

Attachment C

<p>Clause 4.6 Variation Request Height of Buildings</p>

Clause 4.6 Variation

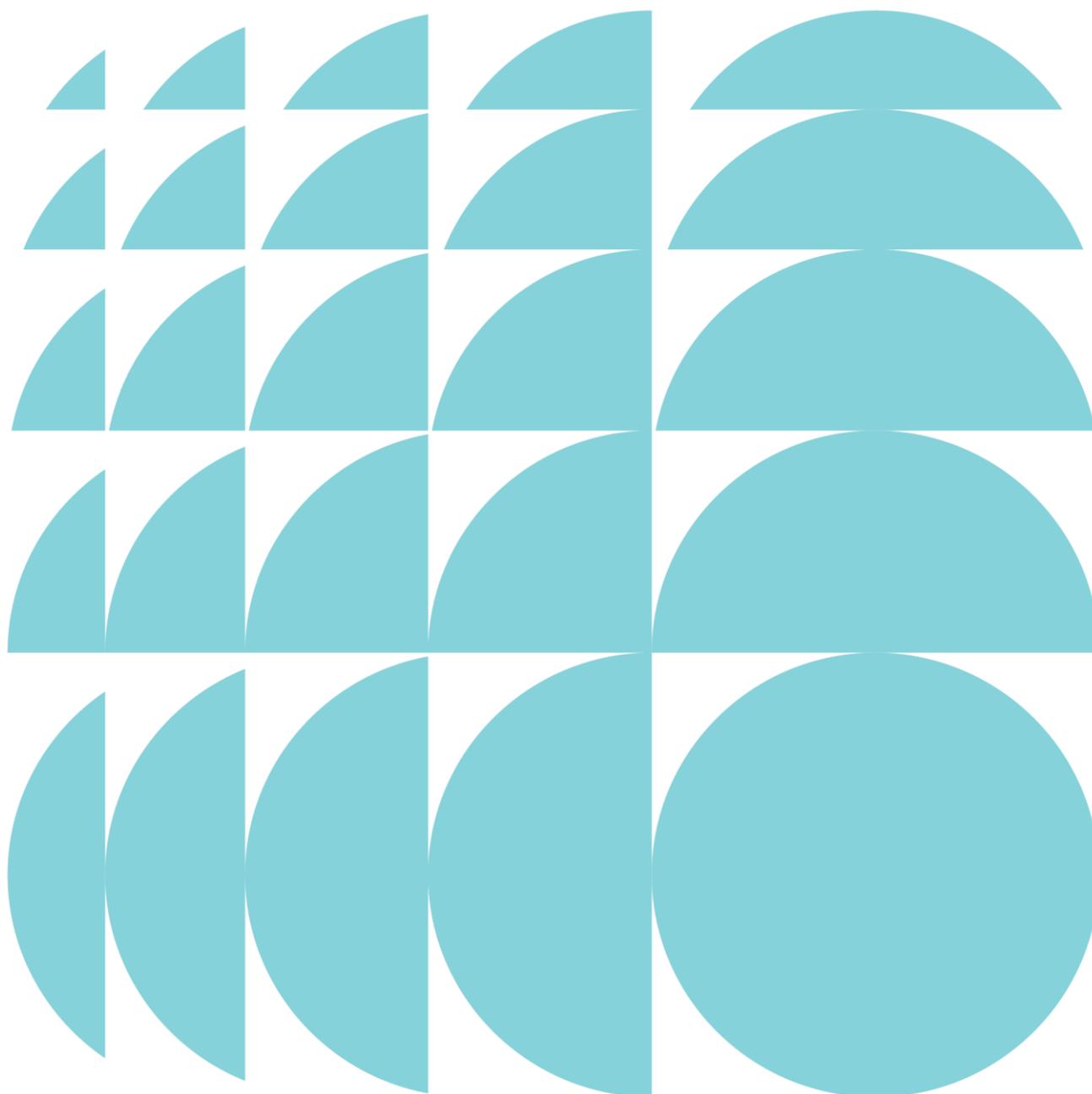
Height of Buildings

189-197 Kent Street, Sydney

Submitted to City of Sydney

On behalf of Barana Group

16 March 2022 | 2200082



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1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of Barana Group. It is submitted to City of Sydney (the Council) in support of an amending development application (amending DA) for a Concept DA relating to a mixed-use development at 189-197 Kent Street, Sydney.

