

Attachment E

Clause 4.6 Variation Request Height of Buildings

15 November 2022

218981

Ms Monica Barone
Chief Executive Officer
City of Sydney Council
456 Kent Street
SYDNEY NSW 2000

Dear Ms Barone,

**WRITTEN REQUEST FOR A VARIATION UNDER CLAUSE 4.6 OF THE SYDNEY LEP 2012
MAXIMUM HEIGHT OF BUILDINGS DEVELOPMENT STANDARD
DARLINGHURST COLLECTION – GROUP 3**

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of TOGA and Ashe Morgan Pty Ltd (the Applicant). It is submitted to the City of Sydney Council (the Council) in support of an 'amending' development application (DA) to modify the approved hotel redevelopment with non-residential lower level uses in D/2020/1072 at 110-122 Oxford Street, Darlinghurst (the site), known as Building 3 of the Darlinghurst Collection.

This DA seeks to amend the approved development to replace the hotel use with a commercial use, as well as associated amendments for physical works to facilitate the commercial use. For clarity, there is no change to the approved 21.9m maximum height of the building or the overall built form and massing of the additions above the existing buildings. The physical works sought for approval above the current maximum height are limited to replanning of the pool deck to a terrace that requires additional façade modules and windows, new roof openings as a result of plant reconfigurations and internal replanning to facilitate the proposed commercial use.

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

This clause 4.6 variation request has been prepared to address the variation to the development standard for height of buildings under clause 4.3 of the Sydney LEP 2012 and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban dated 5 August 2022.

1.0 Introduction

1.1 The Amending DA

The amending DA seeks consent for the following development:

- Replacement of the approved hotel use with a commercial use.
- Internal reconfigurations and physical works, including demolition, to facilitate the change to commercial use.
- Minor external amendments to support the change of use.
- Amendment of the approved signage strategy to align with the commercial uses.

Architectural Drawings prepared by FJMT illustrating the proposed amendments are included at **Appendix A** of the SEE. A further description of the proposed amendments is provided in the Architectural Design Statement prepared by FJMT at **Appendix B** of the SEE.

1.2 Oxford Street Cultural and Creative Precinct Planning Proposal

On 11 April 2022, Council approved a Planning Proposal for the Oxford Street Cultural and Creative Precinct within which the site is located. It amends the Sydney LEP 2012, as it applies to the site to include a new site-specific clause allowing an alternative maximum building height and an alternative maximum FSR, provided that existing floor space of cultural and creative uses will be maintained and an additional 10% of the total GFA is provided for cultural and creative uses and the development comprises uses that support the local centre role of Oxford Street. These uses include at least one of the following: “entertainment facility, health services facility, information and education facilities, hotel and motel accommodation, community facility, education facility, light industry, commercial premises”. The amendments approved in the Planning Proposal are now endorsed by Council and are with the Department of Planning and Environment awaiting gazettal.

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

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

The endorsed controls associated with the Planning Proposal have been the subject of extensive urban design analysis by Council and are intended to facilitate the provision of commercial and cultural and creative development to support and activate the local centre, and regulate built form that protects heritage and manages environmental impact, consistent with the approved development on the site. To this end, the proposed commercial use will support this vision, while retaining the approved built form which accords with the planning controls under the endorsed Planning Proposal.

The maximum height of buildings standard that is now endorsed by Council for the site is 24m as shown in **Figure 1** below. The proposed development would be eligible for the site-specific height increase as an additional 10% of the proposed GFA will be provided for cultural and creative uses, and the remainder of the development comprises commercial and retail uses. The proposed height of the development is consistent with the endorsed maximum height of buildings development standard of 24m.



