

Attachment D

<p>Clause 4.6 Variation Request – Height of Buildings</p>
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7 Franklyn Street & 49-51 Greek Street, Glebe – Height of Building

Clause 4.6 Variation Statement – February 2022



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INTRODUCTION

Overview

This Clause 4.6 Variation request has been prepared pursuant to Clause 4.6 of Sydney Local Environmental Plan 2012 (**SLEP 2012**) in support of the development application for the new mixed boarding house accommodation at 7 Franklyn Street & 49-51 Greek Street, Glebe (**the site**).

This Clause 4.6 Variation has been submitted in conjunction with the Statement of Environmental Effects (SEE) that assessed the proposed works as described above. The request for variation of the development standard has been prepared in accordance with the requirements of Clause 4.6 of the Sydney LEP 2012 (SLEP 2012) which has the following aims and objectives:

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

The proposed variations to development standards for the proposed development are in relation to Clause 4.3 Height of Buildings of the SLEP 2012. In summary the following variations are proposed:

Sydney LEP 2012 Clause	SLEP 2012 Development Standard	Proposed Development Non-Compliance	% of Variation
Clause 4.3 Height of Buildings	Maximum 15m	2.7m	18%

In accordance with Clause 4.6 of the SLEP 2012 Council is required to consider the following:

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.*

This Clause 4.6 Variation request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards.

This variation request demonstrates that:

- The variation to the development standard is in the public interest because it is consistent with the objectives for the zone and the development standard itself.
- Compliance with the height development standard is unreasonable or unnecessary in the circumstances of the case.
- There are sufficient environmental planning grounds to justify contravening the development standard.

RELEVANT ASSESSMENT FRAMEWORK

This section of the report outlines the environmental planning instruments relevant to the proposed development, including the aims and objectives, maximum building height control and the assessment framework for seeking a variation to a development standard.

Some relevant planning principles and judgements issued by the Land and Environment Court regarding the assessment of developments seeking exceptions to development standards are also provided.

Sydney Local Environmental Plan 2012

Clause 4.6 of SLEP 2012 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of Clause 4.6 are listed within the LEP as:

(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.

Clause 4.6 provides flexibility in the application of planning provisions by allowing the Consent Authority to approve a development application that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would satisfy the requirements of clause 4.6.

In determining whether to grant consent for development that contravenes a development standard, Clause 4.6 requires that the Consent Authority consider a written request from the applicant, which demonstrates that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
- There are sufficient environmental planning grounds to justify contravening the development standard.

Furthermore, the Consent Authority must be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone, and the concurrence of the Secretary has been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary consider:

1. Whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
2. The public benefit of maintaining the development standard, and
3. Any other matters required to be taken into consideration by the Secretary before granting concurrence.

[Note: Concurrence is to be assumed as per the applicable planning circular, discussed further below.]

This document forms a Clause 4.6 written request to justify the contravention of the Building Height development standard in Clause 4.3. Also forming part of this request are the architectural drawings that have been submitted in connection with the amended development application. The assessment of the proposed variations has been undertaken in accordance with the requirements of the SLEP 2012, Clause 4.6 Exceptions to Development Standards.

NSW Land and Environment Court: Case Law (Tests)

The following sections of the report provide an assessment of the request to vary the development standards relating to the maximum building height in accordance with Clause 4.6 of SLEP 2012. Consideration has been given to the following matters within this assessment:

- *Varying development standards: A Guide*, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court. The *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 court judgement is the most relevant of recent case law. Justice Preston confirmed (in this judgement):
 - The consent authority must, primarily, be satisfied the applicant's written request adequately addresses the 'unreasonable and unnecessary' and 'sufficient environmental planning grounds' tests:

"that the applicant's written request ... has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ... and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard ..." [15]

- On the grounds for a finding that the strict application of a standard is 'unreasonable or unnecessary' established under *Wehbe v Pittwater Council* [2007] NSWLEC 827:

"The five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way..." [22]

- That, in establishing 'sufficient environmental planning grounds', the focus must be on the contravention and not the development as a whole:

"The environmental planning grounds advanced 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" [26]

- That clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development:

"Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard will have a better environmental planning outcome than a development that complies with the development standard." [88]

This clause 4.6 variation has specifically responded to the matters outlined above and demonstrates that the request meets the relevant tests with regard to recent case law.