Clause 4.6 of *Sydney Local Environmental Plan 2012* (SLEP 2012) enables the consent authority 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 relates to the development standard for height of buildings under clause 4.3 of SLEP 2012 and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban, dated 21 June 2021.

This clause 4.6 variation request demonstrates that compliance with the height of buildings development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the standard.

This clause 4.6 variation request is further justified by the recent amendments to the *Sydney Local Environmental Plan 2012* (SLEP 2012) and Sydney Development Control Plan 2012 (SDCP 2012), resulting from the Central Sydney Planning Strategy and Central Sydney Planning Proposal (CSPP), driven by the City of Sydney. Amendment No. 64 to the SLEP 2012 was gazetted on 26 November 2021. As a result of the amendment, the mapped height limit on the site increased from 80 metres to 110 metres, and the site is within the western edge tower cluster, which will allow towers up to 240 metres (subject to compliance with a number of environmental factors such as solar access planes). The amendment also made changes to the objectives of the B8 Zone, within which the site is located.

While the LEP Amendment has been gazetted, a savings provision under clause 1.8A(5) applies, which states that Amendment No. 64 does not apply to the subject DA, since it was made but not finally determined before the commencement of the amendments. Therefore, this clause 4.6 variation request has been prepared despite the site benefitting from an increase in height to 110m. As such, the height variation sought in this clause 4.6 variation request is justified in relation to the recent changes to the mapped height limit.

This clause 4.6 variation request demonstrates that, notwithstanding the non-compliance with the Height of Buildings development standard:

- The objectives of the standard are achieved, particularly in that the proposal is compatible with its context and the increase in mapped maximum building height under SLEP 2012 Amendment No. 64, given the number of tall buildings in the vicinity of the site.
- There are sufficient environmental planning grounds to justify the variation, as:
 - The mapped height limit of the site has been increased from 80m to 110m as part of a Council-led LEP amendment and therefore the proposal is commensurate with Council's envisaged capacity for the site.
 - The variation does not seek to materially increase the density or development capacity of the development.
 - The redistribution of building envelope massing results in additional public benefits related to the through site link.
 - The site has a significant slope.
- The site provides substantial public benefit through the separation of the built form and the provision of a through-site link and is consistent with the objectives of the B8 zone. Further, the amended building envelope changes sought as part of the amending DA will significantly improve the amenity of the future through site link by opening it to the sky.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of SLEP 2012.

2.0 Development Standard to be Varied

This clause 4.6 variation request seeks to justify contravention of the development standard set out in clause 4.3 of SLEP 2012. Clause 4.3 provides that the height of a building on any land is not to exceed the maximum shown for the land on the Height of Buildings Map. The Height of Buildings Map (sheet HOB_014) shows the maximum building height as being 80m (prior to Amendment No. 64).

The maximum building height as per SLEP 2012 is shown in **Figure 1**.

The proposed development includes additional building envelope mass of approximately 30 metres height, that exceed the 80m height plane for the site.

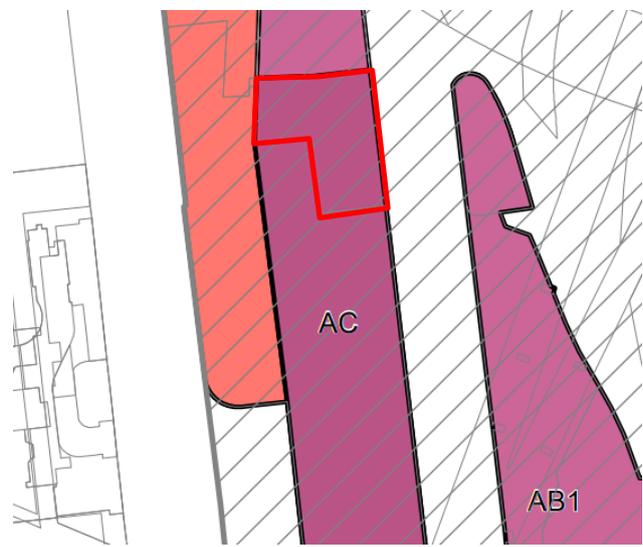
It is noted that SLEP 2012 Amendment No. 64 amended the mapped maximum height limit for the site to 110 metres, as shown in **Figure 2**.