Figure 1 Endorsed site-specific maximum height of buildings map (site outlined in red)

Source: City of Sydney

1.1.1 Summary of Variation Request

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

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

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

2.0 Development Standard to be Varied

1.1 Is the Planning Control in Question a Development Standard?

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

1.2 Relevant Development Standard

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



Figure 2 Height Map (site outlined in red)

Source: City of Sydney, Ethos Urban

1.3 Variation Sought

The maximum height of buildings development standard established for the site under the Sydney LEP 2012 is 15 metres. The existing heritage listed buildings on the site already exceed the maximum height of building, as illustrated in **Figure 3**. The contemporary addition, approved under Development Consent D/2020/1072, above the heritage buildings to be refurbished has a maximum height of 21.9m which varied the height of buildings standard by 6.9m. Contributing to that variation was the natural ground level of the site which varies, declining from south to north away from Oxford Street.

As minor physical works are proposed in areas of the approved building which are above the 15m height plane, a 6.9m variation to the height of buildings development standard is sought under the amending DA. This height variation reflects the approved height of the approved new addition, and is only technically sought given the proposed works above the current maximum height limit.

For clarity, there is no change to the approved 21.9m maximum height of the building or the overall built form and massing of the additions above the existing buildings. The works sought for approval above the current maximum height are limited to:

- replanning of the pool deck to a terrace that requires additional façade modules and windows;
- new roof openings as a result of plant reconfigurations; and
- internal replanning to facilitate the proposed commercial use.

This variation is assessed against the current in-force controls, but it is important to note that the proposed development is generally consistent with the maximum height of building development standard under the endorsed Planning Proposal controls for the site, which are a matter for consideration and now certain and imminent given their impending gazettal.

The new site-specific clause allows an alternative maximum height of 24m for the site provided that an additional 10% of the total GFA is provided for cultural and creative uses and the development comprises uses that support the local centre role of Oxford Street, including commercial uses as proposed. As the site is used for a commercial purpose, and 264.9m² of cultural and creative floor space is proposed amounting to 10% of the total GFA, the proposed development is eligible for a maximum height of 24m under the endorsed Planning Proposal.



Figure 3 Existing heritage buildings and the 15m height plane

Source: FJMT

3.0 Justification for Contravention of the Development Standard

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

4.6 Exceptions to development standards

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

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

- (4) Development consent must not be granted for development that contravenes a development standard unless:

(a) *the consent authority is satisfied that:*

- (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
- (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

(b) *the concurrence of the Secretary has been obtained.*

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

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

3.1 Role of the consent authority

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

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

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

This report provides the basis for the consent authority to reach the required level of satisfaction. The relevant matters contained in clause 4.6 of the Sydney LEP 2012, with respect to the height of buildings development standard, are each addressed below, including with regard to the above decisions.

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

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

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

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

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

- The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (**Fourth Way**).
- The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Way**).

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

3.2.1 The underlying objectives or purposes of the development standard

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

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

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

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

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

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

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

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

As there is no change to the maximum height of the approved new contemporary addition, it remains in keeping with the broader context of Oxford Street, including a number of key sites along Oxford Street where greater height is provided such as 1 Oxford Street which is a (25 storeys), 2- 8 Brisbane Street (6- 10 storeys), 2-4 Poplar Street (15 storeys), 6-18 Poplar Street (11 Storeys) and 1-7 Pelican Street (11 storeys). **Figure 4** illustrates the mix of surrounding building heights in the context of the site.

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



Figure 4 Building context and surrounding building heights

Source: FJMT

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

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

There is no change to the built form, scale and massing of the approved new addition. It continues to appropriately sit above the existing heritage listed buildings, providing a transition in scale internally within the site which is readable along Oxford Street. The setback and sculptured addition on the rooftop of the heritage buildings ensure that the existing datum along Oxford Street is continued to be legible in the streetscape, with a transition of height from the street frontage to the new addition setback from the street. Due to the location of Group 3 part way within a block of existing buildings, the new addition is setback and scaled in height to the edges of the block, resulting in a transition in height when viewing the addition from the east or west along Oxford Street. The minor works proposed in this amending DA within the addition do not change these positive urban design and heritage outcomes.