THE EXTENT OF VARIATION

Relevant Development Standards

The development standards being requested to be varied are Clause 4.3 Height of Buildings of the SLEP 2012.

1.1 The Height Standard

Clause 4.3 (2) of the SLEP 2012 states:

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

The Height of Building Map sets a height standard of 15m for the site. The 15m building height standard has been measured in accordance with the SLEP 2012 definition:

building height (or height of building) means:

- (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.*

1.2 Proposed Variation to Standards

The proposed variations to development standards for the proposed development are in relation to Clause 4.3 Building Height of the SLEP 2012. In summary the following variations to development standards are proposed:

Sydney LEP 2012 Clause	SLEP 2012 Development Standard	Proposed Development Non Compliance	% of Variation
Clause 4.3 Height of Buildings	Maximum 15m	2.7m	18%

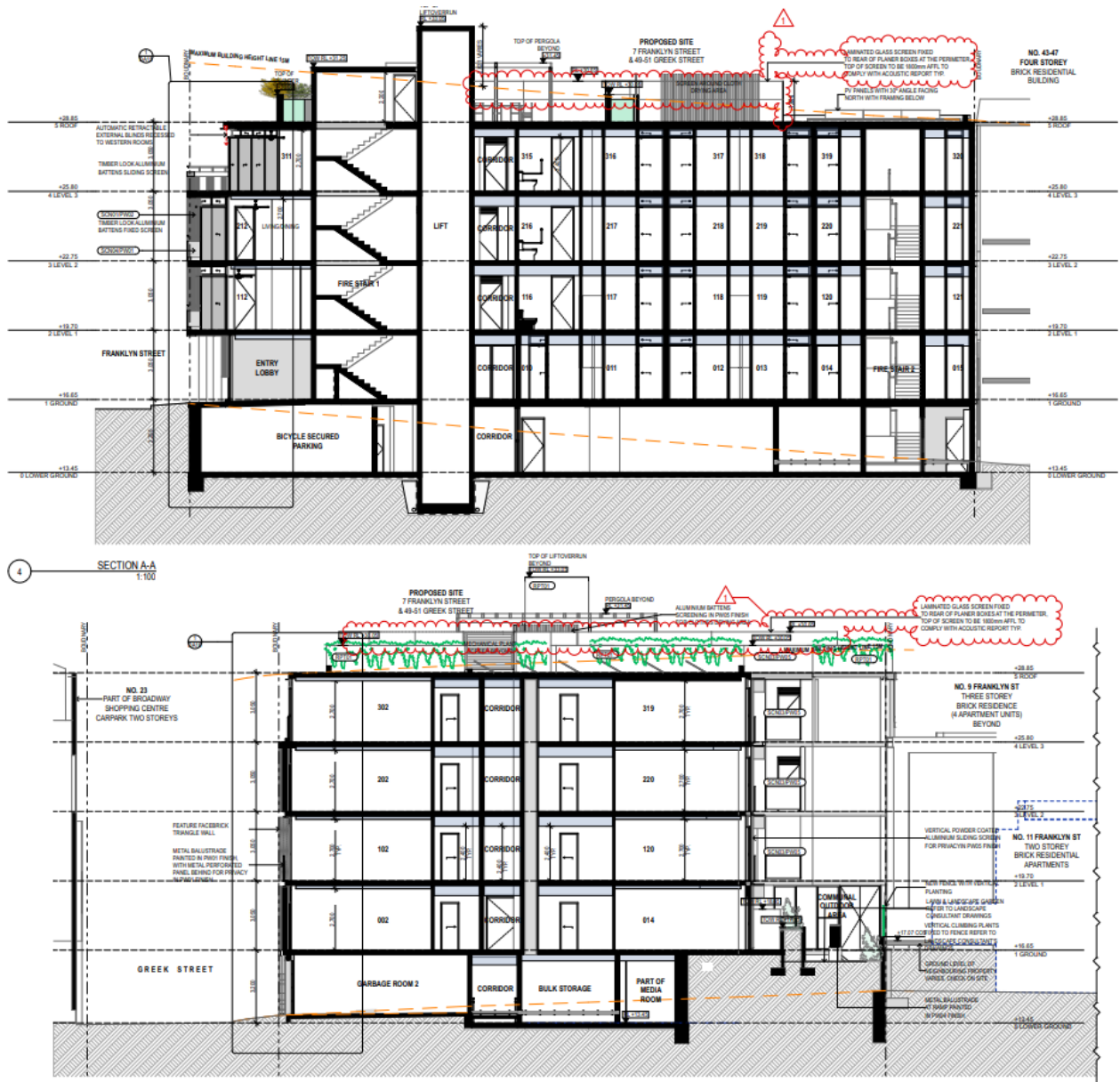


Figure 1: Yellow line denotes the 15m height limit.

