

Attachment C

<p>Clause 4.6 Variation Request - Height of Buildings</p>
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Clause 4.6 Variation Request
Height of Buildings (Clause 4.3)
Sydney LEP 2012

ALTERATIONS AND ADDITIONS TO THE MINERVA THEATRE AND THE
ADAPTIVE REUSE OF THE BUILDING FOR THE PURPOSES OF
ENTERTAINMENT FACILITIES, FOOD & DRINK PREMISES AND TOURIST
AND VISITOR ACCOMODATION

28 – 30 Orwell Street, Potts Point



Prepared by Planning Lab

3 May 2022

1 Introduction

This is a formal written request that has been prepared in accordance with Clause 4.6 (cl 4.6) of the *Sydney Local Environmental Plan 2012* (SLEP 2012) to support a Development Application (DA) submitted to City of Sydney Council the adaptive reuse of the Minerva Theatre, a State heritage listed building located at 28-30 Orwell Street, Potts Point ('the site') to facilitate a mixed use development including performance spaces, tourist and visitor accommodation and food and drink premises.

The purpose of this cl 4.6 variation request is to address a variation to Clause 4.3 Height of Buildings under the SLEP 2012. Specifically, this request seeks to vary the 22 m height standard that applies to the site.

The objectives of cl 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

This request has been prepared having regard to the following considerations:

- The Department of Planning and Environment's *Guidelines to Varying Development Standards* (August 2011);
- The objectives of Clause 4.3 of the SLEP 2012, being the development standard to which a variation is sought;
- Relevant case law in the New South Wales Land and Environment Court and New South Wales Court of Appeal including *Wehbe v. Pittwater Council* [2007] NSWLEC 827.

This variation request provides an assessment of the development standard and the extent of variation proposed to the standard. The variation is then assessed in accordance with the principles set out in the *Wehbe*.

2 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the SLEP 2012 provides that development consent may be granted for development even though the development would contravene a development standard imposed by the SLEP 2012, or any other environmental planning instrument.

However, clause 4.6(3) states that 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 circumstance of the case, and*
- (b) *there are sufficient environmental planning grounds to justify contravening the development standard.*

In accordance with clause 4.6(3) the applicant requests that the height of building development standard be varied.

3 What is the Environmental Planning Instrument (EPI) that applies to the land?

The Environmental Planning Instrument (EPI) to which this variation relates is the SLEP 2012 (SLEP).

4 What is the zoning of the land?

The site is zoned MU1 – Mixed Use pursuant to the SLEP 2012. Refer to **Figure 1**. The proposed *‘tourist and visitor accommodation’, ‘entertainment facility’* and the complementary *‘commercial premises (food and drink premises)’* are permissible with consent in the zone.



Figure 1: Land Zoning Map (Source: Sheet LZN_022 - SLEP 2012)

5 What is the development standard being varied?

Clause 4.3(2) of the SLEP 2012 provides that the maximum height for a building on any land is not to exceed the height shown for the land on the Height of Building Map. The site is within area ‘R’ on the Height of Building Map and accordingly, a Height of 22m applies as shown in **Figure 2**.

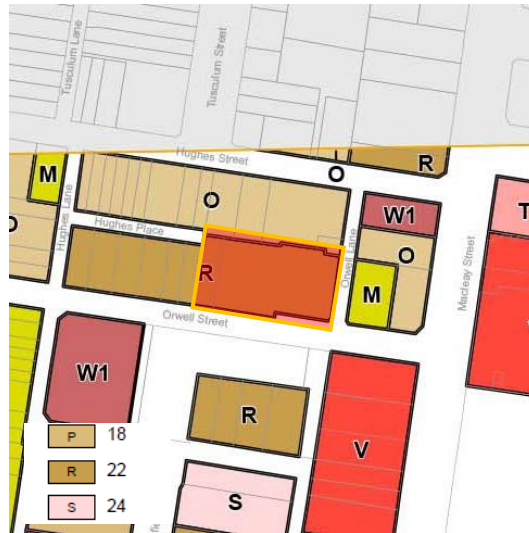


Figure 2: Height of Building Map (Source: Sheet HOB_022 - SLEP 2012)

6 Is the development standard excluded from the operation of Clause 4.6 of the EPI?

Cl 4.6(2) states that development consent may be granted for development even though the development would contravene a development standard. However, this does not apply to a development standard that is expressly excluded under cl 4.6(8) of the SLEP 2012. Given the maximum height development standard is not identified under subclause 4.6(8), it is therefore not specifically excluded from the operation of cl 4.6 of SLEP 2012.