AB1 80

Figure 1 Existing mapped height limit applying to the site under the SLEP 2012

Source: SLEP 2012



AC 110

Figure 2 Mapped height limit under SLEP 2012 Amendment No. 64

Source: SLEP 2012

Figure 3 shows the extent of the proposed building envelope that exceeds the 80m height plan, as well as the proposed tower's relationship with the 110m height limit as per SLEP 2012 Amendment No. 64.

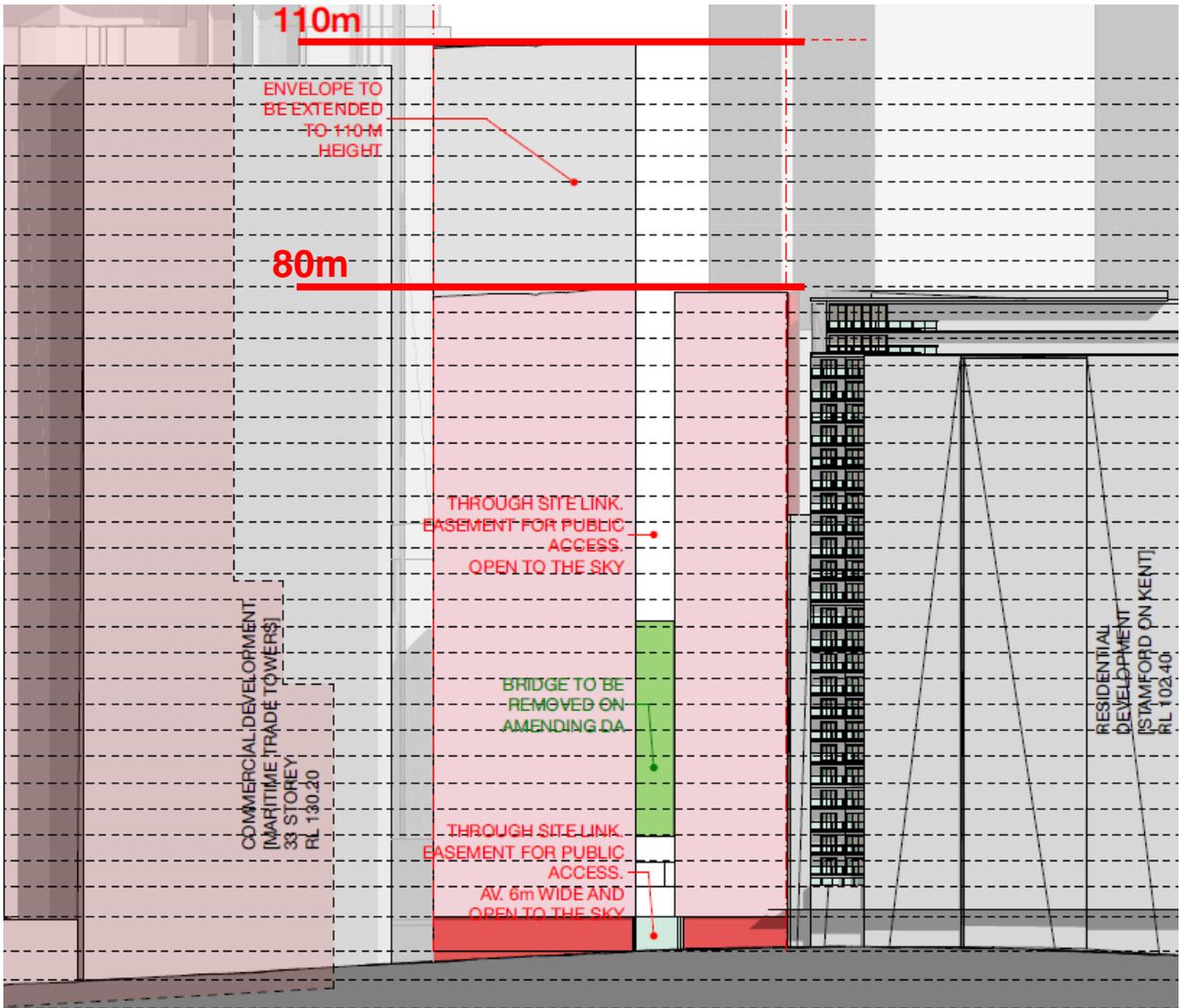


Figure 3 Section showing height plane and proposed development

Source: FJMT

As shown, the maximum height of the building envelope is RL133.400. This results in an extent of variation of 30 metres, or a maximum building height of 110 metres.

3.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of SLEP 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.*

Further, clause 4.6(4)(a) of SLEP 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; and
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.

The relevant matters contained in clause 4.6 of SLEP 2012, with respect to the Height of Buildings development standard, are each addressed below, including with regard to these decisions.

3.1 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.

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 SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of SLEP 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 methods outlined in *Wehbe* include:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
