

# **Attachment B**

## **Clause 4.6 Variation Request - Height of Buildings**

# Clause 4.6 Variation Request – Height of Buildings

349 Liverpool Street, Darlinghurst



**'Gura Bulga'**

Liz Belanjee Cameron



'Gura Bulga' – translates to Warm Green Country. Representing New South Wales.

By using the green and blue colours to represent NSW, this painting unites the contrasting landscapes. The use of green symbolises tranquillity and health. The colour cyan, a greenish-blue, sparks feelings of calmness and reminds us of the importance of nature, while various shades of blue hues denote emotions of new beginnings and growth. The use of emerald green in this image speaks of place as a fluid moving topography of rhythmical connection, echoed by densely layered patterning and symbolic shapes which project the hypnotic vibrations of the earth, waterways and skies.

Ethos Urban acknowledges the Traditional Custodians of Country throughout Australia and recognises their continuing connection to land, waters and culture.

We acknowledge the Gadigal people, of the Eora Nation, the Traditional Custodians of the land where this document was prepared, and all peoples and nations from lands affected.

We pay our respects to their Elders past, present and emerging.

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# 1.0 Introduction

This Clause 4.6 variation request has been prepared by Ethos Urban on behalf of Toohey Miller Pty Ltd (Toohey Miller). It is submitted to the City of Sydney Council (Council) in support of a Development Application (DA) for a residential flat building at 349 Liverpool Street, Darlinghurst (the site).

The proposed development seeks consent for:

- Site preparation works including demolition of the existing residential flat building and bulk earthworks;
- Construction and use of a seven-storey residential flat building comprising:
  - Two x 2-bedroom apartments
  - Twelve x 3-bedroom apartments
- Construction of three (3) basement levels.
- Landscaping works including ground level and rooftop landscaping as well as the provision of private open spaces; and
- Extension and augmentation of infrastructure and services as required.

Clause 4.6 of the *Sydney Local Environmental Plan 2012* (Sydney LEP 2012) enables Council to grant consent for development even though the development varies 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 the development. This Clause 4.6 variation request relates to the Height of Buildings development standard 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 10 August 2022, including supporting documentation.

This Clause 4.6 variation request demonstrates that compliance with the maximum building height development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the standard. It demonstrates that, notwithstanding the variation from the maximum building height standard, the proposed development:

- Achieves the objectives of clause 4.3 of the Sydney LEP 2012 by:
  - Ensuring that the height of the development is in-keeping with the scale and character of neighbouring buildings and is of a form that will not result in any unreasonable environmental impacts.
  - Ensuring that an appropriate height transition is maintained between the higher density character of Central Sydney and neighbouring Darlinghurst.
  - Respecting the character, appearance and scale of the surrounding heritage conservation area (HCA) including the nearby heritage buildings.
- Will provide a rooftop terrace for both communal and private open space, in full alignment with the objectives and provisions prescribed by the NSW Apartment Design Guide and SEPP 65;
- Will have an appropriate impact, in terms of its scale, form and massing.
- Will promote the orderly and efficient use of land, in accordance with the objects of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

In light of the above, the consent authority can be satisfied that there is sufficient justification for the variation to the 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

This Clause 4.6 variation request seeks to justify contravention of the maximum building height development standard set out in Clause 4.3 of the Sydney LEP 2012. Under the LEP, the site is mapped as having a maximum building height of 22m. Clause 4.3 of the Sydney LEP 2012 is reproduced below in its entirety and an extract from the Height of Buildings Map, to which this clause applies, is shown at **Figure 1**.