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

Moreover, the new addition is consistent with the maximum height limit endorsed in the Oxford Street Cultural and Creative Precinct Planning Proposal, which is awaiting gazettal following approval by Council. As these endorsed height controls have been the subject of extensive urban design analysis by Council, the height of the new additions are accordingly contextually appropriate to the surrounding locality and heritage precinct. Furthermore, the subject works are minor to the approved addition, and will not alter the approved massing or scale of the addition above the current height limit.

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

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

Given the immediate dense context of the site, and the presence of the existing heritage listed buildings on the site, minor works proposed in this amending DA within the approved addition will not obscure any views across the site. The design amendments which are proposed to the upper portions of the new addition, which exceed the height of buildings development standard, do not significantly impact existing public or private views, as:

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

The overall height and scale of the addition is not amended through the proposed works, and therefore the proposed variations will not overpower the existing buildings when viewed from the surrounding public realm.

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

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

3.2.3 Conclusion on Clause 4.6(3)(a)

The above section has demonstrated that compliance with the height of buildings development standard is unreasonable or unnecessary in the circumstances of the case. The objectives of the height of buildings development standard, set out in clause 4.3, have been achieved by the proposed development notwithstanding the height of buildings exceedance that does not change the built form, bulk or street presentation.

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

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

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site at [60]. In this instance, the relevant aspect of the development are the physical works sought for approval above the current maximum height. These proposed works are limited to replanning of the pool deck to a terrace that requires additional façade modules and windows, new roof openings as a result of plant reconfigurations and internal replanning to facilitate the proposed commercial use.

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

Built Form and Land Use Context

As outlined above, the proposed variation will not result in any amendment to the built form of the approved development, with no change to the approved 21.9m maximum height of the building or the overall built form and massing of the addition above the existing buildings. The works to the parts of the approved building above the current height limit take advantage of the building height uplift opportunities endorsed by Council in the Oxford Street Cultural and Creative Precinct Planning Proposal. These works are primarily the result of the internal reconfigurations proposed to facilitate the change of use to commercial.

The height of buildings variation sought with the proposal contributes to the holistic vision for the Oxford Street precinct, and by providing the new commercial and cultural creative space, the project is capable of being delivered to achieve the vision of City Plan 2036. When delivered, the proposal will importantly have the following benefits for the surrounding context:

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

The revitalisation and economic viability of Oxford Street and its surrounding context is dependent on a critical mass of community working and visiting daily. The proposal, and importantly the height variation, has the potential to deliver the required scale of amenity and commercial floorspace activation within the approved building form.

Consistency with Oxford Street Creative and Cultural Precinct Planning Proposal

The proposed development is consistent with the new site-specific height of buildings development standard endorsed in the Oxford Street Creative and Cultural Precinct Planning Proposal which is currently awaiting gazettal. The proposal's consistency with the endorsed amendment to the Sydney LEP 2012 is a relevant environmental planning ground as the consent authority is to take into consideration the provisions of any proposed instrument that is, or has been, the subject of public consultation under the EP&A Act and that has been notified to the consent authority (cl 4.15 of the EP&A Act). Furthermore, the amendments are considered certain and imminent given the final endorsement by Council in April 2022 and impending gazettal. This is reflected in the determination of both D/2020/1071 and D/2020/1072 which relate to the Darlinghurst Collection and relied on the increased height development standard under the Planning Proposal. In these cases, the City of Sydney Local Planning Panel place determinative weight on the amendments which are awaiting gazettal.

As outlined above, under the endorsed controls, the site is eligible for an alternative site-specific height of 24m if an additional 10% of the total GFA is provided for cultural and creative uses across the Darlinghurst Collection, and the remainder of the development comprises commercial premises.

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

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

As the works proposed above the height limit in this amending DA will facilitate the expansion of commercial floor space and cultural and creative floorspace, the above objective is achieved. Moreover, the proposed expansion of commercial uses will increase the permanent worker base to the precinct to support its role as local centre offering ongoing job opportunities, further achieving the objective.