7 The site and its context

The site is located at 28-30 Orwell Street, Potts Point within the City of Sydney Local Government Area. The site is located east of central Sydney within the urban centre of Potts. The site is legally described as Lots 1,2,3 and 4 in DP 456456, and Lot 10 in DP 10682 and is privately owned by CE Minerva Pty Ltd. It is rectangular and has an area of 1,267m². It has a primary frontage to Orwell Street of approximately 46m and a secondary frontage of 27m to Orwell Lane.

Within the immediate surrounds of the site, the built form is generally made up of commercial and residential buildings with ground floor retail/commercial uses. The surrounding buildings range in height from 2-3 storeys to 8 storeys (to the south and west) and as shown at the Gowrie Gate directly to the west.

The subject site houses the ‘Metro Theatre’, an Art Deco style building which consists of 5 storeys over a basement level bounded on two sides by road, and on the other two sides by residential blocks

An aerial photo of the site is shown in **Figure 3**.

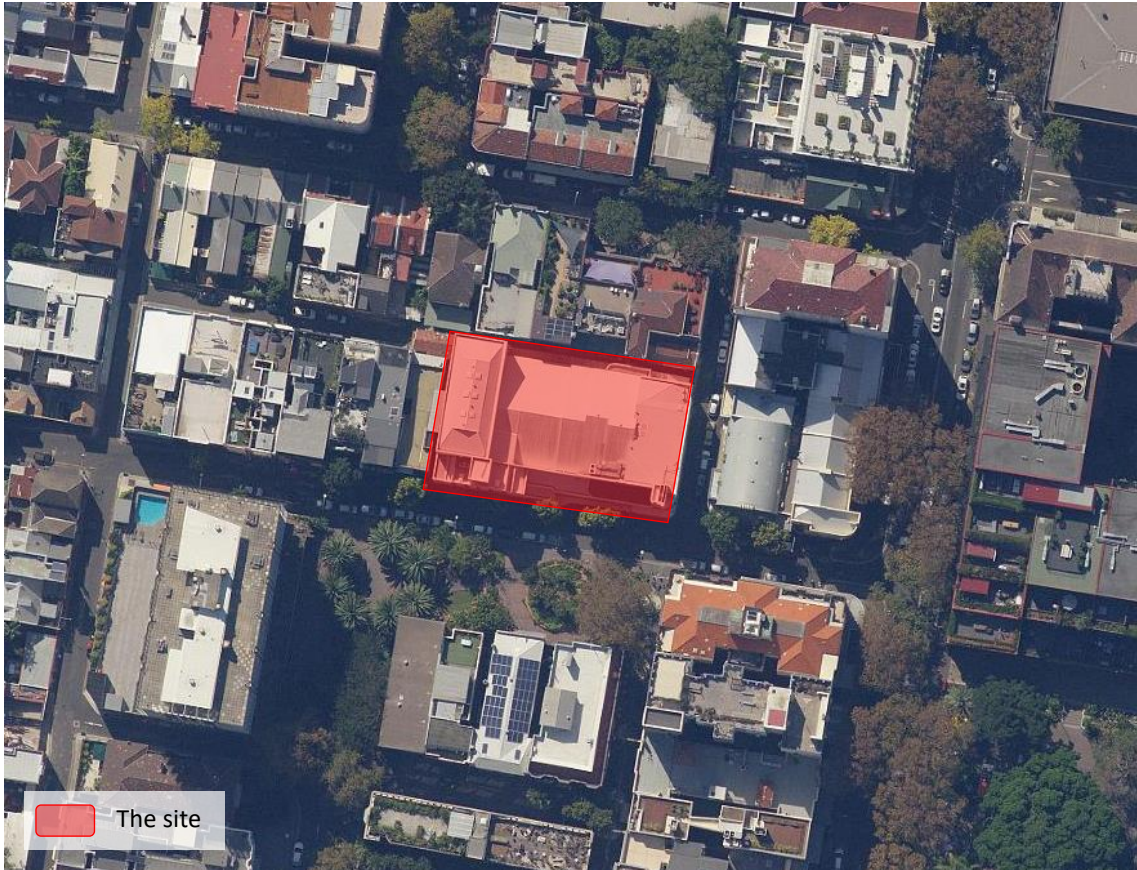


Figure 3: Aerial photograph of the site and surround (Source: Six Maps 2021)

