

Attachment C

Clause 4.6 Variation Requests

Clause 4.6 Variation

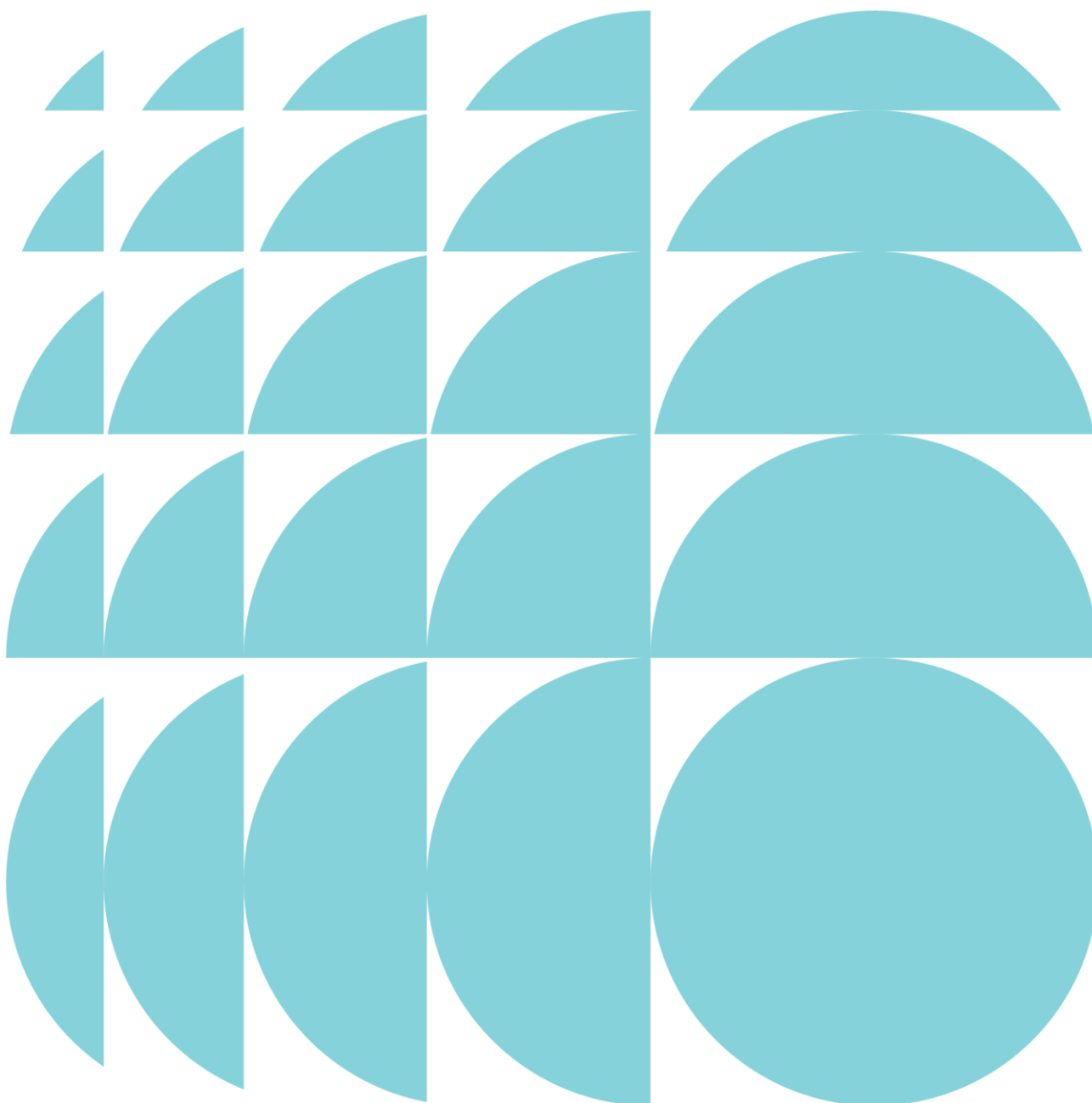
Height of Buildings

189-197 Kent Street, Sydney

Submitted to City of Sydney

On behalf of Barana Group

15 March 2022 | 2200082



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21 June 2021



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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 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 overshadowing). The amendment also amended some 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 recent change in mapped height limit 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 height variation exhibits design excellence and is a result of a competitive design process and design integrity assessment.
 - The mapped height limit for the site has been increased from 80m to 110m as part of SLEP 2012 Amendment No. 64 (noting that a savings provision means the 80m height limit applies to this DA).
 - The variation does not seek to materially increase the density of the development.
 - 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 built form changes sought as part of the amending DA, including the redistribution of the central massing between the two towers to the top of the southern tower, significantly improves the amenity of the through site link by opening it to the sky. This further enhances the public benefit of the through site link and meets the objectives of the zone.