### 4.3 Height of buildings

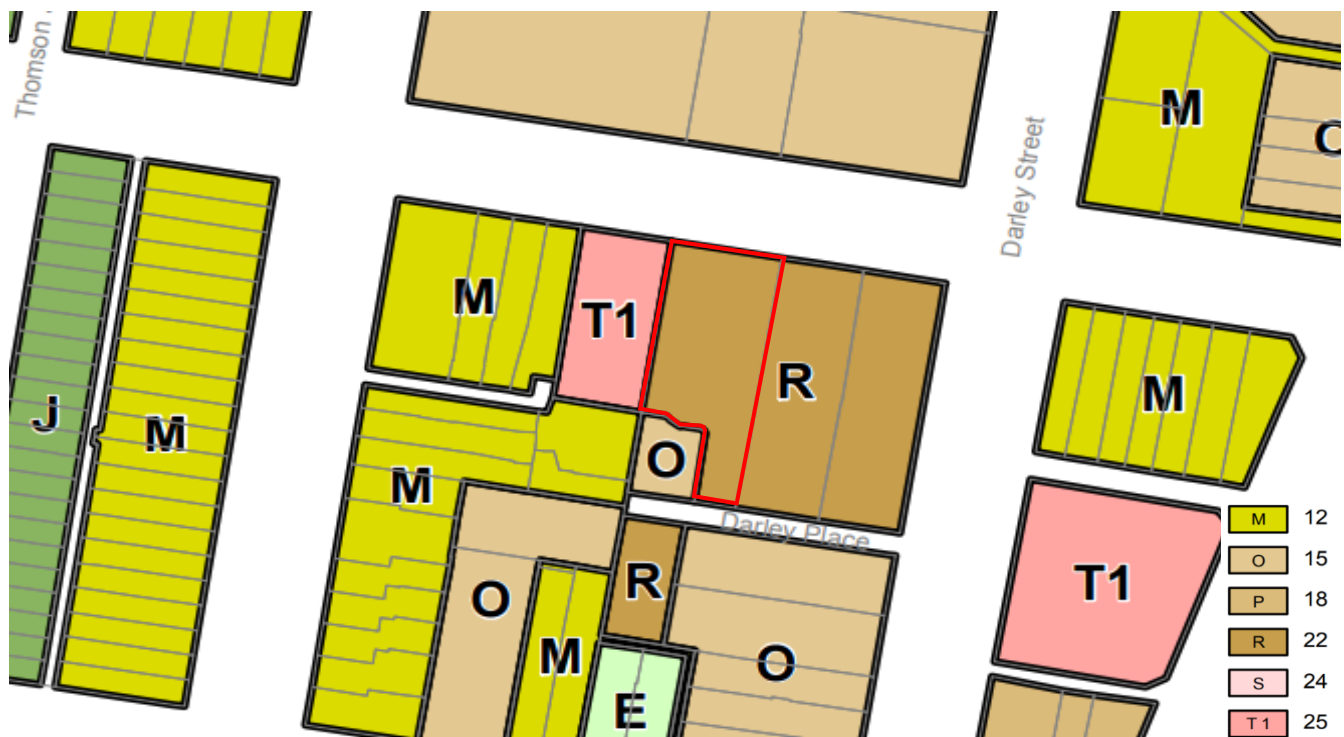
(1) The objectives of this clause are as follows—

- (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 outside Central Sydney,
- (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.

Note—No maximum height is shown for land in Area 3 on the Height of Buildings Map. The maximum height for buildings on this land are determined by the sun access planes that are taken to extend over the land by clause 6.17.

(2A) Despite any other provision of this Plan, the maximum height of a building on land shown as Area 1 or Area 2 on the Height of Buildings Map is the height of the building on the land as at the commencement of this Plan.