8 Extent of Variation to the Development Standard

Although most of the proposed building envelope complies with the 22m height limit, there is a section that exceeds it. According to the architectural drawings from Tonkin Zulaikha Greer Architects, the maximum building height, measured from the existing ground level, is 24.92m meaning that the proposed development breaches the height limit by a maximum of 2.92m (13.27%).

The non-compliance is caused by the two-storey hotel addition to the flytower (RL +62.10 or 24.92m) along the western boundary and the adjacent vertical circulation element (RL +61.39 or 24.76m) proposed to provide lift and fire egress throughout the building.

9 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was the satisfaction of the first test of the five-set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In *Wehbe v Pittwater Council* [2007] 156 LGERA 446 [42] – [51] (“*Wehbe*”) and repeated in *Initial Action* [17]-[21] the Chief Judge identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established.

Although *Wehbe* concerned a SEPP 1 objection, it remains relevant to requests under clause 4.6 as confirmed by Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, notwithstanding that if the first and most commonly applied way is used, it must also be considered in 4.6(4)(a)(ii).

The 5 ways in *Wehbe* are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council’s actions in granting consents departing from the standard and hence the standard is unreason
5. The zoning of the land is unreasonable or inappropriate. The five ways are not exhaustive, and it may be sufficient to establish only one.

For completeness, this request addresses the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

Compliance with the Height of Buildings development standard is unreasonable or unnecessary in the circumstances of this case because, as explained in **Table 1** (below), the objectives of the development standard are achieved, notwithstanding non-compliance with the standard.

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34], the Chief Justice held, “*establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary*”.

Demonstrating that there will be no adverse amenity impacts is, therefore, one way of showing consistency with the objectives of a development standard.

Table 1: *Achievement of Development Standard Objectives*

Objective	Discussion
<p>1(a) to ensure the height of development is appropriate to the condition of the site and its context,</p>	<p>The maximum height of the building, measured at the top of the parapet of the skytower addition, is 24.92m, which exceeds the specified height control limit by 2.92m. However, it is important to note that the majority of the proposed building complies with the 22m height limit. Moreover, the portion of the building that exceeds the height limit does not cause any negative visual or environmental impacts on the public domain, local streetscape, or surrounding residential properties. This has been demonstrated in the assessment below:</p> <p><u>Visual Impacts</u></p> <p>The proposed development is designed to have minimal visual impact on the original building's setting. The primary façades facing Orwell Street and Orwell Lane, including the decorative corner tower and Streamline Modernist style, will be preserved and remain the focal point of the composition.</p> <p>The proposed addition above the flytower is designed to correspond with the original building's form, and it will be clearly distinguishable as a secondary element. The use of contemporary detailing and a complementary palette of materials and finishes will allow the original building's form to remain visible. The size and scale of the proposed development are appropriate, with setbacks and building alignments that respect the historic building's architecture.</p> <p>On the northern boundary, the new lift and fire stairs have been designed as simple forms that complement the gradual rise of the building towards the flytower. The eastern end of the building has a five-storey structure, while the section next to the flytower has eight storeys. This design maintains the building's proportions and respects the historic structure's overall appearance.</p> <p><u>Overshadowing Impacts</u></p> <p>The proposed additions have been designed to ensure that the current level of solar access to surrounding properties is maintained and little significant additional</p>

overshadowing of the public domain, such as the Springfield Gardens, is caused.

The below Shadow Diagrams (Drawings Nos. A500 & A501) (**Figure 5**) have been prepared by the project's architect, Tonkin Zulaikha Greer Architects to demonstrate compliance with clause 4.2.3.1 Solar Access of the SDCP 2012.