- 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 Method**).
- 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 Method**).

Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary is the First Method.

3.1.1 The underlying objectives or purposes of the development standard

The objectives of the development standard contained in clause 4.3 of SLEP 2012 (prior to Amendment No. 64) 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.

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

Objective (a): to ensure the height of development is appropriate to the condition of the site and its context

189 Kent Street is located in the Sydney CBD, one of the highest density centres in Australia. The site also sits within a cluster of height that has primarily been driven by the recent development of Barangaroo. **Figure 4** shows the context of the site, particularly within the context of the potential future tower cluster heights available under Amendment No. 64.

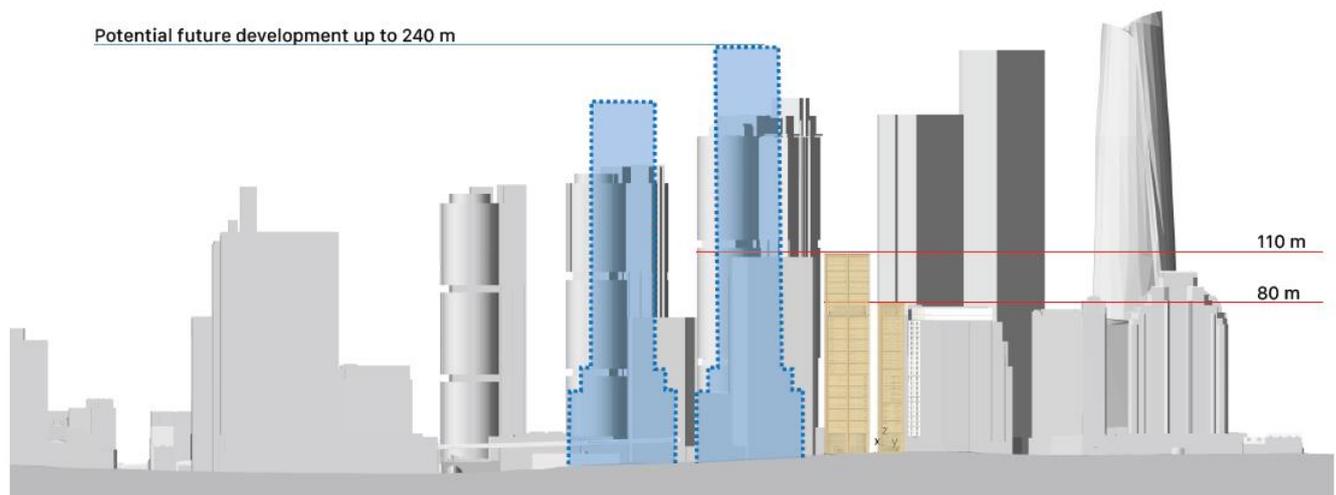


Figure 4 Height context of the site

Source: FJMT

As shown, the development is of a relatively small height when compared with the surrounding development and potential future development. In the immediate context, the proposed development is approximately equivalent in height to the Maritime Trade Towers to building to the south, whilst the southern tower steps down to match the height of Stamford on Kent to the south.