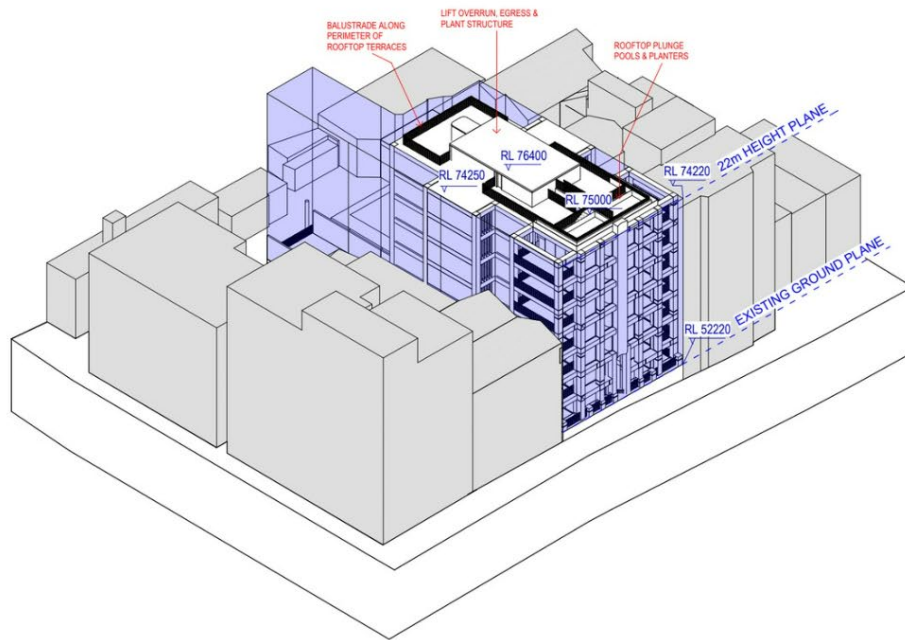


**Figure 1** Sydney LEP 2012 Height of Buildings map (site outlined in red)

Source: City of Sydney via NSW Legislation

The proposed development comprises a seven storey residential flat building with a maximum height of 22.05m to the top of the parapet, which presents discernible additional height of 0.05m from the maximum LEP height limit. The proposal also presents a maximum height of 24.2m at the top of the lift overrun and stair access, which presents a 2.2m (or 10%) variation to the height of buildings control. The principal reason for this variation relates to the provision of lift/stair access to a rooftop level comprising of communal open space as well as private open spaces associated with apartments on Level 6. Whilst some areas of additional height above the maximum limit also relate to planters and balustrades on the perimeter of the roof terrace, the majority of the variation, being the lift and stair overrun, is localised to the central portion of the building where it will be indiscernible from the public domain.

This is illustrated in the 3D height plane diagram provided at **Figure 2**. Architectural drawings providing further detail of the variation sought are provided at **Appendix A** of the SEE.



**Figure 2** 3D Height Plane Diagram

Source: Woods Bagot

## 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.*

Further, clause 4.6(4) 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 (*Wehbe*)
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (*Four2Five*)
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*)
5. *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511 (*Turland*)
6. *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386 (*Micaul*)
7. *Moskovich v Waverley Council* [2016] NSWLEC 1015 (*Moskovich*)
8. *Baron Corporation Pty Ltd v The Council of the City of Sydney* [2018] NSWLEC 1552 (*Baron Corporation*)

The relevant matters contained in Clause 4.6 of the Sydney LEP 2012, with respect to the maximum height development standard, are each addressed below, including with regard to these decisions.

### 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 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 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. This Clause 4.6 variation request is proposed in context of Clause 4.3 of the Sydney LEP 2012. Relevant matters contained in Clause 4.6 of the Sydney LEP 2012, with respect to the maximum building height development standard, are each addressed below.

### 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.

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

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

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
- The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (**Fourth Method**).
- The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Method**).

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 development standard are achieved notwithstanding the non-compliance with the standard (**First Method**).

#### 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:

(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 outside Central Sydney,*
- (d) *to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,*
- (e) *in respect of Green Square—*

- (i) *to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and*
- (ii) *to ensure the built form contributes to the physical definition of the street network and public spaces.*

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

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

The proposed variation results in an appropriate height for the site and its context, as described below.