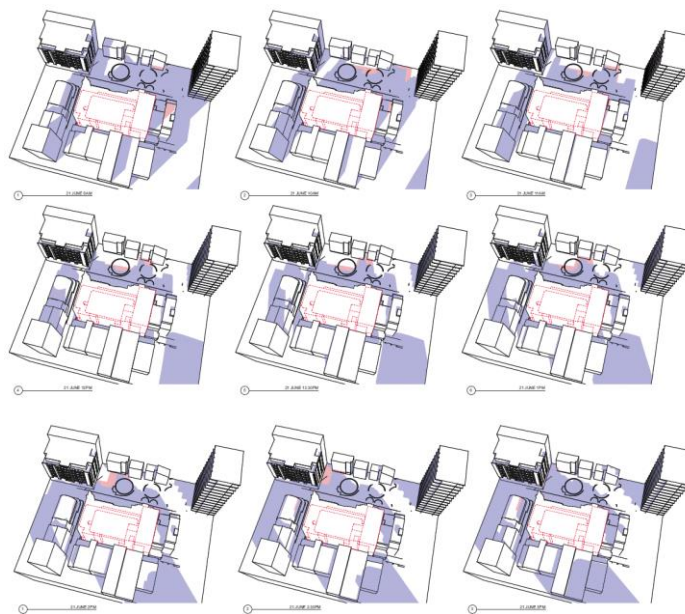


Figure 5: Shadow Diagrams 21 June | 9.00 am to 3.00 pm
(source: Tonkin Zulaikha Greer Architects)

Residential Amenity Impacts

The building's height variation does not negatively affect the neighbouring residential properties. The elements that exceed the height limit are adequately separated from residential development, which eliminates concerns about overlooking or noise disruption. The proposed building has been designed with consideration of its surroundings, minimising negative impacts, and as such the height variation does not unreasonably impact the locality..

Views Impacts

Refer to below response to Objective 1(c)

Note: The proposed building envelope has been developed in consideration of the detailed design parameters provided by the City of Sydney's Design

	<p>Advisory Panel concerning an earlier re-development proposal for the site (Advise sheet: No. 53/2019). According to the Panel, a successful strategy to the provision of a vertical addition to the building should consider the following: <i>‘A thin tower may have less of an impact– allowing the character of the architecture of the rest of the existing building to remain intact, and result in less overshadowing of Springfield Gardens. Noting that the building height limit is 22m, the Panel suggested providing some additional height for a tower element of up to 25m, to encourage design excellence’.</i> (Emphasis Added).</p>
<p>1(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,</p>	<p>As discussed above, the proposed addition is appropriately scaled and designed as a secondary component which defer to the architecture of the original building. The addition has been setback from the principal façades and adopts a contemporary materials and colour palette to minimise the visual impact on the heritage listed building and the Potts Point Heritage Conservation Area (C51).</p>
<p>1(c) to promote the sharing of views outside Central Sydney</p>	<p>A view impact report, prepared by Urbaine Architecture and dated July 2021 was submitted with the DA to consider the impact of the proposal on views from neighbouring residential buildings to the south-west and south-east of the subject site. The study identifies as potentially affected several apartments within two residential buildings located at Nos.5 to 15 Orwell Street and 113 to 115, Macleay Street and determines that the proposal represents a minor variation to the existing views enjoyed by those apartments. Noting that the highest value views are middle and distant views to the north-west, north and north-east, namely to the Sydney and North Sydney CBDs, the harbour, harbour bridge, Opera House, lower reaches of the Lower North Shore, and Elizabeth Bay and Garden Island, the consultants concluded that when observed in the context of the density and variety of neighbouring buildings, the additional impact on those views can be considered relatively minor.</p> <p>Subsequently, Urbaine Architecture conducted additional view studies (dated August 2022 and April 2023) following amendments to the proposal to minimise its impact on the Gowrie Gate, a heritage-listed apartment building situated</p>