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 an additional nine storeys containing apartments, or 30 metres, 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**.



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

Source: SLEP 2012

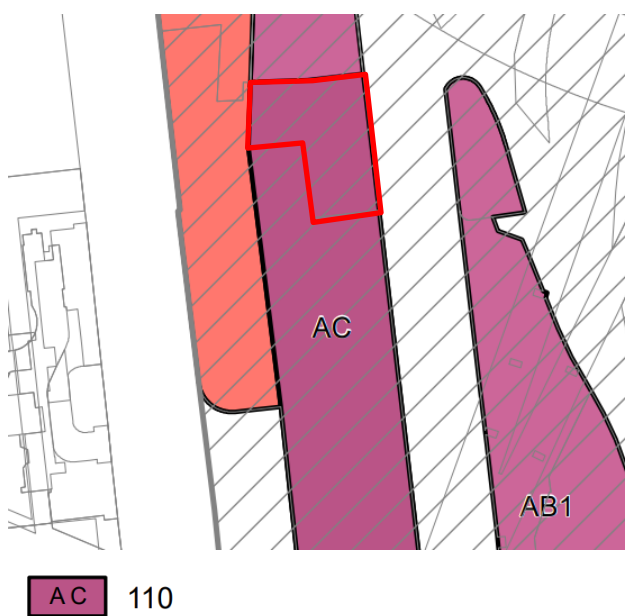


Figure 2 Mapped height limit under SLEP 2012 Amendment No. 64

Source: SLEP 2012

Figure 3 shows the extent of the proposed development 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.