In the broader context, the proposed development is less than half the height of International Tower One, the approved Barangaroo residential towers and the Crown Resort. The building is also less than half the height of the potential tower cluster maximum height of 240 metres (as per SLEP 2012 Amendment No. 64), and shown in **Figure 4**. The building is also to the west of the CBD core, which contains numerous towers that are significantly taller than the proposed development.

Figure 5 shows the indicative development from the west. As shown, the proposed height of the southern tower complements the scale and form of the adjacent Maritime Trade Towers.



Figure 5 Photomontage of indicative development from the west

Source: FJMT

It is also noted that SLEP 2012 Amendment No. 64 increased the mapped height limit for the site to 110m. As such, there is an acknowledgement by Council that increased height at the site is appropriate and desirable in the context. It is further noted that the site is identified as being located within a tower cluster, due to its location within the western edge of the CBD, and therefore, the site is capable of accommodating a building of up to 240 metres height (pending compliance with other environmental controls such as solar access planes). Whilst the base height of 110 metres will apply to the entire site, only a portion of the site (i.e. the southern tower envelope) will be of this height.

In conclusion, the proposed concept development:

- Matches the height of the adjoining Stamford on Kent building to the north (northern tower).
- Matches the height of the Maritime Trade Tower building to the south (southern tower).
- Is significantly lower in height than the Barangaroo and Crown Resort developments to the west.
- Sits within a broader context of taller buildings.
- Is significantly shorter than the potential height of the tower cluster context within which the site is located.
- Reflects the newly mapped height limit for the site of 100m, under SLEP 2012 Amendment No. 64, which is the maximum height of the building proposed.

For these reasons, the height of the proposed development is considered to be appropriate to the condition of the site and its context.

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

There are several heritage items in the vicinity of the site, including the Grafton Bond Building and adjoining sandstone wall to the west of the site and Jenkins Street to the west and north-west of the site. These items are shown in **Figure 6**.