	<p>at 113-115 Macleay Street to the south east of the subject site. The focus of these studies was to further assess the impact of the proposed development on Units 505, 506, and 604 in the Gowrie Gate building.</p> <p>The assessment of Unit 505 revealed a significant improvement in the highest value views, namely the Sydney Opera House sails and the northern pylon of the Harbour Bridge, compared to the original design. The report noted that the remaining view loss would be considered of moderate significance under the assessment guidelines typically applied to view sharing issues as established in the case of <i>Tenacity Consulting v Warringah Council</i> [2004] NSWLEC 140. The consultants concluded that the proposed development maintains a reasonable access to the existing views.</p> <p>The assessment of Unit 506 indicates that the proposed development would lead to a partial loss of views from the living room window. District views, which encompass the sight of the top of buildings and tree canopies situated beyond the development site, would be restricted. Additionally, the development would cause a minor impact on the view from the north-western facing bedroom of the apartment, partially affecting the eastern skyline of the city and the view of a small section of the eastern sail of the Opera House. It is noteworthy that these affected elements are situated at a 45-degree angle from the primary view. The consultants determined that the view loss resulting from the amended proposal would be of moderate significance under the guidelines of the <i>Tenacity Consulting v Warringah Council</i> [2004] NSWLEC 140 case.</p> <p>With regard to Unit 604, the assessment has determined that the loss of view from the apartment primarily affects the district views of the surrounding area with a minimal impact on views of the harbor. This is due to the fact that the harbor is already largely obstructed by surrounding developments and in particular the multi-storey residential building located to the northwest of the site, known as Kanimbla Hall. Nevertheless, a small portion of the harbor view can still be seen from the outdoor deck area of the apartment. As a result of the proposed changes, less than 20% of this remaining water view will be impacted. Based on the assessment guidelines</p>
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	established in the case of <i>Tenacity Consulting v Warringah Council</i> [2004] NSWLE 140, the impact of the proposal to this apartment would be considered of minor or minor-to-medium significance.
1(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,	n/a
1(e) in respect of Green Square: <i>(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and</i> <i>(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.</i>	n/a

Compliance with the maximum height development standard is unreasonable or unnecessary in the circumstances of this case because the objective of the standard is achieved notwithstanding the non-compliance.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The underlying objective or purpose of the height standard is relevant. As demonstrated above, the proposal retains consistency with the objectives of Clause 4.3 of SLEP, despite non-compliance.

3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The underlying objectives or purpose of the standard would not be defeated or thwarted if compliance was required, however, as outlined above consistency with objectives is

achieved despite non-compliance.

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;

Council has varied the height of building standard in circumstances where the objectives of the standard are achieved.

5. 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.

The proposed zoning of the land is reasonable and appropriate.

Strict compliance with the height of building development standard is unreasonable and unnecessary in the circumstances of the case in that:

- The proposal is consistent with the objectives of the 'Height of Building Standard' as detailed above.
- The vast majority of the proposed building envelope is below or in line with the 22m height limit. As such, the scale of the building remains consistent with the desired character of the locality notwithstanding the proposed minor variation.
- The proposal retains, conserves and adapts the building, respecting its aesthetic significance. The existing streetscape is varied, with a range of scales and architectural styles. The proposed additions have been designed to minimise visual impacts on the streetscape and the local Heritage Conservation Area.
- The proposed variation to the Height of Buildings control does not give rise to an impact on the amenity of the locality.

As the proposal is consistent with the objectives of the height of buildings standard, compliance with the development standard is considered to be unreasonable and unnecessary in the circumstances of the case.

10 Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?

The proposed massing and design of the flytower addition is the result of a considered analysis of the qualities of the base theatre building and the surrounding context and the desire to deliver a

positive design outcome with a high level of architectural merit. The modifications to the original flytower of the building have been carefully designed to ensure that its external volume retains its primacy within the streetscape and the vertical extension reads as secondary complementary form.

In this particular circumstance, there are sufficient environmental planning grounds to warrant the proposed variation to the height of buildings standard.

11 Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

12 Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

12.1 Objective of the Development Standard

The consistency of the proposed development with the specific objectives of the height of buildings development standard is addressed above.