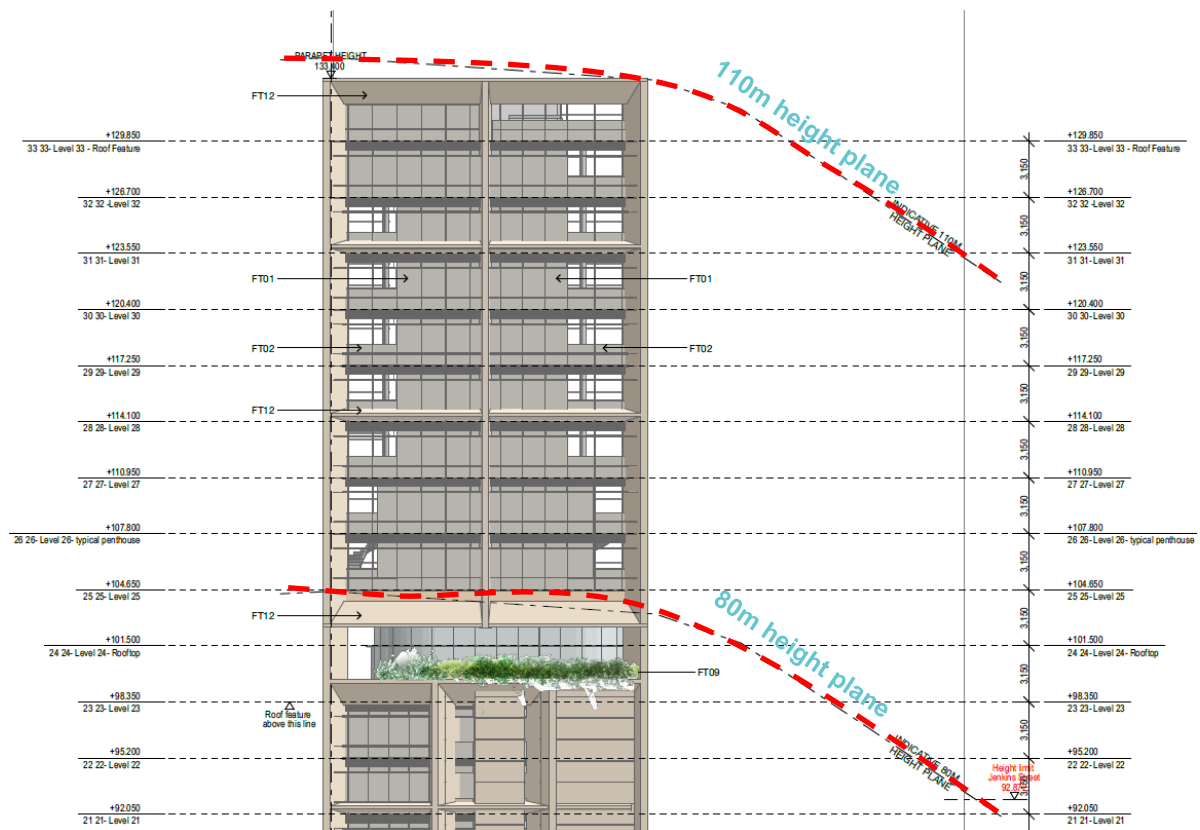


Figure 3 Section showing height plane and proposed development

Source: FJMT

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

Further, it is noted that this application does not seek approval for any changes to the height or architectural roof feature of the northern tower.

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.

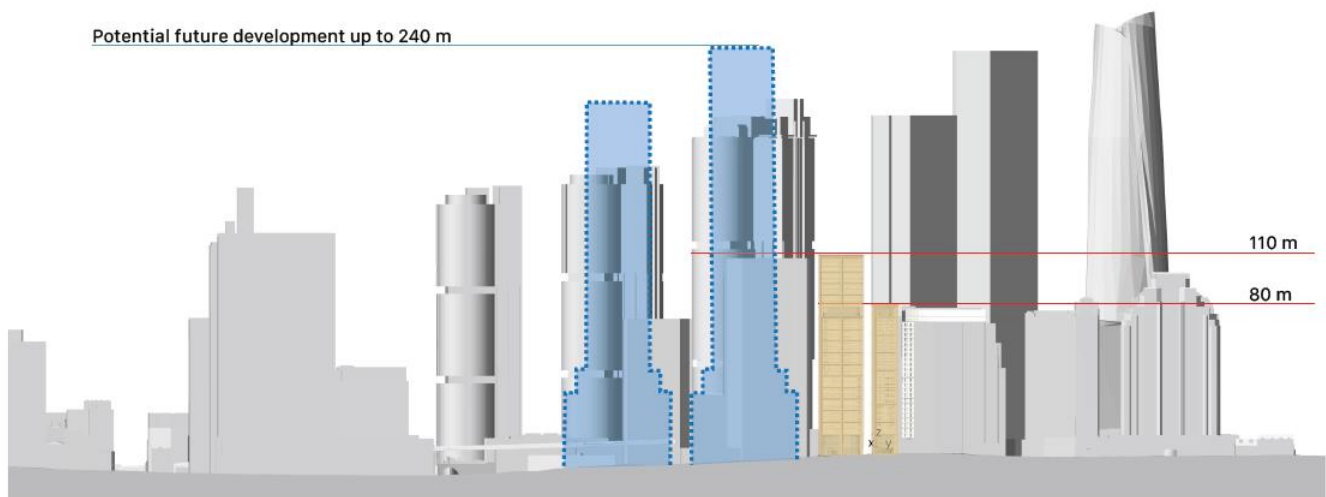


Figure 4 Height context of the site

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 proposed 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 proposed 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 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) will be of this height.

In conclusion, the proposed 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. 6, 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 proposed western elevation is shown at **Figure 8**.



Figure 8 Proposed 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. Indeed, 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 design excellent towers will improve the overall form and compatibility of the building with its surrounds.

Further, it is 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. This is discussed further in the Addendum to the Heritage Impact Statement provided at **Appendix J** of the Statement of Environmental Effects prepared by Ethos Urban.

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 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.
- Is of a high architectural quality and exhibits design excellence, as per the Design Integrity Assessment.