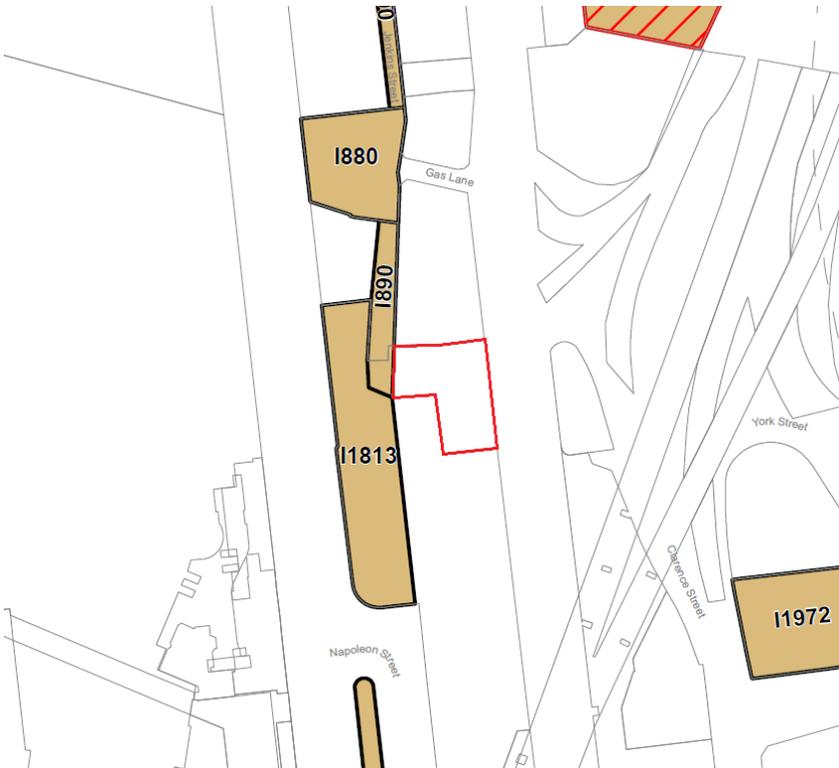


Figure 6 Heritage items in the vicinity of the site

Source: Sydney LEP 2012

It is first noted that there is an existing commercial building on the site. This building has a relatively dated and inactive façade facing west. This interface is shown in **Figure 7**.



Figure 7 Interface with Jenkins Street and the Grafton Bond building

Source: Ethos Urban

The proposed development significantly improves on this heritage interface by creating a new public through-site link, as well as by improving activation and materiality along the western façade of the building. The indicative western elevation is shown at **Figure 8**.



Figure 8 Indicative development western elevation

Source: FJMT

Finally, it is noted that the inclusion of the additional height on the southern tower does not significantly change the interface of the building with surrounding heritage items. It is unlikely that this height will be immediately read as a backdrop to the heritage items when viewed up close, and from a longer distance, the future proposed towers will improve the overall form and compatibility of the building with its surrounds.

It is also noted that the additional height will result in little to no additional overshadowing of the heritage items, given its location, scale and context within Central Sydney.

Overall, it is considered that that the proposed variation continues to maintain appropriate height transitions between new development and the surrounding heritage items.

Objective (c): to promote the sharing of views

The proposed variation will not result in any significant impacts to views from surrounding buildings or public places. The redistribution of the massing from between the two towers to the top of the southern tower allows for improved views between the two towers. Further, the additional height on the southern tower does not result in view impacts for the neighbouring building to the south, as it is a commercial building.

It is also noted that under SLEP 2012 Amendment No. 64, for a building with a height 30m taller than the current height limit, any potential view sharing should be considered in the context that the site will be capable of achieving a significantly taller development within the near future.

Amendment No. 64 also amended this objective of the building height control, to read as follows (emphasis added):

To promote the sharing of views (outside of Central Sydney).

In line with this amended objective, the additional height sought under this application will not restrict access to views outside of Central Sydney.

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

The site is located in the heart of Central Sydney and is not considered to be within an area important to achieving a transition between Central Sydney and surrounding areas. As such, this objective is not considered to be directly relevant to the proposed variation.

(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.**

This objective is not relevant to the proposal since it is not located in Green Square.

3.1.3 Conclusion on clause 4.6(3)(a)

In summary, as per clause 4.6(3)(a), compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, as the proposed concept development:

- Is consistent with its context in terms of height.
- Responds appropriately to surrounding development and heritage.
- Complies with the new mapped height limit for the site.

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

3.2.1 Ground 1: The height limit of the site has been increased as part of a Council-led LEP amendment

As previously mentioned, Amendment No. 64 to the SLEP 2012 increased the height limit of the site from 80m to 110m. While savings provisions under Clause 1.8A(5) mean the new height limit does not technically apply to the site, the proposed development is consistent with Council's future desired character for the area and the envisaged capacity for the site. The site is also identified as being within a tower cluster, which are sites designated as potentially being capable of achieving significant additional height beyond the mandated height limit, up to 240 metres (pending compliance with other controls such as solar access planes). As such, the proposed variation is considered minor in the context of the current and potential future character of the site.

3.2.2 Ground 2: The development does not seek to materially increase the density of development

The proposed development seeks to redistribute a portion of the building envelope massing from the connecting portion between the two towers, to the top of the southern tower. Key in the approach is the "redistribution" of mass, which does not envisage additional capacity or density of development potential at the site. As such, the height variation has not been driven by an intensification or overdevelopment of the site, but by the spatial constraints of the site and the massing of the buildings (including the provision of a significant through-site link and building separation between the two towers). The approved and proposed building envelope is shown in the Western Elevation drawings at **Figure 9** and **Figure 10**. The additional height is considered to provide a more appropriate volumetric response to the site whilst not increasing the capacity or density of the development.