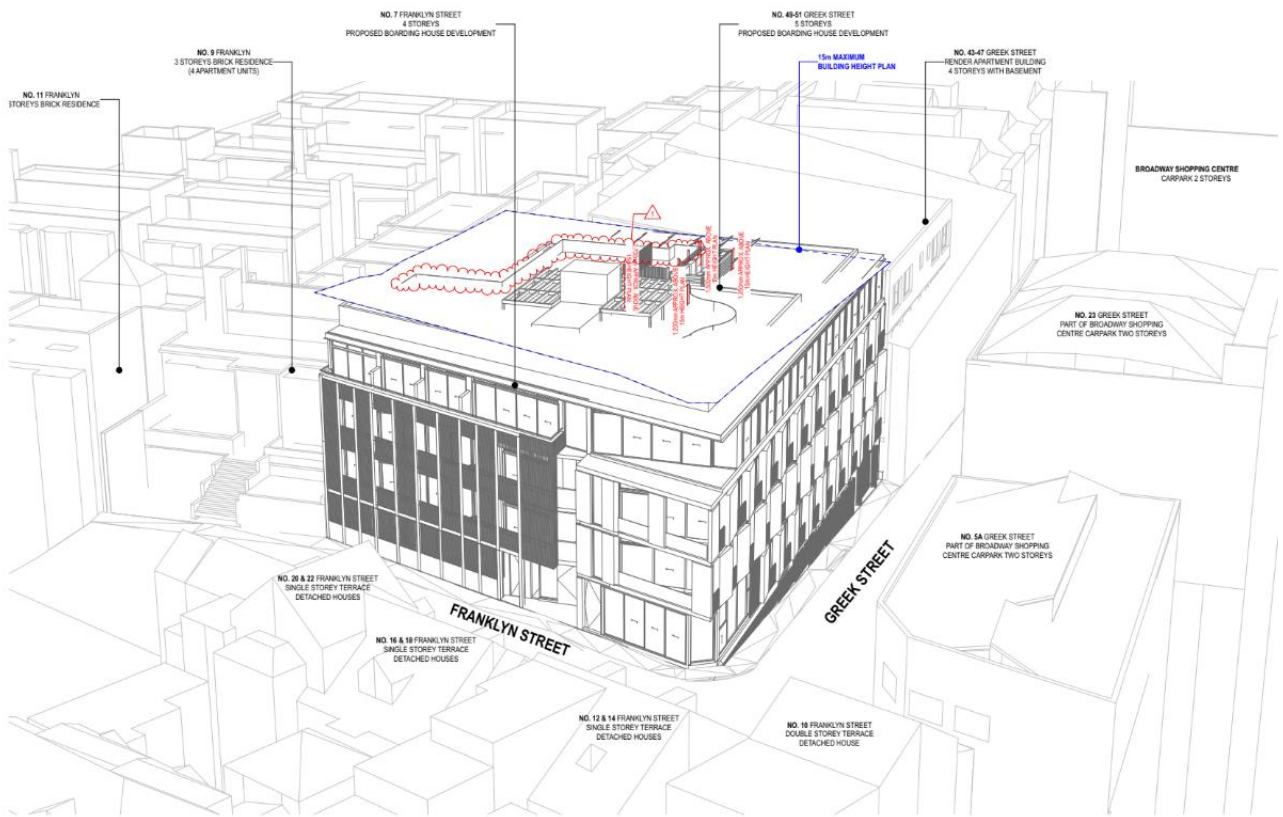


Figure 2: Height Plane Diagram. Blue line denotes 15m height limit.

