

Attachment F3

**Clause 4.6 Variation Request
Height of Buildings
(Bourke Street Buildings)**

903-921 Bourke Street, Waterloo

D2(A) Bourke Street North & D2(B) Bourke Street South

Clause 4.6 Variation Request to Clause 4.3 Height of Building of the Sydney Local Environmental Plan 2012

On behalf of
Dahua Group Waterloo Project Pty Ltd
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* This document is for discussion purposes only unless signed and dated by the persons identified. This document has been reviewed by the Project Director.

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1 Introduction

This clause 4.6 variation request accompanies a Development Application (DA) submitted to City of Sydney Council (Council) for a mixed-use development involving the construction of four buildings across Sub-Precinct D1 and two buildings across Sub-Precinct D2, with associated landscaping and public domain works at 903-921 Bourke Street, Waterloo (the site).

This clause 4.6 variation applies 'Bourke Street North' D2(a) and 'Bourke Street South' located on Sub Precinct D2(b) (**Figure 1**). Bourke Street North includes the delivery of a 12 storey building comprising of 122 apartments and ground floor retail. Bourke Street South consists of a 6-storey (plus attic) building comprising 28 apartments and ground floor retail.

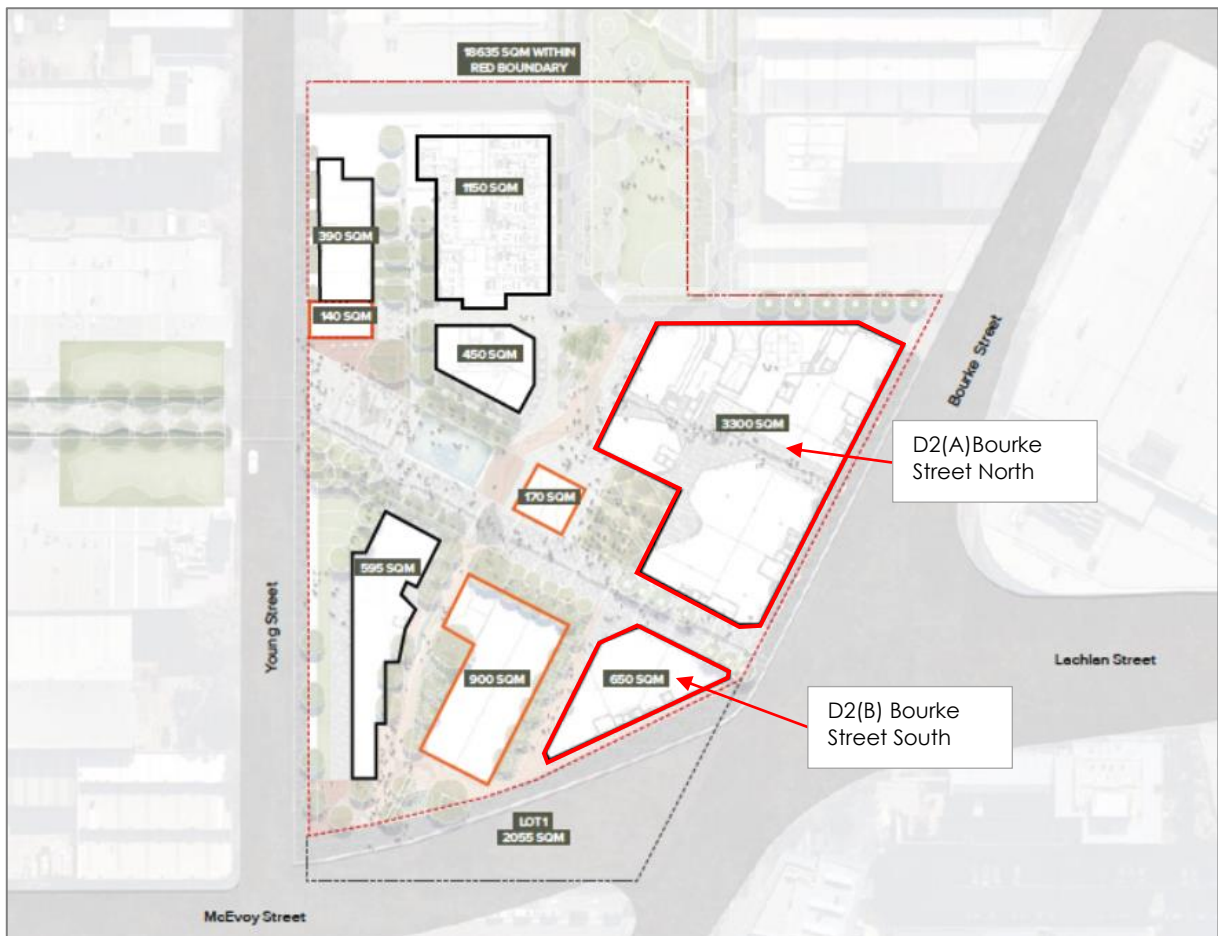