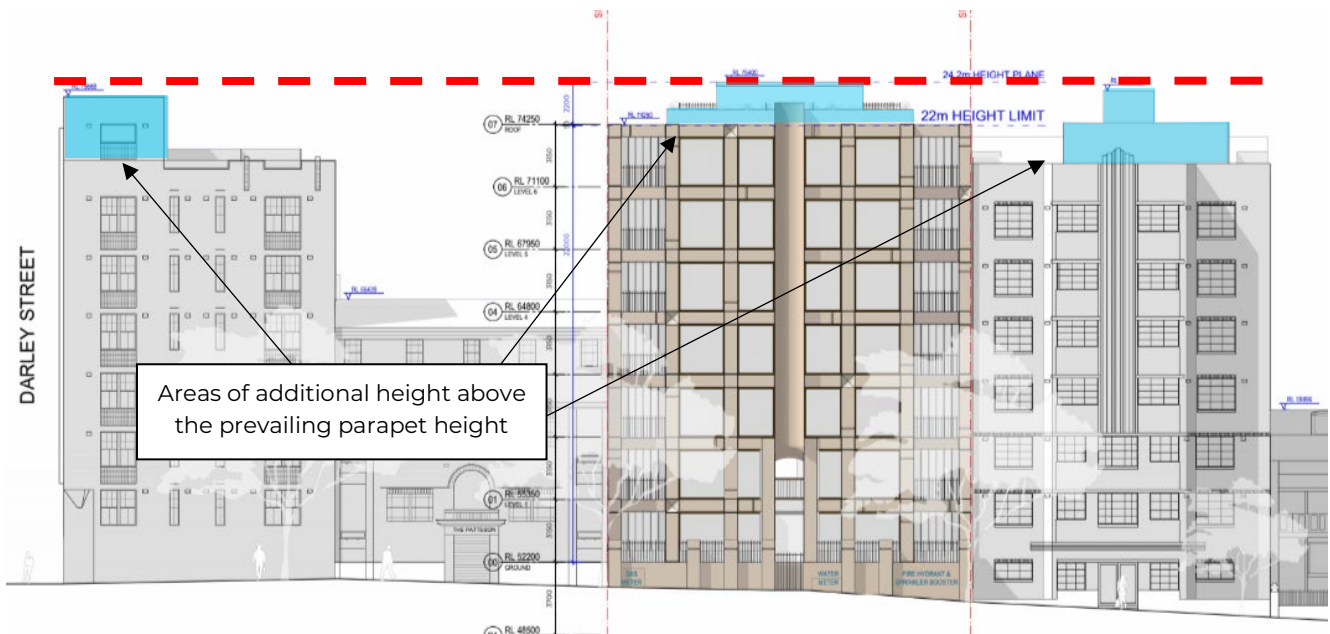
The site is located in a highly urbanised context which is characterised by an array of multi-storey residential flat buildings fronting Liverpool and Darley Streets, as well as rows of terrace houses fronting Forbes Street and other areas of Darley Street, which present varying street walls between 3-7 storeys. A summary of the site's surrounding built form context is provided below:

- **North:** To the north, on the opposite side of Liverpool Street is 278 Liverpool Street which comprises a three storey dwelling house which is currently known as the Robin Gibson Gallery.
- **East:** To the east, directly adjoining the side boundary of the site is 355-357 Liverpool Street, which comprises a three storey boarding house built to the front and side boundaries. Further to the east at 3-5 Darley Street, is a seven storey residential flat building built to the side and front boundaries.
- **South:** To the south, directly adjoining the site is a one storey cottage dwelling house at 1 Darley Place. Further to the south on the opposite side of Darley Place is a one storey dwelling house at 5 Darley Place, which is also listed as a Local Heritage Item (Item No. I271).
- **West:** To the west, directly adjoining the side boundary of the site is 347 Liverpool Street, comprising a seven storey residential flat building known as "Mont Clair", which is built to the front, side and rear boundaries, with areas carved out along the side boundaries. Further to the west is a row of two and three storey terrace dwelling houses at 339-345 Liverpool Street.

It is also noted that the block bounded by Liverpool, Darley, Forbes and Burton Streets, of which the site forms part of, has a highly irregular pattern of maximum building height controls (refer **Figure 1** above), with the maximum height varying between 6m and 25m across the block. As such, it is clear that there is no homogenous character in the locality, nor homogenous LEP height limits, whereby a variation to the maximum building height control would prevent the achievement of the subject objective. Instead, the test is whether the height of the proposed building is compatible and appropriate to the site surrounds.