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

3.2.1 Ground 1: The mapped 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 entirely consistent with Council's future desired character for the area. 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 amending DA was intended to be a transfer of mass and did not seek to materially increase the GFA at the site. The proposed development only marginally exceeds the maximum FSR granted to the site of 12.1:1 under D/2020/399 (including a 10% design excellence bonus). It achieves an FSR of 12.12:1. As such, the height variation has not been driven by an overdevelopment of the site or significant increase in GFA, 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). Further, the additional height comes from a transfer of massing, previously located connecting the two towers, as shown at **Figure 9** and **Figure 10**, and therefore, the additional height provides to a more appropriate volumetric response to the site whilst not notably increasing the overall density of the development.



Figure 9 Previously approved 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, and subsequent variation to the height limit, results in the improvement 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 and walkability 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 floor space. It seeks to redistribute floorspace, not significantly increase it.

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:

- Provides for a development that is of an intensity consistent with the site's location in the Sydney CBD.
- Provides for 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 increase 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 towers, opening the through site link to the sky and therefore further encouraging walkability.

- The amended proposal improves the legibility of the through site link.
- The amended proposal maximises active frontages and pedestrian traffic within and around the building.

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:

- Promotes uses with active street frontages within podiums that contribute to the vitality, life and existing character of the street.
- 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 replace 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 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:*
- (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.

3.4.1 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 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 height variation exhibits design excellence and is a result of a competitive design process and design integrity assessment.
 - The mapped height limit of the site has been increased from 80m to 110m as part of a Council-led LEP amendment.
 - The variation does not seek to materially increase the density of the development.
 - 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 built form changes sought as part of the amending DA, including the redistribution of the central massing between the two towers to the top of the southern tower, significantly improves the amenity of the through site link by opening it to the sky. This further enhances the public benefit of the through site link and meets the objectives of the zone.