The new commercial and cultural creative floorspace facilitated by the proposed variation will serve a two-pronged role in achieving Council's vision for Oxford Street as the focal point of Sydney's creative and cultural industry and reactivate the precinct as a vibrant and sustainable local centre. The change of use to commercial floorspace will facilitate the commercial viability of the proposed redevelopment to allow the increased quantum of cultural and creative space to be provided on the lower levels which achieve Council's vision for a strong cultural life, a diverse and safe night-time economy, and a thriving live music and performance industry in the Oxford Street Creative and Cultural Precinct.

Importantly, the proposed development is consistent with the objectives of the approved Planning Proposal which underpin the amended controls. The relevant objectives and the proposal's achievement of those objectives is summarised in **Table 1**.

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

Objective	Consistency
<p>Encourage the provision of uses that support Oxford Street's role as a local centre and an activity street.</p>	<p>The amendment from hotel to commercial use, and minor works sought within the approved building envelope above the height limit, will allow for increased commercial floor space. This floor space will generate job opportunities, increase the daily mass of people in the area through strong activation, and attract a diverse range of users, in turn supporting Oxford Street's role as a local centre and high street and increase patronage to the prospective cultural and creative establishments in the precinct.</p>
<p>Facilitate the provision of floor space for a cultural and creative purpose in the Oxford Street cultural and creative precinct to:</p> <ul style="list-style-type: none"> • Encourage the cultural and creative, entertainment, education, commercial and tourism sectors and associated industries in the precinct; • Support the existing cluster of creative uses in the area, anchored by the educational facilities in the area consistent with District Plan actions for the Harbour CBD; • Enhance the local area's cultural and night-time offering including supporting Oxford Street's role in the Eastern Creative Precinct and Harbour CBD; and • Prevent the loss of arts, cultural and creative floor space in the precinct. 	<p>The amendment from hotel to commercial use, supported by the height variation, will maximise opportunities for the creation of commercial floor space that integrates creative and cultural start-ups that can contribute to the wider activation of the Oxford Street Cultural and Creative Precinct.</p>
<p>Support the local centre role of Oxford Street and facilitate the provision of cultural and creative space in the precinct by allowing for additional floor space and additional building height. The additional floor space and building height will only be available if development provides uses that are strategically important to the local centre and cultural and creative floor space on the site.</p>	<p>The proposal provides uses that are strategically important to the local centre role of Oxford Street, being commercial and ground level retail uses, as well as providing for cultural and creative space. The delivery of new uses within Group 3 will directly contribute to the vibrancy and role of Oxford Street as a local centre.</p>
<p>Ensure that the scale and massing of the height and floor space ratio controls is appropriate in response to its context within the Oxford Street and Victoria Street, East Sydney, Oxford Street, Paddington Urban and Victoria Barracks Heritage Conservation Areas, setting of the surrounding heritage items, streetscapes and the surrounding low scale residential and commercial development.</p>	<p>The proposal does not change the approved scale and massing of the development, and therefore continues to respond to the site's heritage and surrounding context.</p>
<p>Ensure that additional floor space and additional building height is only permitted if it is demonstrated that it does not adversely affect heritage fabric or the structural stability of heritage items or contributory buildings.</p>	<p>As explained below, impacts to internal heritage fabric have been minimised to the furthest extent, and are considered acceptable by Urbis Heritage, particularly in the context that only modest internal changes are required to facilitate the change to commercial use and all fabric of high significance will be retained and conserved. Van der Meer has provided detail in their Structural Design Statement to demonstrate that the proposed structural scheme will be design to the relevant Australian Standards and provide adequate load-bearing for the heritage building (refer to Appendix K of the SEE).</p>
<p>Retain and encourage other business, office, retail and education uses in the local centre, including shops, food and drink premises and educational facilities.</p>	<p>The amendment from hotel to commercial use, and height variation sought will expand commercial uses on the site and patronage along Oxford Street, contributing to the retention and growth of other businesses in the locality.</p>
<p>Ensure that all new development protects and prevents the loss of existing entertainment and creative and cultural floor space within the precinct.</p>	<p>The proposed development will increase the amount of cultural and creative floorspace in the precinct.</p>