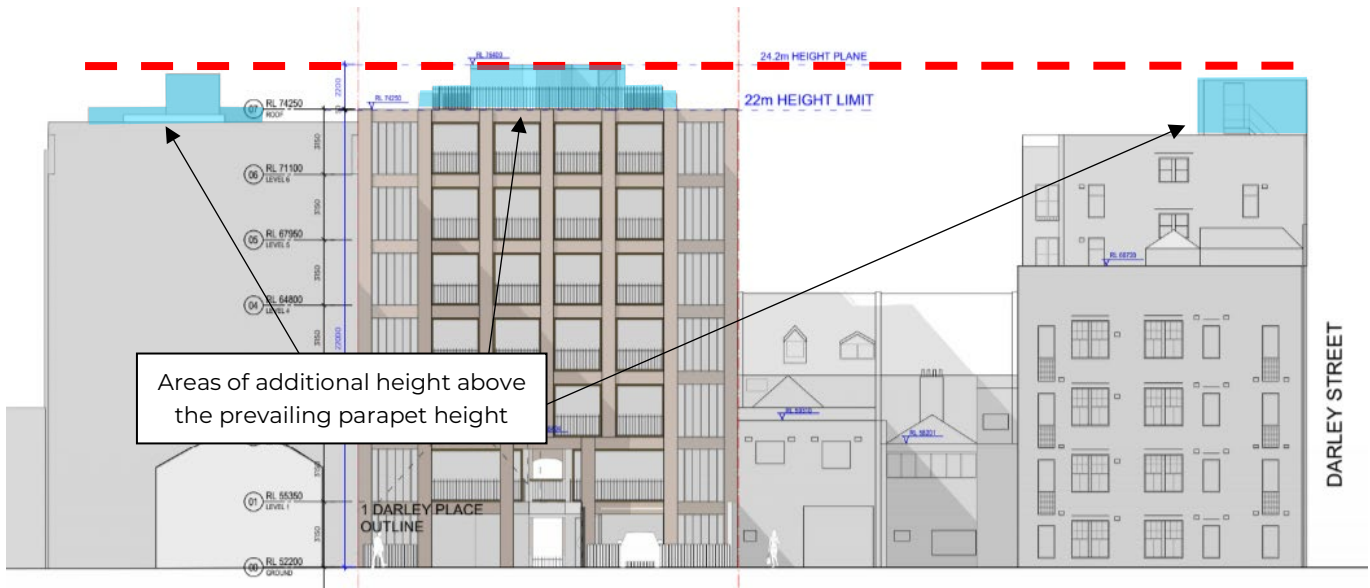
In light of this, it is noted that the design of the proposed development and height of the building has drawn on contextual cues from adjacent residential flat buildings as well as the maximum building height controls in the locality in order to deliver a development outcome that intrinsically fits in to the neighbourhood context. As can be seen below in **Figure 3** and **Figure 4**, the proposal has been designed to generally align with the building height set by the nearby residential flat buildings of 347 Liverpool Street and 3-5 Darley Street, so as to present a consistent built form outcome that suits the streetscape whilst simultaneously completing the street wall of Liverpool Street. As well as this, it is also noted that 347 Liverpool Street and 3-5 Darley Street also have localised areas of additional height which protrude above the prevailing parapet height of the building, as shown at **Figure 3** and **4** below. In this sense, the variation sought is consistent with the prevailing built form typology for higher density residential flat buildings in the immediate vicinity, and cannot be read as out of character with the streetscape.

As well as this, it is reiterated that the proposed variation generally pertains to the lift/stairs overrun and balustrades/planters only, with minor areas of the parapet above the height. In this sense, the variation does not compromise the proposal's integration with the character of this immediate portion of Liverpool Street.



**Figure 3 Additional height above prevailing parapet height in surrounding built form context (Liverpool Street Elevation)**

Source: Woods Bagot



**Figure 4 Additional height above prevailing parapet height in surrounding built form context (Darley Place Elevation)**

Source: Woods Bagot

Further, it is also noted that the proposed inclusion of both communal and private open space on the rooftop is in direct response to the site's dense urban context. The provision of communal open space is identified in the NSW Apartment Design Guide (ADG), which is given statutory effect by *State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment development* (SEPP 65). The ADG recommends that communal open space has a minimum area equal to 25% of the site, however, acknowledges that in certain contexts, such as in dense urban areas or small lots where developments are unable to achieve the design criteria, that proposals should:

- provide communal spaces elsewhere such as a landscaped rooftop terrace or a common room;
- provide larger balconies or increased private open space for apartments;
- demonstrate good proximity to public open space and facilities and/or provide contributions to public open space;

The site is noted to be spatially constrained, comprising approximately 685m<sup>2</sup> with a maximum permissible Floor Space Ratio of 3:1. While the proposal has been designed to provide communal open space on the ground floor at the rear of the site, this does not meet the required 25% due to constraints relating to the rear vehicular access. Given this, the proposal has been designed to comply with the 25% requirement through accommodating communal open space on the rooftop terrace and in a more desirable location for residents. It is also noted that the site is located in the highly sought-after suburb of Darlinghurst, which is in close proximity to the Sydney CBD and Woolloomooloo with access to significant open space on the waterfront. Additionally, the site is in close proximity to open space at Green Park, approximately 350m to the south east of the site. In these circumstances there would be reasonable grounds not to provide open space within the development, however, the proposal still seeks communal open space to enhance the amenity for its residents.