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

Clause 4.6 Variation

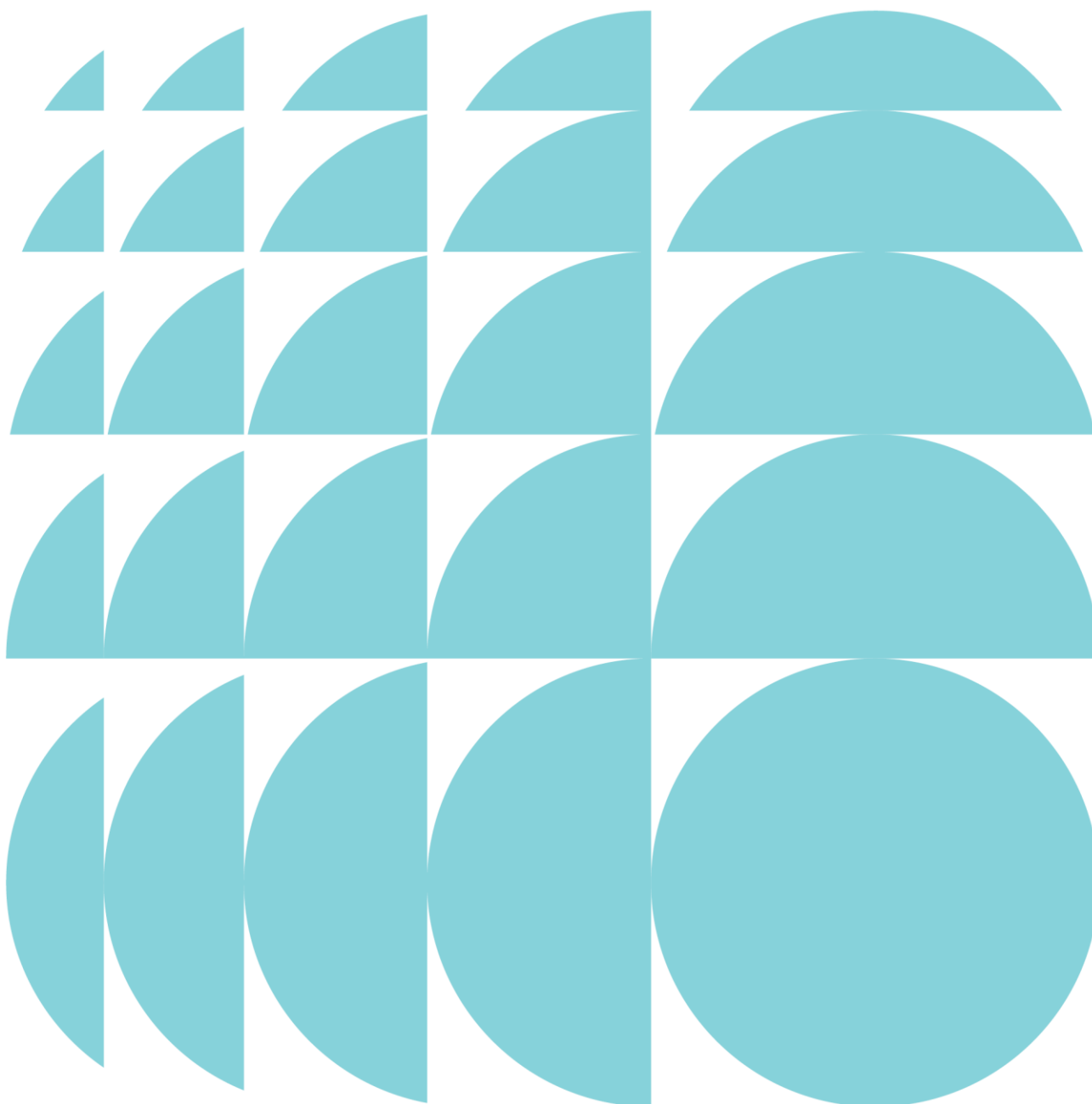
Floor Space Ratio

189-197 Kent Street, Sydney

Submitted to City of Sydney

On behalf of Barana Group

15 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). The amending DA seeks to modify the approved Stage 2 Development Application (D/2020/399) at 189-197 Kent Street, Sydney (the site), in relation to the approved built form and create additional building height.

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 floor space ratio (FSR) under clause 4.4 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 FSR 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.

Under clause 4.4 of the SLEP 2012, the site has a 'base' FSR of 8:1, with an additional 2.99:1 accommodation floor space bonus provided under clause 6.4 of the SLEP 2012 (based on the proposed proportion of 98% residential use and 2% retail/office use). A Stage 1 Development Application (D/2018/1014) and Design Excellence Competition has been previously undertaken on the site, and therefore, during the Stage 2 DA (D/2020/399), an additional 10% design excellence FSR bonus was granted by the consent authority since they were satisfied that the proposal exhibited design excellence. This increased the maximum permissible FSR on the site to 12.09:1.

Under clause 6.21(9) of the SLEP 2012, a 'building demonstrating design excellence' means:

a building where the design of the building (or the design of an external alteration to the building) is the winner of a competitive design process and the consent authority is satisfied that the building or alteration exhibits design excellence.

Since the proposal subject to this amending DA has not technically been through a formal competitive design process, it is arguably not eligible for the 10% design excellence bonus. However, the amended design has undergone a Design Integrity Assessment (DIA) in accordance with Section 5.2 of the City of Sydney Design Excellence Policy. The Selection Panel from the original Competitive Design Policy was reconvened to assess the amended design and concluded that the proposed amended design was capable of demonstrating design excellence and represented an improvement on the competition winning scheme.

This amending DA proposes a very marginal increase in gross floor area on the site, increasing the FSR of the Stage 2 DA from 12.06:1 to 12.12:1. While marginally over the permissible 12.09:1, inclusive of the Design Excellence Bonus, the FSR variation sought in this clause 4.6 variation request is justified on the grounds that the proposed amended design is capable of exhibiting design excellence, as confirmed by the DIA process and compliance with the development standard is unreasonable and unnecessary in the circumstances of the case. As a result, the FSR proposed in this amending DA exceeds the maximum permissible FSR of 11:1.

This Clause 4.6 Variation Request seeks to address the technical non-compliance resulting from the above scenario. It demonstrates that, notwithstanding the non-compliance with the FSR development standard:

- The objectives of the standard are achieved, particularly in that the amended proposal is capable of exhibiting design excellence despite not undergoing a formal design competition process.
- There are sufficient environmental planning grounds to justify the variation, as:
 - The amended proposal exhibits design excellence and is a result of a design integrity assessment.