Objective	Consistency
Ensure that new development provides the diverse and activated street frontages that attract pedestrian traffic and contribute to the vibrancy, diversity and function of the high street, local centre, laneways and cultural and creative precinct.	The proposal does not change the approved retention of retail stores and shopfronts along Oxford Street. Specifically, the amendment from hotel to commercial use, and height variation sought will increase the permanent daily population and patronage within the precinct to contribute to the precinct's function as a local centre and high street.
Facilitate the increased certainty, viability and activation of the NAS with additional uses that support its primary education use and cultural and creative purpose.	The proposal does not relate to the NAS, therefore this objective is not relevant.

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

Heritage

Group 3 comprises locally heritage listed buildings which are to be retained on the site. A Conservation Management Plan has been prepared by Urbis Heritage to guide the refurbishment of these buildings, and also to provide guidance on works associated with the proposal as a whole (refer to **Appendix C** of the SEE). Urbis Heritage has also completed a Statement of Heritage Impact considering the proposal, and in particular the commercial use and internal reconfigurations required which necessitate the physical works above the height limit that result in the height variation sought (refer to **Appendix H** of the SEE).

In the Statement of Heritage Impact, Urbis Heritage has determined that the heritage conservation approach applied to the proposed internal reconfigurations in the context of the approved development is consistent with the CMP and Burra Charter. Therefore, Urbis Heritage, and has determined that the proposed changes will be minor, reasonable, and will enable the buildings to enter the next functional stage of their lives by providing high-quality new commercial retail & office spaces. Moreover, Urbis Heritage has noted that the proposed commercial use is wholly in keeping with the historical development of Oxford Street. Accordingly, Urbis Heritage has concluded that the proposed works will generate a reasonable and acceptable level of heritage impact and are therefore acceptable on heritage grounds.

Employment Generation

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

- A population increase to 340,000 residents by 2036 (compared to 225,000 in 2016), contributing to a total increase of approximately 115,000 residents at an average annual growth rate of 5.75%.
- A large portion of the predicted total population growth (31.5%) is expected to be in the working age cohorts between 20 and 64 years of age.
- An increase in the total number of jobs (between 2016 and 2036) by around 200,000 positions at an average annual growth rate of 10%. This increase in employment in Surry Hills is projected to be concentrated in industries such as Professional, Scientific and Technical Services, Education and Training, and Health Care and Social Assistance.

The proposed amendment from hotel to commercial use, and the height variation sought, will allow the development to achieve a quantum of floorspace envisaged for the site that remains completely within the approved building envelop and is consistent with the commercial floor space and employment requirements and expectations of Darlinghurst.

The proposed development will assist in providing sufficient commercial floor space to meet needs arising from the broader population increase within the Eastern Sydney District (from 2016 to 2036) by 325,000 people, and the targeted 97,000 of additional jobs within the City of Sydney by 2032.

In this respect, the height variation will have a direct bearing on the sites critical contribution to meeting new commercial floor space and jobs targets for Darlinghurst and East Sydney.

Moreover, the works proposed above the height limit which have necessitated this variation request are the result of largely internal design reconfigurations that will provide for more efficiently planned open plan contemporary commercial office space. The modern open plan style commercial office space is highly desired in the tenant market, and providing this office space in association with the refurbished heritage buildings within a highly accessible location, will ensure that tenant demands can be met and desirable floor space is provided.

Environmental Impacts

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

- There is no change to the approved built form. Therefore, there will be no additional overshadowing, visual or privacy impacts.
- The Traffic Impact Assessment (**Appendix J** of the SEE) has determined that the surrounding transport, parking and pedestrian infrastructure can readily support the proposed commercial use.
- A Conservation Management Plan (**Appendix D** of the SEE) has been prepared to guide the refurbishment works and the ongoing conservation and maintenance of the heritage buildings, ensuring their longevity and contribution to the precinct.
- A Heritage Impact Assessment (**Appendix H** of the SEE) concludes that the proposed works will generate a reasonable and acceptable level of heritage impact

It follows that there would be no significant adverse environmental impacts as a result of the development that exceeds the floorspace ratio development standard.