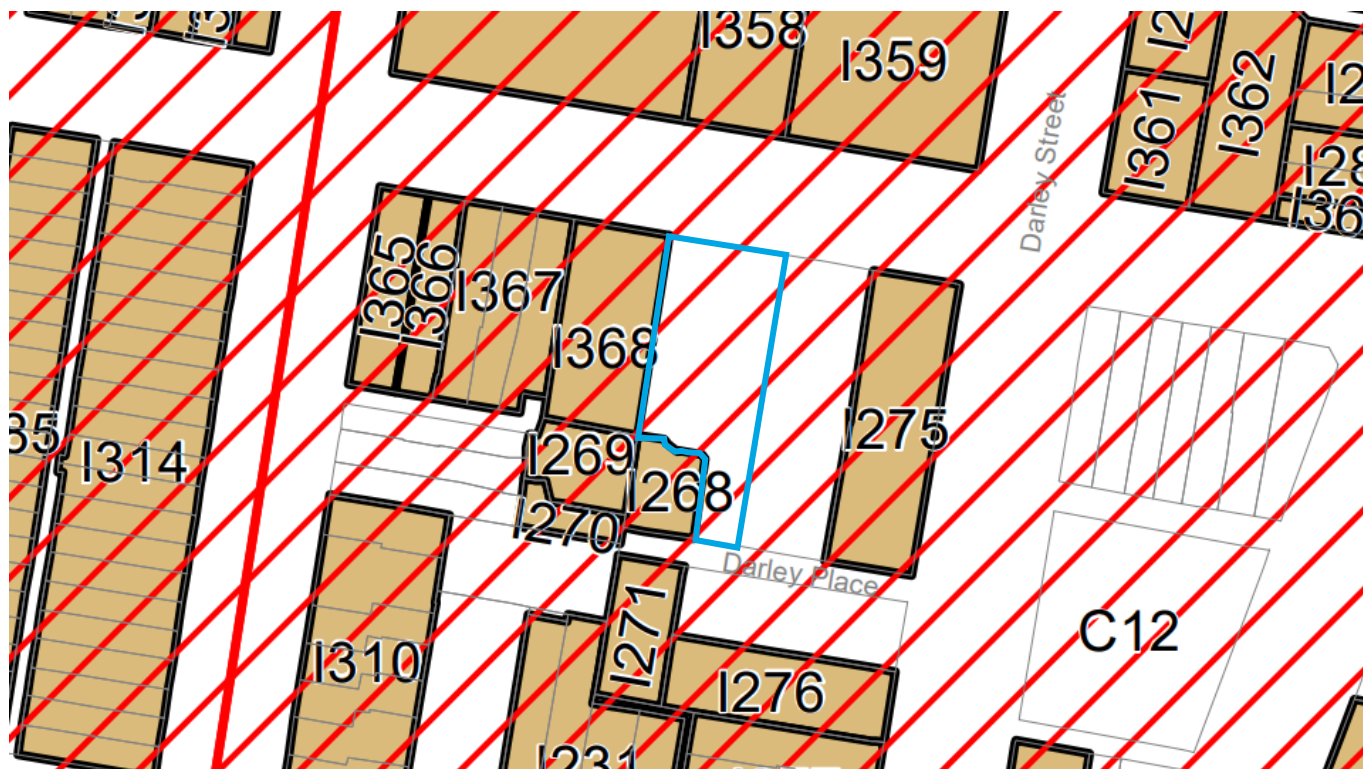
Taking into account these factors, it is considered that the height breach, substantively limited to the lift overrun and some balustrades/planters framing the terrace, is both appropriate to the condition and context of the site. The additional height provides for a significant improvement to the building's response to the unique site conditions, and broader local context by providing more equitable access to the communal rooftop open space for all residents and visitors.