- There is only a very minor, insignificant change to FSR proposed as compared to D/2020/399. The amending DA seeks to transfer floor space and not significantly increase it.
- The amended proposal 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 built form changes sought as part of the amending DA, including the redistribution of the central massing between the two towers to the top of the southern tower, significantly improves the amenity of the through site link by opening it to the sky. This further enhances the public benefit of the through site link and meets the objectives of the zone.

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 4.4 of SLEP 2012. Clause 4.4 provides that the floor space ratio for a building on any land is not to exceed the maximum shown for the land on the Floor Space Ratio Map. The Floor Space Ratio Map (sheet FSR_014) shows the maximum 'base' floor space ratio as 8:1.

The maximum FSR as per SLEP 2012 is shown in **Figure 1**. The Floor Space Ratio Map FSR_014 also identifies the site is located within Area 3, as per **Figure 2**. Area 3 relates to clause 6.4 under the SLEP 2012, which identifies that a building for residential accommodation within Area 3 is eligible for an additional 3:1 FSR bonus and commercial/office uses are eligible for an additional 2.5:1 FSR bonus. Where more than one bonus applies, the accommodation floor space is to be split proportionally based on the uses within the development. The proposal includes 98% residential use and 2% retail/office uses. Therefore, the total FSR applicable to the site is 10.99:1 (excluding the 10% bonus granted for design excellence under D/2020/399).

The proposed development provides a gross floor area of 14,482.7m², or a total FSR of 12.12:1 (equating to a 10.2% increase).



Figure 1 Maximum FSR under clause 4.4

Source: SLEP 2012

Figure 2 The site is located within Area 3

Source: SLEP 2012

As noted previously, a Stage 1 Development Application (D/2018/1014) and Design Excellence Competition has been previously undertaken on the site, and therefore, during the Stage 2 DA (D/2020/399), an additional 10% design excellence FSR bonus was approved.

As the building resulting from this amending DA has not been through a competitive design process, it is technically not eligible for the 10% design excellence bonus, due to the wording of clause 6.21(7) and (9) of the SLEP 2012. However, the amended design has undergone a Design Integrity Assessment in accordance with Section 5.2 of the City of Sydney Design Excellence Policy. The competition Selection Panel was reconvened to assess the amended design and concluded that the proposed amended design was capable of demonstrating design excellence. The endorsed Design Integrity Assessment Report is provided at Appendix J of the Stage 2 Amending DA SEE.

This clause 4.6 has been prepared to address this non-compliance with the FSR standard, despite the proposal remaining capable of exhibiting design excellence and representing an improvement on the competition winning scheme.

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 4.4 of SLEP 2012 are:

- (a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,*
- (b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,*
- (c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,*
- (d) to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.*

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

Objective (a): to provide sufficient floor space to meet anticipated development needs for the foreseeable future

Under the original Stage 2 development application D/2020/399, an FSR of 12.06:1 was approved, with a maximum of 12.1:1 permissible, including the base FSR, accommodation floor space bonus and design excellence bonus. D/2020/399 was approved by the Central Sydney Planning Committee (CSPC) in December 2020, and provided the following reasons for approving the application:

The proposed development has a height, scale and form suitable for the site and its context, and subject to conditions, satisfactorily addresses the heights and setbacks of neighbouring developments, is appropriate in the streetscape context and setting of the broader locality.

and

The proposed mix of compatible land uses will support the vitality of the area and do not result in any significant adverse environmental or amenity impacts on the subject or surrounding properties, the public domain and the broader Sydney Central Business District, subject to the recommended conditions.

Therefore, the design approved under D/2020/399 was considered as being an appropriate response to the site and provided sufficient floor space to meet the anticipated development needs.

This application does not seek significant FSR above the maximum provided under D/2020/399. As 12.1:1 was deemed a suitable maximum FSR for the site, the FSR of 12.12:1 proposed under this amending DA remains an appropriate FSR response and will continue to provide sufficient floor space to meet anticipated development needs for the foreseeable future.

Objective (b): to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,

As discussed above, D/2020/399 considered a maximum FSR on the site of 12.1:1, which was considered an appropriate density, built form and land use intensity for the site. As this application does not seek an FSR above the 12.1:1 maximum provided under D/2020/399, it is considered that the FSR of the amended development is appropriate in regulating density, built form and land use intensity, in line with this objective. Furthermore, the

amended proposal promotes walkability by improving the through-site link and its legibility, and as demonstrated within the SEE, has no change to traffic generation of parking.