Figure 1. Public Domain Area (annotated by Mecone)
Source: Arcadia

The clause 4.6 variation request seeks to vary the maximum Building Height (height) of the building standard which applies to the site under clause 4.3 of the Sydney Local Environmental Plan 2012 (the SLEP 2012).

The maximum height standard which applies to both the sub-precinct under the SLEP 2012 is 24m plus a 10% (2.4m) bonus from the Competitive Process, resulting in a maximum height of 26.4m.

Clause 4.3 of the SLEP 2012 states the following:

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



Figure 2. Height Control - SLEP2012
Source: Mecone MOSAIC

This clause 4.6 variation request therefore seeks a minor variation to the height standard by proposed a maximum height of 27.17m for Bourke Street South and 27.195m for Bourke Street North.

This represents a 0.77m or 2.92% and 0.795m or 3.01% variation with the height control that applies to the sub precinct. Strict application of the height controls is unnecessary and unreasonable because the proposed changes are minor in nature.

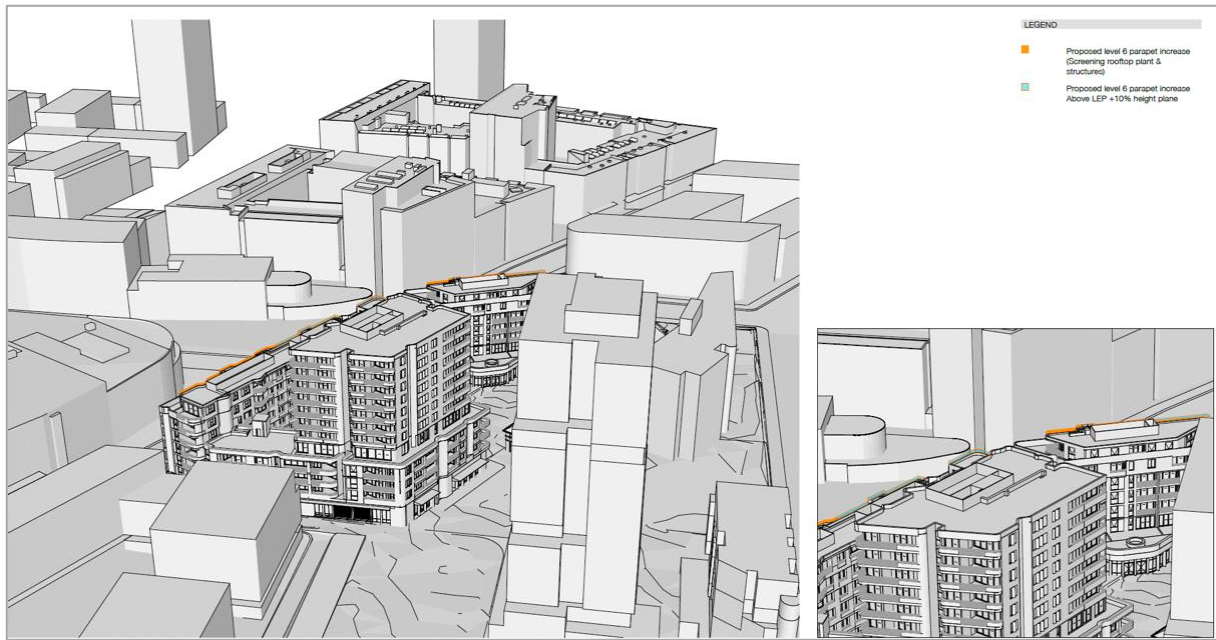


Figure 3. Parapet Study D2A-B

Source: MHNDU

The variation will enable the delivery of a high-density residential development that is compatible with the surrounding area and is considered an improvement to the existing site that will not generate any unreasonable environmental effects.

