydney local government area, respecting the locality's heritage, particularly the existing heritage listed buildings on the site.
- Contributes to growing a stronger and more competitive Harbour CBD by providing new hotel floor rooms and jobs on the CBD fringe.
- Is well located for access to public transport and the inner Central Sydney.
- Is well located with a site supported by existing services and facilities in the Oxford Street precinct.
- Contributes to reducing carbon emissions and managing energy, water and waste efficiently by refurbishing existing heritage listed buildings and making more efficient use of the buildings with a contemporary addition.
- Will further contribute to the generation of jobs during both the construction and operational stages.

Furthermore, the variation of the height of buildings development standard does not result in any significant adverse impact on the surrounding area, surrounding residences and enables a more high quality design to be delivered on the site which contributes to the Oxford Street precinct.

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

As outlined in **Section 3.3** above, there are sufficient environmental planning grounds to warrant contravention of the development standard and it is therefore considered to be in the public interest for the variation to be supported in this case. The existing heritage listed buildings on the site already contravene the height of buildings development standard, therefore any development above to deliver the permissible floor space, and in turn public benefits, can be also understood to contravene the standard. As the contemporary new addition, which contravene the height of buildings standard, facilitate the conservation and refurbishment of the heritage listed buildings below, the proposed variation is considered to be in the public interest and necessary.

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

There are no other matters required to be taken into consideration.

4.0 Conclusion

The preceding assessment demonstrates that compliance with the height of buildings development standard contained in clause 4.3 of the Sydney LEP 2012 is unreasonable and unnecessary in the circumstances of the case and that the variation is well founded. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, while also allowing for a positive outcome in planning terms.

This clause 4.6 variation request demonstrates that, notwithstanding the variation from the height of buildings development standard, the proposed development:

- Achieves the objectives of clause 4.3 of the Sydney LEP 2012 by:
 - Providing a contemporary and high-quality addition to the heritage listed buildings in a form and scale appropriate to the site and context.
 - Ensuring that the height of the development is in-keeping with the scale and character of neighbouring buildings and is of a form that will not result in any negative environmental impacts.
 - Respecting the character appearance and scale of nearby buildings within the heritage conservation area, including nearby and adjoining heritage items, and existing buildings adjacent to the site.
 - Ensuring an appropriate transition in height to neighbouring buildings given the varied surrounding height context, particularly along Oxford Street.
- Will deliver a compliant FSR of 4:1, consistent with the permitted FSR under the Sydney LEP 2012.
- Is consistent with the draft maximum height of buildings development standard as currently being exhibited in the Oxford Street Cultural and Creative Precinct Planning Proposal, and achieves the intended strategic objectives and outcomes to activate the locality with commercial and cultural and creative uses while protecting heritage and managing environmental impacts.
- Is in the public interest as it is consistent with the objectives of both the development standard and the B2 Local Centre zone, and will ensure the long-term conservation of the listed heritage buildings on the site.
- Is consistent with the Greater Sydney Regional Plan, the District Plan and the City of Sydney Council strategic planning policies such as City Plan 2036, and does not raise any matter of significance for State or regional planning.
- There are sufficient environmental planning grounds to justify contravening the development standard as the proposal has been designed to be complementary to the heritage significance of the site.

In particular, the variation proposed to the height of buildings standard will result in a positive planning outcome as it will facilitate the refurbishment of the heritage listed buildings on the site and delivery of a new modern addition containing hotel rooms. As outlined in this written variation request, there is an absence of any significant or unreasonable impacts and the proposal will deliver benefit in accordance with the City of Sydney Councils strategic planning framework.

Moreover, the proposed height variation is consistent with the draft maximum height of buildings development standard as proposed in the Oxford Street Cultural and Creative Precinct Planning Proposal which is currently on exhibition and is a matter for consideration. The proposed development therefore fulfills Council's vision for the precinct as the cultural and creative centre of the Eastern City and a vibrant and activated local centre with a functional high street.

Therefore, the consent authority can be satisfied that there is sufficient justification for the variation to the height of buildings development standard as proposed in accordance with the flexibility allowed under Clause 4.6 of the Sydney LEP 2012.