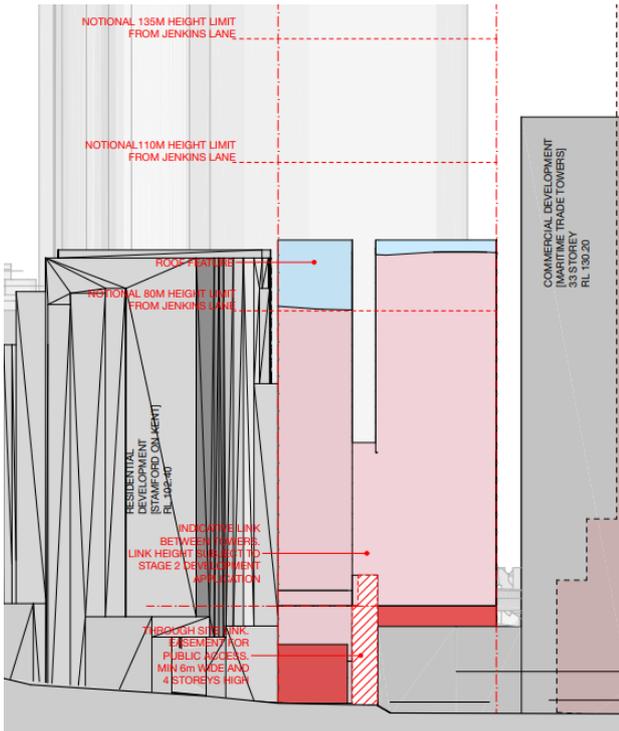


Figure 9 Previously approved envelope showing massing between the two towers

Source: FJMT

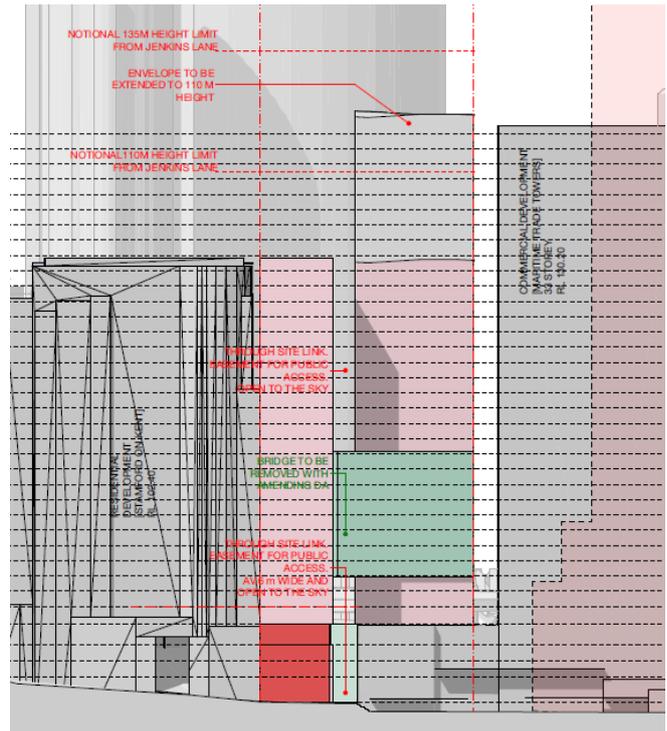


Figure 10 Proposed relocation of massing to top of southern tower

Source: FJMT

3.2.3 Ground 3: Redistribution of massing resulting in increased height improves public benefit

The redistribution of the central massing from between the two towers to the top of the southern tower envelope, and subsequent variation to the height limit, results in the improved visibility and openness to the sky of the through site link, and therefore improved public benefit. The removal of this massing above the through site link allows for the link to be open to the sky, improving the legibility of the link for the public. Therefore, the redistribution of this massing, resulting in an increased building height, improves the public benefit of the project overall. The additional height contravening the maximum height limit is therefore justified on this ground.