The following sections of this report provide an assessment of the request to vary the height standard of clause 4.3 of SLEP 2012. Consideration has been given to the following matters within this assessment:

- Varying Development Standards: A Guide, prepared by the Department of Planning and Infrastructure dated August 2011; and
- Relevant planning principles and judgements issued by the Land and Environment Court.

2 Exceptions to Development Standards

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

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

Clause 4.6 enables a variation to any development standard to be approved on consideration of a written request from the applicant that justifies the contravention in accordance with Clause 4.6.

Clause 4.6 provides flexibility in the application of planning provisions by allowing a Consent Authority to support a DA for approval, even where it does not comply with certain development standards where it can be shown that flexibility in the circumstances of the case would achieve better outcomes for the development.

In determining whether to grant consent for development that contravenes a development standard, clause 4.6(3) and (4) requires that the Consent Authority consider a written request from the applicant, which demonstrates that:

- Compliance with the development standard is **unreasonable or unnecessary in the circumstances** of the case, and
- There are **sufficient environmental planning grounds** to justify contravening the development standard.
- That the proposed development will be **in the public interest** because it is consistent with the objectives of the particular standard and the objectives for **development within the zone** in which the development is proposed to be carried out.

(Emphasis added)

A further judgement by Preston in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* clarified the correct approach to Clause 4.6 variation requests, including that:

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

Accordingly, this clause 4.6 variation request is set out using the relevant principles established by the Court. Clause 4.6 of the SLEP 2012 reads as follows:

Clause 4.6 Exceptions to development standards

- 1) The objectives of this clause are as follows—
 - (a) to provide an appropriate degree of **flexibility in applying certain development standards** to particular development,
 - (b) to **achieve better outcomes** for and from development by **allowing flexibility** in particular circumstances.
- (2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed

by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(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**.

(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 Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning 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 Planning Secretary before granting concurrence.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(Emphasis added)

The proposed non-compliance in height has been assessed against the objectives of the zone and development standard in **Section 6** and **Section 7**.

The assessment of the proposed variation has been undertaken in accordance with the requirements of the SLEP 2012, clause 4.6(3) Exceptions to Development Standards in the assessment in **Section 5** and **Section 6**.

This clause 4.6 variation has been prepared as a written request seeking to justify contravention of the following provisions under the SLEP 2013:

'4.3 Height of Buildings'

(1) The objectives of this clause are as follows—

- (a) to ensure the height of development is appropriate to the condition of the site and its context,
- (b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,
- (c) to promote the sharing of views,
- (d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,
- (e) in respect of Green Square—

- (i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and*
 - (ii) to ensure the built form contributes to the physical definition of the street network and public spaces.*
- (2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

3 Extent of Variation to the development standard

In accordance with clause 4.3 of the SLEP 2012, the site is subject to a maximum building height of 24m. In accordance with the SLEP 2012, a 10% height bonus is applicable to the development subject to design excellence, providing an additional 2.4m to the overall building height.

The extent of variation from the development standard is summarised in **Table 1**.

Table 1 – Height Variation				
Building	LEP Height Control	10% Bonus	Variation	Proposed Height
D2(A) Bourke Street North	24m	26.4 (+2.4m)	Exceedance 0.795m (3.01%)	27.195m
D2(B) Bourke Street South	24m	26.4 (+2.4m)	Exceedance 0.77m (2.92%)	27.17m

As depicted in the figure below, the Bourke Street North exceeds the maximum height by 0.795m (3.01%) and Bourke Street South by 0.77m (2.91%).

This exceedance is a result of the building parapet feature which has been proposed to conceal various roof features including the roof plant and ducting which are largely contained within the height plane as shown in Figure 4 and Figure 5 below.