Consistency with Objects of the EP&A Act

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

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

Object	Comment
(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State’s natural and other resources	The proposal will promote the economic and social welfare of the community by improving the quality and contribution of the existing heritage listed buildings along Oxford Street, rejuvenating the site which has grown to have a poor condition over time. The collection of uses, including cultural/creative, food and beverage, retail, and commercial office space, will ensure that a mass of activity is created on the site which directly supports the viability, vitality and welfare of the area and community.
(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment	The proposal will promote ecologically sustainable development by achieving compliance to Section J (equivalent to a 5.5 star rating) for the new additions, and an overall 4.5-star NABERS rating for the entire development. The proposal seeks to provide new jobs in a prime position serviced by existing facilities, services and public transportation, with no car parking proposed on-site. High quality end of journey facilities will also be provided in the basement /lower ground levels of the buildings, ensuring a sustainable mode share split is supported in the development.

Object	Comment
(c) to promote the orderly and economic use and development of land	The proposal promotes the orderly and economic use and development of land providing a mix of land uses and increasing the density of the site commensurate to its location close to Central Sydney, nearby transportation linkages, and a wide variety of services and facilities. The orderly use of land is also achieved by providing a building height that is in accordance with the endorsed planning controls for the site which provide for an increased height to encourage greater floor space to be delivered in accordance with the strategic direction of the locality as a cultural and creative precinct and vibrant local centre with employment opportunities.
(d) to promote the delivery and maintenance of affordable housing	The proposal relates to non-residential uses, and therefore this object is not relevant.
(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats	The proposal will not have any impact on threatened species or ecological communities.
(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)	The proposal will directly facilitate the conservation and refurbishment of existing locally heritage listed buildings on the site. The proposed commercial use will ensure the long-term use and conservation of the heritage listed buildings.
(g) to promote good design and amenity of the built environment	Good design has been exhibited in the sensitive approach to heritage fabric in making internal reconfigurations to suit the proposed commercial use.
(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants	The proposal will comply with the relevant provisions of the BCA and will promote the health and safety of occupants (refer to BCA Statement at Appendix L of the SEE)
(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State	This object is not relevant to this proposal, however, the proposal has adhered to the required planning processes for the site and scale of development, and implements the strategic planning priorities for employment growth in well-serviced locations close to Central Sydney.
(j) to provide increased opportunity for community participation in environmental planning and assessment	The proposed development will be publicly exhibited in accordance with the requirements of Council's Community Participation Plan.

3.3.1 Conclusion on clause 4.6(3)(b)

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

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

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

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

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

Consistency Caselaw

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

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

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

3.5.1 Consistency with objectives of the development standard

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

3.5.2 Consistency with objectives of the zone

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

To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area

The proposal provides a range of cultural/creative, food and beverage, retail, and commercial office space uses which will directly services the needs of the community who live, work, and visit the Oxford Street precinct. The diversity of uses to be delivered are reflective of the pattern of development in the Oxford Street precinct, and the lower level cultural/creative, food and beverage and retail uses will be important in servicing the local population and activating the frontages of Oxford Street and Foley Street. The proposed commercial uses which require a variation of the height of buildings development standard, will support the renewal of the heritage buildings.

To encourage employment opportunities in accessible locations

The proposal seeks to deliver increased employment opportunities across a range of job types, with the mix of cultural/creative, food and beverage, retail, and commercial office space providing a variety of employment opportunities. The proposed commercial uses which require a variation of the height of buildings development standard, will deliver new, high quality office floor space equating to new jobs. This mix of employment opportunities is provided on a highly accessible site, in close proximity to a variety of public transport linkages, and existing services and facilities in the Oxford Street precinct. The Oxford Street precinct is a recognised hub of activity in a city-fringe location, ensuring the site is one of the most accessible outside of Central Sydney.