CLAUSE 4.6(4)(A)(II) – WILL THE PROPOSED DEVELOPMENT BE IN THE PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES OF THE PARTICULAR STANDARD AND OBJECTIVES FOR DEVELOPMENT WITHIN THE ZONE IN WHICH THE DEVELOPMENT IS PROPOSED TO BE CARRIED OUT?

2. Overview

The proposed development will be in the public interest because it is consistent with the objectives of the height control standard and the zone objectives.

2.1 The Proposal Achieves the Objectives of the Height Standard

The objectives of the building height control as listed within Clause 4.3 of the SLEP 2012 have been achieved as demonstrated below.

The objectives of Clause 4.3 are as follows:

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

Notwithstanding the proposed variation to the standard, the proposed development is nevertheless consistent with these objectives:

- (a) to ensure the height of development is appropriate to the condition of the site and its context,*
 - The proposed development is compatible with the built form and density of surrounding developments. It has been designed to incorporate a setback to the upper levels to ensure it integrates with the scale and bulk of surrounding developments.
 - The top level which comprises the encroaching elements will not be readily discernible from the street by virtue of its setback from the front at Greek Street and Franklyn Street.
 - The proposed development will be viewed as a five storey development from the streetscape and will not appear to exceed the height of the adjoining building on Greek Street or the Broadway Shopping Centre building.
 - The proposed variation will not affect the overall height of the development, the lift shaft and plant, pergola and fire stair, and acoustic screen exceed the height limit by 2.7m, however the overall scale is appropriate for the area. Strict application of the height control would be unreasonable in the circumstances.

- The proposed 1800mm high AFFL glazed screen at roof level is provided to comply with an Acoustic Assessment which also breaches the height limit is setback from the facades of the building, and will be a laminate glass structure which will be light weight and not visible from street level.
- The acoustic screen will not add any discernable bulk or massing to the rooftop level as it is setback from the building edges and screened by vegetation in some places.

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

- The site is not located adjacent a heritage item and is not located within a heritage conservation area.

(c) to promote the sharing of views,

- The portion of development which protrudes beyond the prescribed height limit comprises the lift overrun, pergola, acoustic screen and fire stairs.
- No significant views from surrounding properties currently occur, and therefore no view sharing is required.

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

- The site is not located within 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 street network and public spaces.

- The site is not located within Green Square.

2.2 The Proposal Achieves the Objectives of the Zone

The site is currently zoned B2 Local Centre Zone under the Sydney LEP 2012.

The proposed new development is consistent with the B2 zone objectives in that:


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 Site will provide boarding house accommodation which is well serviced by retail, business and community uses in the surrounding area.

To encourage employment opportunities in accessible locations.

- The Site use will not necessarily encourage employment opportunities, with the exception of the Managers role.

To maximise public transport patronage and encourage walking and cycling.

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- The Site's has excellent accessibility to public transport options (including frequent bus services, the existing Central Train Station accessible by pedestrian and bus connection) and access to services, education and employment.
 - The provision of 101 bicycle spaces will promote cycling.

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

- Housing diversity is an issue faced within the Sydney LGA and the proposed development will have a positive social and economic impact by providing low-cost accommodation with excellent access to public transport, retail, education, hospitals and Sydney CBD at a reasonable price point.

CLAUSE 4.6(3)A – COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE

Compliance with the development standard **is** unreasonable or unnecessary in the circumstances of the case.

Clause 4.6(3)(a) requires that this Variation Request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

Such compliance is unreasonable or unnecessary in the circumstances of the case.

In *Wehbe v Pittwater Council* [2007] NSWLEC 827 Preston CJ set-out the five ways of establishing that compliance with a development standard is unreasonable or unnecessary in support of justifying a variation:

1. *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.***
2. *Establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.*
3. *Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.*
4. *Establish that 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.*
5. *Establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary".*


In applying the tests of **Wehbe v Pittwater Council** [2007] NSWLEC 827, only one of the above rationales is required to be established. Notwithstanding the proposed variation, as demonstrated in Sections 2.1 and 2.2, the proposed development is consistent with the underlying objectives of the standard for Building Height and the B2 zone of SLEP 2012.

As addressed previously the proposal has demonstrated compliance with the relevant objectives of Clause 4.3 of the Sydney LEP 2012.