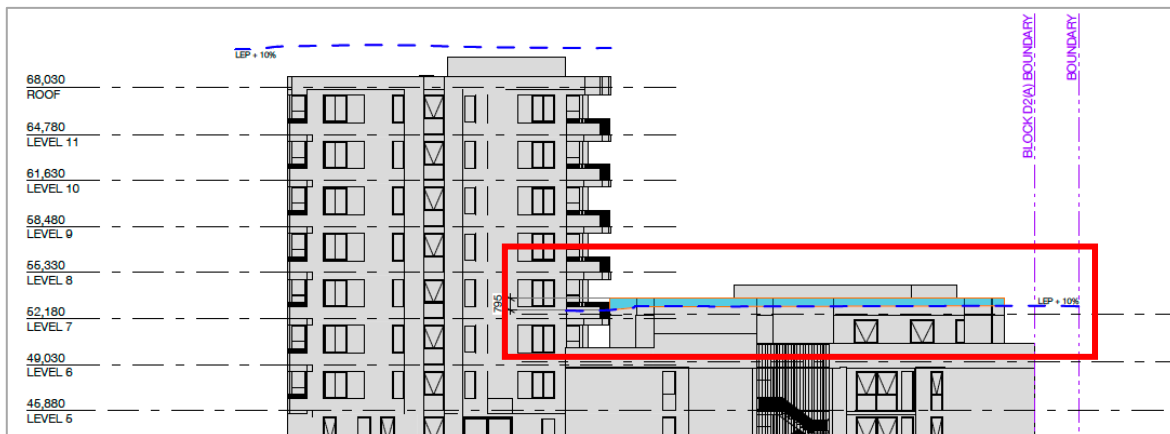


Figure 4. Elevation Southeast (D2A) (Bourke Street North Building)

Source: MHNDU



Figure 5. Elevation Southeast (D2B) (Bourke Street South Building)

Source: MHNDU

The minor exceedance is a result of the raised floor parapet to level 6 of the building to shield the prominent features of the roof plant located on the roof of the 2 buildings.

The feature has been proposed to conceal the roof plant from neighbouring properties and street view. Additionally, the variation from the standard for Bour Street South can also be attributed to the slight slop of the site to the south.



Figure 6. Level 6 Parapet – Compliant
Source: MHNDU



Figure 7. Level 6 Parapet - Proposed
Source: MHNDU

The parapet is setback from the roofs edge and has been designed to interface with the external faced to create a transition between the built form and the surrounding developments.

In concealing the roof features, the parapet will improve the overall visual appeal of the building through the utilisation of materials that complement the proposed development.

Additionally, the exceedance will not generate significant additional overshadowing or bulk and scale impacts.

With maximum building heights of 27.17m and 27.195m, the minor exceedances to the height control for only a small portion of the rooftops will improve the buildings' interfaces with the street.

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

In *Wehbe V Pittwater [2007] NSW LEC 827 (Wehbe)* a five-part test was established in which a variation to a development standard is considered to be unreasonable or unnecessary as per clause 4.6(3A). The five tests established in *Wehbe* are (emphasis added):

1. **The objectives of the standard are achieved notwithstanding non-compliance with the standard;**
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*
5. *The zoning of the 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.*
(Emphasis added)

Satisfaction of any one of these tests is sufficient to demonstrate the compliance with the standard is unreasonable or unnecessary.

This objection is based on the **first test**, which is addressed further below.

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

The **first test** of *Wehbe* requires demonstration that the objectives of a development standard can be achieved notwithstanding noncompliance with that particular standard.

Variation to clause 4.3 Height of Buildings of the SLEP 2012 is proposed. Notwithstanding, the objective of the standards are achieved as outlined below.

(1) The objectives of this clause are as follows—

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

Notwithstanding the non-compliance with the development standard, the proposed 'Bourke Street North' and 'Bourke Street South' buildings provide a height that responds to the surrounding area and is compatible with the other proposed buildings on the site. It is important to note the height and scale aligns with the future aspirations and density of the Danks Street South Precinct.

Additionally, as the variation to the development standard is minor in nature, the parapet feature will not create any unreasonable impacts on neighbouring developments in relation to overshadowing, privacy or views.

As such, objective (a) is satisfied.

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

The minor variation from the height standard seeks to improve the developments interface with the surrounding area through the provision of a parapet to conceal the necessary ancillary roof feature and roof plant.

The two buildings maintain an appropriate height relationship with adjoining development within the site, consistent with the envisaged heights in the Precinct and a suitable setback and relationship with existing Sydney Water heritage items and public domain areas.