To maximise public transport patronage and encourage walking and cycling

The proposal, inclusive of the height variation which will facilitate new commercial office space, provides new jobs in a location well-served by public transport. There are several bus stops and bus services that are accessible to and from the site, which service the Eastern Suburbs, North Shore, Sydney CBD and Inner West. Other modes of public transport, including the Museum Train Station is located 800m north-west of the site, is within a comfortable walking distance. The proposal also includes high quality end of journey facilities which will encourage active modes of transport, including walking and cycling.

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

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

3.6 Other Matters for Consideration

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

(5) *In deciding whether to grant concurrence, the Secretary must consider:*

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

These matters are addressed in detail below.

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

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

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

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

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

As outlined in **Section 3.3** above, there are sufficient environmental planning grounds to warrant contravention of the development standard and it is therefore considered to be in the public interest for the variation to be supported in this case. The height variation is in accordance with the endorsed planning proposal which has undergone a rigorous public participation process, and will result in a rejuvenated and activated locality. Therefore, the proposed variation is in the public interest and necessary.

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

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

4.0 Conclusion

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

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

- Achieves the objectives of clause 4.3 of the Sydney LEP 2012 by:
 - Continuing to provide a contemporary and high-quality addition to the heritage listed buildings in a form and scale appropriate to the site and context.
 - Ensuring that there is no change to the maximum height of the development or building envelope that is in-keeping with the scale and character of neighbouring buildings and is of a form that will not result in any negative environmental impacts.
 - Retaining the approved built form, scale and massing to continue respecting the character appearance and scale of nearby buildings within the heritage conservation area, including nearby and adjoining heritage items, and existing buildings adjacent to the site.
 - Retaining the approved built form, scale and massing to continue ensuring an appropriate transition in height to neighbouring buildings given the varied surrounding height context, particularly along Oxford Street.
- Does not change the approved built form of the development and therefore does not result in any additional building bulk, overshadowing impact, visual impact, or impact to the heritage setting surrounding the site.
- Is consistent with the height of buildings development standard endorsed in the Oxford Street Cultural and Creative Precinct Planning Proposal, and achieves the intended strategic objectives and outcomes to activate the locality with commercial and cultural and creative uses while protecting heritage and managing environmental impacts.
- Is in the public interest as it is consistent with the objectives of both the development standard and the B2 Local Centre zone, and will ensure the long-term conservation and productive use of the listed heritage buildings on the site.
- Is consistent with the Greater Sydney Regional Plan, the District Plan and the City of Sydney Council strategic planning policies such as City Plan 2036, and does not raise any matter of significance for State or regional planning.
- There are sufficient environmental planning grounds to justify contravening the development standard as the proposal has been designed to be complementary to the heritage significance of the site.

In particular, the variation proposed to the height of buildings standard will result in a positive planning outcome as it will facilitate the productive use of the refurbished heritage listed buildings and approved addition. As outlined in this written variation request, there is an absence of any significant or unreasonable impacts and the proposal will deliver benefit in accordance with the City of Sydney Councils strategic planning framework.

Moreover, the proposed height variation is consistent with the maximum height of buildings development standard endorsed in the Oxford Street Cultural and Creative Precinct Planning Proposal which is currently awaiting gazettal. The proposed development therefore fulfills Council's vision for the precinct and the consent authority can be satisfied that there is sufficient justification for the variation to the height of buildings development standard as proposed in accordance with the flexibility allowed under Clause 4.6 of the Sydney LEP 2012.

We trust that this written request addresses all necessary requirements. Should you have any queries about this matter, please do not hesitate to contact the undersigned.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'jyuen'.

Jethro Yuen
Junior Urbanist
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A handwritten signature in black ink, appearing to read 'Brendan Hoskins'.

Brendan Hoskins
Director
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