3.2.4 Conclusion on clause 4.6(3)(b)

There are considered to be sufficient environmental planning grounds to justify contravening the development standard, as:

- The mapped height limit applying to the site has been increased under SLEP 2012 Amendment No.64.
- The building does not represent an overdevelopment of the site or significant increase in development potential for the site. It seeks to redistribute massing of the building envelope, not significantly increase the capacity of the site.

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

3.3.1 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 3.1.2 of this report.

3.3.2 Consistency with objectives of the zone

The proposed development is consistent with the objectives of the B8 Zone, as it:

- Will enable a development that is of an intensity consistent with the site's location in the Sydney CBD.
- Enables a future application that will provide a diversity of land uses complementary to Sydney's global status.
- Facilitates significant public benefit in the form of a public through-site link that will serve the workforce, visitors, and wider community.
- Encourages walking through the provision of a through-site link that increases connectivity between Barangaroo and Central Sydney. The amended proposal improves the legibility of the through site link through the removal of the central massing between the two tower envelopes, opening the through site link to the sky.
- The amended proposal improves the legibility of the through site link.

It is noted that under SLEP 2012 Amendment No. 64, several amendments to the objectives of the B8 Zone were implemented. The development is consistent with the following amended objectives of the B8 Zone since it:

- Enables uses with active street frontages within podiums that contribute to the vitality, life and existing character of the street (subject to detailed DA).
- Promotes the efficient and orderly development of land in a compact urban centre.
- Recognises and reinforces the important role that Central Sydney's public spaces, streets and their amenity play in a global city.
- Promotes the primary role of the zone as a centre for employment and permit residential and serviced apartment accommodation where they complement employment generating uses.

3.3.3 Overall public interest

The proposed development represents an innovative and responsive approach to the street environment and the overall streetscape. It seeks to enable the replacement of an ageing commercial building that contributes little in terms of public domain with a development that adds significant public benefit in the form of a public through-site link from Kent Street to Jenkins Street. This through site link has been significantly improved through the design changes made under this amending DA, including widening the link and opening it to the sky.

Further, the proposed development improves the volumetric built form outcome on the site by establishing an envelope that responds to its surrounding context and the heights set by the adjoining Stamford on Kent and Maritime Trade Towers.

3.4 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:*
- whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - the public benefit of maintaining the development standard, and*
 - any other matters required to be taken into consideration by the Secretary before granting concurrence.*

These matters are addressed in detail below.

3.4.1 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.

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

There is no public benefit to maintaining the development standard. The additional height contributes significant public benefit by establishing the presence of the development against the sky, improving upon the existing building

located on the site and responding to the adjoining buildings. Maintaining the development standard would also result in a mismatch of heights between the mapped height under SLEP 2012 Amendment No. 64 and the future desired character of the Western Corridor, given the mapped height limit has been increased to 110 metres.

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

Nil.

4.0 Conclusion

The assessment above demonstrates that compliance with the Height of Buildings development standard contained in clause 4.3 of SLEP 2012 is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst also allows for a better outcome in planning terms.

This clause 4.6 variation demonstrates that, notwithstanding the non-compliance with the Height of Buildings development standard:

- The objectives of the standard are achieved, particularly in that the proposal is compatible with its context and the increase in mapped maximum building height under SLEP 2012 Amendment No. 64, given the number of tall buildings in the vicinity of the site.
- There are sufficient environmental planning grounds to justify the variation, as:
 - The mapped height limit of the site has been increased from 80m to 110m as part of a Council-led LEP amendment and therefore the proposal is commensurate with Council's envisaged capacity for the site.
 - The variation does not seek to materially increase the density or development capacity of the development.
 - The redistribution of building envelope massing results in additional public benefits related to the through site link.
 - The site has a significant slope.
- The site provides substantial public benefit through the separation of the built form and the provision of a through-site link and is consistent with the objectives of the B8 zone. Further, the amended building envelope changes sought as part of the amending DA will significantly improve the amenity of the future through site link by opening it to the sky.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of SLEP 2012.