Undermining objectives of the EP&A Act

Section 1.3(g) of the Environmental Planning and Assessment Act 1979 (the EP&A Act) says that it is an objective of the legislation:

to promote the orderly and economic use and development of land



Requiring strict compliance with the height control would undermine the achievement of this objective of the legislation. This is because orderly and economic use and development of land is encouraged/supported by permitting development in accordance with the relevant development standards.

This is sufficient, by itself, to establish that requiring strict compliance is unreasonable or unnecessary in the circumstances of the case.

Disproportionate burden on the community

The severity of the burden placed on members of the community (by requiring strict compliance) would be disproportionate to the consequences attributable to the proposed non-compliant development (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 (at [15])).

The adverse consequences by requiring strict compliance have already been outlined. In brief terms, they are:

- an unnecessary reduction in housing supply and housing choice.

It is unreasonable to expect the community to bear these adverse consequences in circumstances where there are no significant adverse impacts from allowing the height contravention.

This is sufficient, by itself, to establish that requiring strict compliance is unreasonable or unnecessary in the circumstances of the case.

CLAUSE 4.6(3)(B) – ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

The proposed development demonstrates that there are sufficient environmental planning grounds in support of the contravention for the following reasons:

- The portion of development which protrudes beyond the prescribed height limit comprises the lift overrun, pergola and fire stairs. The lift shaft will exceed the building height control by approximately 2.7m. Strict application of the height control would be unreasonable in the circumstances.
- The proposed 1800mm high AFFL glazed screen at roof level is provided to comply with an Acoustic Assessment which also breaches the height limit is setback from the facades of the building, and will be a laminate glass structure which will be light weight and not visible from street level. The acoustic screen will not add any discernable bulk or massing to the rooftop level as it is setback from the building edges and screened by vegetation in some places.
- The proposed development is compatible with the built form and density of surrounding developments. It has been designed to incorporate a setback to the upper level to ensure it integrates with the scale and bulk of surrounding developments.
- The top level which comprises the encroaching element will not be readily discernible from the street by virtue of its setback from the front at Franklyn Street and Greek Street.
- The proposed massing of the development is considered acceptable with regard to the height controls and intent for the locality.
- The provision of a mix of façade treatments and articulation contribute to minimising the visual perception of bulk and scale of the buildings.
- In light of the proposals contribution to achieving the desired future character of the area, a reduction of height would serve no material planning purpose, other than numerical compliance with a generic Council control.
- The proposal will add to delivering a mix of well-designed low cost housing that meets the needs of Sydney's growing population and to meet the changing population needs.
- The proposed development will not significantly impact on the amenity of adjoining occupiers.
- The proposal results in the delivery of residential accommodation within easy access of the public transport, retail, employment and services.



CLAUSE 4.6(5)(A) – WOULD NON-COMPLIANCE RAISE ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL PLANNING?

The proposed non-compliance with the maximum height of building development standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

CLAUSE 4.6(5)(B) – IS THERE A PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD?

Overall it is considered that the strict maintenance of the standard in this instance is not in the public interest as the current proposal will result in the delivery of a high-quality residential development and housing stock which achieves the strategic objectives of Council.

CLAUSE 4.6(5)(C) – ARE THERE ANY OTHER MATTERS REQUIRED TO BE TAKEN INTO CONSIDERATION BY THE SECRETARY BEFORE GRANTING CONCURRENCE?

The Planning Circular PS 18-003, issued on 21 February 2018 (Planning Circular), outlines that all consent authorities may assume the Secretary's concurrence under clause 4.6 of the Standard Instrument (Local Environmental Plans) Order 2006 (with some exceptions). The NSLEP is a standard instrument LEP and accordingly, the relevant consent authority may assume the Secretary's concurrence in relation to clause 4.6 (5). This assumed concurrence notice takes effect immediately and applies to pending development applications.

We note that under the Planning Circular this assumed concurrence is subject to some conditions - where the development contravenes a numerical standard by greater than 10%, the Secretary's concurrence may not be assumed by a delegate of council.



CONCLUSION

It is requested that council supports the proposed variation to Clause 4.3 of the SLEP 2012 for the following reasons:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.
- There are sufficient environmental planning grounds to justify contravening the development standard.
- The proposed variation allows for the provision of improved residential accommodation, for family housing.
- No unreasonable environmental impacts are introduced as a result of the proposal.
- There is no public benefit in maintaining strict compliance with the standards.