Given this, objective (b) is satisfied.

(c) to promote the sharing of views,

The consequent variation to the development standard as a result of the parapet will not further impede in the views as a result of the proposed development on the site. The proportion of any view obstructed by parapet will be negligible in the context of the site and the proposed development.

As the buildings are subject to the lowest permissible height standard in the Danks Street South Precinct the variation does not obstruct or compromise any views at this level, with the visual impact of the variation ensuring the roof features are imperceptible from street.

As such, objective (c) is satisfied.

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

Notwithstanding the minor variation to the height limit, the proposed building is generally consistent with the height standards applied in accordance with the Dank Street South Planning Proposal and subsequent DCP.

This results in appropriate height transition across the site and with surrounding properties. The variation to the height control will not result in any significant adverse environmental impact such as overshadowing or noise.

Taking the abovementioned into consideration, objective (d) is achieved, notwithstanding the non-compliance with the standard.

(e) in respect of Green Square—

(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and

(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.

The proposed development is largely compliant with the height control with a minor variation up to 0.795m to Bourke Street North and 0.77m to Bourke Street South required to accommodate the proposed parapet required to conceal the building's roof features.

The proposed encroachment on the standards is centrally located within the built form, with an appropriate setback of the structure to ensure that it will not increase the extents of overshadowing and subsequent environmental impacts. Furthermore, the variation does not compromise the built forms interface with the public domain.

The proposed development ensures the amenity of the public domain and ensure that the built form contributes to the street network and public spaces.

Given the above, objective (e) of the standard is achieved.

In accordance with Wehbe Test 1, it is clearly demonstrated that the proposed development meets the objectives of the height control under clause 4.3 notwithstanding the minor noncompliance with the numerical controls for the site. As such, strict application of the standard is unreasonable and unnecessary in the circumstances.

6 Clause 4.6 (3)(b) Sufficient environmental planning ground to justify contravening the development standard

Clause 4.6(3)(b) requires the applicant to demonstrate that there are sufficient environmental planning grounds to contravene the development standard. In Initial Action the Court found at [23]-[24] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15].

Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].

In the case of the subject development, there are sufficient environmental planning grounds to justify contravening the development standard for the following reasons:

- The minor height variation will not result in significant environmental impacts;
- The proposed parapet results in the minor exceedance of the height and as such, the structure will not result in any significant visual noise or shadow impact upon neighbouring properties;
- The parapet is to conceal roof features to improve the building interface with the surrounding area;
- The variation is minor in nature (less than 10%) and relates to a negligible area above the height plane;
- If a compliant scheme was pursued, the roof plant would remain visible from the street;
- The proposed height variation will improve the built forms interface with the streetscape and will therefore be in keeping with the desired future character of the area; and
- The height variation will not result in additional gross floor area or intensification of the use of the building.

Furthermore, as demonstrated in **Section 5** of this report, the proposal demonstrates compliance with the objectives of the standard in that:

- It ensures the height of the development is appropriate to the condition of the site and its context;

- It ensures appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas;
- It promotes the sharing of views; and
- It ensures appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas.

The proposed development achieves the objects in Section 1.3 of the EP&A Act, specifically:

- The proposal promotes the orderly and economic use and development of land (1.3(c)).
- The development represents good design (1.3(g)).
- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

Therefore, it is considered that there are sufficient environmental planning grounds to justify contravening the development standard in this instance, as, amongst other reasons listed above, the development will deliver one of the key objectives of the EP&A Act, will promote the delivery of a residential dwelling that will complement the desired future character of the area, while providing improved amenity in the locality.

In addition, it is noted that the proposed development will still produce a contextually appropriate development outcome consistent with the objectives of the development standards, despite the non-compliances with the numerical provisions.

7 Clause 4.6 (4a)(ii) Public Interest

Clause 4.6(4a)(ii) requires that the consent authority consider whether 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.

Preston CJ in *Initial Action* (Para [27]) described the relevant test for this as follows:

The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. 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.

If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).

As detailed above the proposed development will be consistent with the objectives of the zone standards as discussed in detail below.

Consistency with B4 Mixed Use Zone

Further, it is considered that the proposal will remain consistent with the objectives of the B4 Mixed Use Zone as summarised below:

To provide a mixture of compatible land uses.