12.2 Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the MU1 - Mixed Use zone. The objectives of the zone are:

1. *To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.*

2. *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*
3. *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
4. *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
5. *To ensure land uses support the viability of nearby centres.*
6. *To integrate suitable business, office, residential, retail and other land uses in accessible locations that maximise public transport patronage and encourage walking and cycling.*

The subject proposal meets the objectives for the zone in that:

1. The proposed development, which includes a mix of uses such as tourist and visitor accommodation, entertainment facilities, and commercial premises, has the potential to significantly increase employment opportunities and economic growth in the surrounding locality. The addition of a hotel, restaurant, and cafe would not only attract more visitors to the area, but also generate more foot traffic, leading to a boost in business for the local shops and services. This would create a more active and vibrant atmosphere, making the area a more desirable place to visit and spend time. In addition, the performance spaces would provide a venue for events, concerts, and shows, creating further economic opportunities and encouraging the growth of local arts and culture. Overall, the proposed development has the potential to greatly contribute to the activation of the area, leading to a more prosperous and thriving community.
2. The proposal aims to enhance the building's street presence along Orwell Street and Orwell Lane by introducing active uses on the ground floor. This includes a proposed café with outdoor seating on Orwell Street, a pedestrian access to the foyer through existing door-sets on the corner of Orwell Street and Orwell Lane and restoring the original entries and poster boxes on Orwell Lane. These changes will activate the building's frontages and create a more vibrant and welcoming atmosphere in this section of the Potts Point area.
3. Potential negative impacts are minimised through the careful planning, design of the proposal and the future management of the venues. By taking these factors into consideration and working collaboratively with the local community, the proposed development could make a valuable contribution to the local economy and enhance its overall attractiveness.
4. As noted above, one of the goals of the proposal has been to improve the building's appearance on Orwell Street and Orwell Lane by adding a café with outdoor seating, restoring original entries and poster boxes, and providing pedestrian access to the foyer. These changes will create a lively and inviting environment in the vicinity of the renovated building.

5. The proposed project is expected to bring significant benefits to the surrounding community by promoting economic vitality and activation. The operation of new facilities is anticipated to generate job opportunities for local residents, including entry-level positions and skilled management roles, thereby injecting new money into the local economy. This influx of funds will, in turn, support other businesses in the surrounding area. Moreover, the project is likely to enhance the appeal of Potts Point as a destination, thus increasing demand for local goods and services, and making the area more attractive for both commercial and residential investment.

Overall, the proposed mix of uses is expected to have a positive impact on the surrounding community, creating jobs, driving increased spending, and attracting new visitors and residents. It will also serve as a catalyst for increased vitality and activation, driving new investment and opportunities that will support the economic viability of the locality.

6. The location of the site boasts remarkable access to a multitude of public transportation options, which include rail services, bus networks, and cycleways. This advantageous accessibility is anticipated to mitigate the need for private vehicles for employees, customers, and visitors traveling to the site. Therefore, it is highly feasible for them to make use of the public transportation modes available, as well as other private transportation options besides motor vehicles.

The diverse array of transportation choices available to those visiting the site is a significant advantage. The rail services available from the nearby Kings Cross Station offer frequent and reliable connections to the neighbouring areas, making it easy for commuters to reach their destination. Furthermore, the extensive bus network enables easy navigation throughout the city, making it convenient for people to get to the site. The cycleways provide an environmentally friendly and healthy option for those who prefer cycling as a mode of transportation.

In conclusion, the site's convenient accessibility to an assortment of public transportation options, along with the encouragement of alternative private transportation modes, presents a multitude of benefits. It provides people with a variety of options to choose from while reducing the environmental impact of transportation and promoting a healthier lifestyle.

For the reasons given the proposal is consistent with the objectives of the MU1 - Mixed Use zone.

13 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

- (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.*

Given its location within the heart of Potts Point, the proposed adaptive reuse of the building as the

'Minerva Theatre' strikes a balance between achieving good conservation outcomes and finding an appropriate use that is commercially viable and sustainable for the future. The proposal demonstrates a high-quality outcome for a building which has sat vacant for five years and now has the opportunity to again serve the cultural needs of the local community by providing entertainment venues capable of hosting a diverse range of live performances.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the floor space ratio development standard will achieve a better outcome in this instance in accordance with objective 1(b).

14 Conclusion

Strict compliance with the height of buildings development standard contained within clause 4.3 of the Sydney Local Environmental Plan 2012 has been found to be unreasonable and unnecessary in the circumstances of the case. Further, there are sufficient environmental planning grounds to justify the proposed variation. In this regard, it is reasonable and appropriate to vary the height of buildings development standard to the extent proposed.