Objective (c): to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure

D/2020/399 considered a maximum FSR on the site of 12.1:1 as an appropriate response, considering the existing and planning infrastructure within the vicinity of the site. Specifically, significant public transport is currently being delivered or is expected to be delivered within the vicinity of the site, including the Sydney Metro stations at Barangaroo and Hunter Street, as well as the George Street Light Rail service from Circular Quay to Randwick.

D/2020/399 considered the maximum FSR of 12.1:1 to be an appropriate FSR to provide for an intensity of development that is commensurate with the infrastructure expected to be delivered within the vicinity of the site. Therefore, this amending DA proposes an FSR that is consistent with this previous maximum of 12.12:1, and therefore will continue to provide an appropriate quantum of development that is commensurate with the capacity of surrounding infrastructure.

Objective (d): to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality

As discussed in Objective (a) above, the CSPC provided the following reason when approving D/2020/399:

The proposed development has a height, scale and form suitable for the site and its context, and subject to conditions, satisfactorily addresses the heights and setbacks of neighbouring developments, is appropriate in the streetscape context and setting of the broader locality.

This indicates that the approved proposal, and maximum FSR approved as part of this development, reflects the desired character of the locality of the surrounding area, and is an appropriate response to streetscape and neighbouring developments. The design of this amending DA does not seek to significantly change the building and its response to the surrounding streetscape. Further, the proposed FSR of 12.12:1 is commensurate with the 12.1:1 considered by D/2020/399, which reflects that the amended design continues to respond to the locality of the site, as well as the streetscape and neighbouring buildings. The amended proposal also creates a superior and more legible through site link than the approved scheme, which represents a better response to the site and its surrounding locality.

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 development:

- Is comparable to the maximum FSR set out in D/2020/399 of 12.1:1.
- Is consistent with the surrounding locality of the site and neighbouring developments.
- Delivers a quantum of floor space appropriate for the ongoing needs of Central Sydney, as well as the amount of infrastructure being delivered within proximity of the site.

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

3.2.1 Ground 1: Design excellence retained

Under clause 4.4 of the SLEP 2012, the site has a 'base' FSR of 8:1, with an additional 2.99:1 accommodation floor space bonus provided under clause 6.4 of the SLEP 2012. A Stage 1 Development Application (D/2018/1014) and Design Excellence Competition has been previously undertaken on the site, and therefore, during the Stage 2 DA (D/2020/399), an additional 10% design excellence FSR bonus was approved, increasing the maximum permissible FSR on the site to 12.09:1 (based on the mix of uses in this amended proposal).

As the proposed amendments to which this amending DA relates have not been through a competitive design process of their own, the DA is not eligible for the 10% design excellence bonus, meaning the maximum permissible FSR under the amending DA is 10.99:1.

However, the amended design has undergone a Design Integrity Assessment (DIA) in accordance with Section 5.2 of the City of Sydney Design Excellence Policy. The Design Excellence Selection Panel previously involved in the Design Competition was reconvened to assess the amended design and concluded that the proposed amended design was capable of demonstrating design excellence.

The Selection Panel in their assessment considered the reasons for selection of the original FJMT competition winning design, as well as nominating more generally items that were supported and items that required further design development. Overall, the panel considered the amended design an improvement on the competition winning scheme. A Design Integrity Assessment Report prepared by Ethos Urban is provided at Appendix I of the Stage 2 Amending DA prepared by Ethos Urban.

The selection panel were supportive of the following:

- Additional height to the southern tower, resulting in a better volumetric response for the site considering its location and surrounding streetscape.
- Opening of the through-site link to the sky.
- Increased width of the through-site link.
- Complete visual separation of the two towers and the improved visual connection it provides between the CBD and Barangaroo. The panel considered this visual connection through the site to be a key reason for selection of the FJMT scheme.
- The integration of landscaping, public art and gentler stair grade within the through-site link, resulting in better realisation of the concept of 'the Cut'.
- Marginally improved wind conditions, particularly at Ground Level within the through-site link and along Kent Street.
- The increase in the quantum of communal open space (provided equitable access to communal open space is provided for in each tower – particularly for the north tower).
- The principle of the landscape proposal (i.e. removal of façade planting and increased planting at ground level/in the cut), provided the landscape proposal was bolstered along Kent Street and the Jenkins Street podium façade.