The proposed development will ensure the provision of a mix of uses on the site with the action of the ground floor through the integration of retail premise across the sub-precincts. The proposed variation will not impede on the delivery of the proposed mix of land uses on the site.

To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.

The proposed development is near a variety of public transport options and is an accessible location to encourage walking and cycling. Increased patronage of public transport by future residents of the development will be enhanced through the provision of secure rooftop communal garden that improves the appeal of living in a dense mixed use precinct. Despite the minor variation to the height standard as a result of the parapet, the increased uptake of public transport, walking and cycling by residents is considered a positive outcome due to the increased amenity of the building.

To ensure uses support the viability of centres.

The proposal achieves this objective as it provides a development outcome which complements the range of existing uses within the locality, including commercial,

residential, and retail uses. The proposal includes the delivery of residential development that is suitably located to ensure accessibility to nearby centres.

As demonstrated in this request, the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the proposed change of use is to be carried out.

Accordingly, the Council can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

8 Clause 4.6(5) Grounds for Consideration

In deciding whether to grant concurrence, subclause 4.6(5) requires that the Secretary 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.*

The proposal has been assessed against the relative criteria below:

Would non-compliance raise any matter of significance for State or regional planning?

The non-compliance is minor, specific to the circumstances of the site and proposed development and does not raise any matter of significance for State or regional environmental planning.

Is there a public benefit of maintaining the development standard?

There is no public benefit associated with maintaining strict compliance with the development standard in this instance. Doing so would require the removal or roof features that result in a minor non-compliance with the development standard and do not significantly impede on the privacy and views of neighbouring dwellings.

Are there any other matters required to be taken into consideration by the Secretary before granting concurrence?

There are no additional matters that need to be considered in exercising the assumed concurrence of the Secretary.

9 Conclusion

The objectives of clause 4.6 are to provide an appropriate degree of flexibility in applying certain development standards and to achieve better outcomes for and from development in particular circumstances.

This clause 4.6 variation is necessary to provide the required flexibility in the height development standard to enable the development of the proposed residential tower. The request concludes that strict compliance with the numerical standard of the height control is unnecessary and unreasonable, and satisfies the tests under clause 4.6 for the following reasons:

- Strict compliance with the SLEP 2012 maximum height development standard would be unreasonable and unnecessary in the circumstances as the objectives of the standard are achieved notwithstanding non-compliance with the numerical control (clause 4.6(3)(a) and Wehbe test 1);
- There are sufficient environmental planning grounds to justify the minor contravention of the development standard. Specifically:
 - The variation is solely to permit rooftop communal open space for residents as opportunities at ground level are limited;
 - The variation has been designed to not give rise unreasonable levels of overshadowing impacts to adjoining properties and the public domain;
 - The variation is minor in nature and will not impede on the amenity and character of the surrounding area;
- The matters required to be demonstrated by sub-clause (3) are adequately addressed (clause 4.6(4)(a)(ii));
- The proposal is in the public interest (clause 4.6(4)(a)(ii)) because it will deliver a high-quality design that is compatible with the character of the area and:
 - the proposed development will be consistent with objectives relating to the maximum height development standard; and
 - the proposal is consistent with the objectives stated in the SLEP 2012 Land Use Table for the B4 Mixed Use Zone. There would be no public benefit in maintaining strict compliance with the development standard;
- The minor variation to the height standard will not create any significant additional impact on the amenity of the surrounding developments in regard to overshadowing, privacy or views;
- The variation relates to only a minor portion of the proposed parapet required to conceal the buildings plant located on the roof, with most being contained wholly within the height plane; and
- Despite the breach of the numerical height controls, the proposed developments are appropriate for its context in that it will enhance the amenity of the residential tower through the provision of access to the communal rooftop open space.

Overall, the objectives of clause 4.6(1) are to provide an appropriate degree of flexibility to achieve a better outcome for and from development. Strict compliance with the maximum height standard would prevent the proposed development proceeding and delivering the benefits and enhancements described. The proposal will have minimal impacts of the community and is compatible with the local character of the area.

The relevant tests under clause 4.6 are satisfied and there are sufficient environmental planning grounds to justify the minor non-compliance with the height standard.



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