Therefore, whilst the amending design has not gone through a formal design competition process as per Section 5.2 of the City of Sydney Design Excellence Policy, the consent authority can be satisfied that the design is capable of exhibiting design excellence. Whilst the amended design is not eligible for the design excellence floor space bonus, an FSR of 12.12:1 is considered appropriate in this circumstance.

3.2.2 Ground 2: No material change to density of development

This amending DA scheme is seeking approval to redistribute the central massing connecting the two towers to the top of the southern tower, resulting in an almost like-for-like swap of GFA between the two locations (see **Figure 3** and **Figure 4**). This results in a small increase in total gross floor area of 71.7m², from 14,411m² to 14,482.7m², or an increase in FSR from 12.06:1 to 12.12:1. This additional 71.7m² is a result of ongoing design development and attempts to better activate the ground level.

Therefore, whilst the FSR proposed in this amending DA contravenes the maximum permissible FSR, it is not a result of any significant design change or notable increase in the density of development from that approved in D/2020/399. Therefore, the contravention of clause 4.4 is considered appropriate on this ground.



Figure 3 Previously approved massing between the two towers

Source: FJMT



Figure 4 Proposed relocation of massing to top of northern tower

Source: FJMT

3.2.3 Ground 3: Redistribution of massing resulting in the need for amending DA improves public benefit

The redistribution of the central massing from between the two towers to the top of the southern tower, and subsequent variation to the height limit, results in the improvement 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 and walkability 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 consent authority can be satisfied that the proposed amended development continues to exhibit design excellence, despite not going through a formal design competition.
- The proposed development is not seeking a material increase in FSR from that proposed in D/2020/399 and would comply with the maximum permissible FSR of 12.1:1 associated with the Stage 2 DA.
- The redistribution of massing results in a significant improvement in public benefit, particularly in relation to the through-site link.

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 Floor Space Ratio 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:

- Provides for a development that is of an intensity consistent with the site's location in the Sydney CBD.
- Provides for 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 increase 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 towers, opening the through site link to the sky and therefore further encouraging walkability.
- The amended proposal improves the legibility of the through site link and the improvement of the design of the design will continue to encourage walkability.
- Maximises active frontages and pedestrian traffic in and around the building.

It is noted that the site is affected by SLEP 2012 Amendment No.64, a City of Sydney led rezoning process seeking to facilitate ongoing development within the CBD. The amendment was gazetted on 26 November 2021, but savings provisions under Clause 1.8A(5) mean the amendments do not apply to this DA since it was made but not finally determined prior to commencement of Amendment No. 61. Amendments to the objectives of the B8 Zone were gazetted. The development is consistent with the following proposed objectives of the B8 Zone, to be included in the SLEP 2012 imminently:

- To promote uses with active street frontages within podiums that contribute to the vitality, life and existing character of the street.
- To promote the efficient and orderly development of land in a compact urban centre.
- To recognise and reinforce the important role that Central Sydney's public spaces, streets and their amenity play in a global city.
- Promote 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 replace 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 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:*
- (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.

3.4.1 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 Floor Space Ratio 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 floor space ratio 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 smaller building to the one approved under D/2020/399, resulting in a mismatch of heights and density between the approved development and the ongoing changing character of the surrounding area and Central Sydney more broadly.

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 Floor Space Ratio development standard contained in clause 4.4 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 Request seeks to address the technical non-compliance resulting from the above scenario. It demonstrates that, notwithstanding the non-compliance with the FSR development standard:

- The objectives of the standard are achieved, particularly in that the amended proposal is capable of exhibiting design excellence despite not undergoing a formal design competition process.
- There are sufficient environmental planning grounds to justify the variation, as:
 - The amended proposal exhibits design excellence and is a result of a design integrity assessment.
 - There is only a very minor, insignificant change to FSR proposed as compared to D/2020/399. The amending DA seeks to transfer floor space and not significantly increase it.
- The amended proposal 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 built form changes sought as part of the amending DA, including the redistribution of the central massing between the two towers to the top of the southern tower, significantly improves the amenity of the through site link by opening it to the sky. This further enhances the public benefit of the through site link and meets the objectives of the zone.

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