In light of the above, it is considered that the proposed variation to the height control and the overall development support the achievement of this objective and would ensure that the building presents as an appropriate response to the condition of the site within its local and site context.

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

The proposed development is located in the Oxford Street and Victoria Street Heritage Conservation Area (HCA), and adjoins several heritage items (refer **Figure 5**) including:

- To the west, the site adjoins the flat building 'Mont Clair' (Item No. I368) at 379 Liverpool Street which is a heritage item of local significance.
- To the south, the site adjoins named Cottage (Item No. I268) at 1 Darley Place.
- To the southwest, the site adjoins two semi-detached house groups (Item Nos. I269 and I270) at 2-3 and 4 Darley Place which are heritage items of local significance.



**Figure 5** Site's heritage context (Site outlined in blue)

Source: City of Sydney via NSW Legislation

The existing development is identified as a detracting item to the Oxford Street and Victoria Street HCA in accordance with the Sydney Development Control Plan 2012 (Sydney DCP 2012). As such, the design of the proposal and its building height has sought to deliver a development outcome that respects the prevailing heritage character of the area and street in terms of bulk, form and scale and materiality, therefore providing an improved heritage outcome for the streetscape and HCA.

As confirmed in the Heritage Impact Statement (HIS) appended to the SEE (refer **Appendix H**), the proposed development has been designed to ensure the heritage significance of adjoining and surrounding items is retained. Principally, in relation to the proposed height variation, the proposal continues to align with the height of the adjacent 'Mont Clair' residential flat building. The HIS provides that the increase to the overall height will have no heritage impacts to the adjacent item as it maintains the predominant street setback and alignment of flat buildings, consistent with the principles of the HCA's desired character. The scale and massing are considered responsive to the established height alignment of flat buildings along the street and in particularly the adjoining Mont Clair.

The HIS also comments on the additional height in relation to the adjoining cottage to the south at 1 Darley Place. Urbis Heritage comments that the height and scale of the proposed development will not further impact on the heritage significance of the adjacent cottage, given the setback is maintained and the existing building's height and scale dominates the cottage at the rear. As such the additional height does not contribute to any further heritage related impacts on this item, given that existing setbacks are replicated.

As such, that notwithstanding the proposed variation to the building height development standard, the proposal is sympathetic to the surrounding heritage character of the locality and provides a suitable built form response to the adjoining heritage items. Overall, Urbis concludes that its impact on the adjacent heritage items is negligible, and wholistically, the proposed development presents an improved contribution to the HCA. Further discussion regarding heritage is provided at **Section 5.7** and **Appendix H** of the SEE.

#### **Objective (c): to promote the sharing of views outside Central Sydney**

The site is located outside of Central Sydney as defined in the Sydney LEP 2012. Due to the site's location and the height and scale of surrounding buildings, the proposal does not impact views from surrounding residential buildings.

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

As aforementioned, the site is located in an area of inconsistent building heights, although the portion of Liverpool Street bounded by Forbes and Darley Streets, of which the site comprises part of, is characterised by higher density residential flat buildings. In this sense, the proposal has sought to provide a building height that is consistent with the prevailing Liverpool Street wall height, to ensure that the development does not contribute to an inappropriate height transition between Central Sydney and the adjoining areas of Darlinghurst.

As such, notwithstanding the proposed variation to the height of buildings development standard of up to 0.05m for the parapet and 2.2m for the lift overrun and balustrades/planters, the proposed building height is considered to support this objective by being consistent with the built form of adjoining development, therefore maintaining a suitable transition in height.

#### **Objective (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 site is not located within Green Square. Therefore, the objective does not apply to the proposed development.

### **3.2.3 Conclusion on clause 4.(3)(a)**

In summary, compliance with the building height development standard is considered unreasonable and unnecessary since:

- The variation does not result in a building height that is inappropriate for the site and its context, and in fact contributes to a development outcome that will complete and reinforce a street wall along Liverpool Street.
- The variation enables access to functional, high amenity communal and private open spaces on the rooftop in response to the site's dense urban context, which is in full alignment with the objectives of the NSW ADG.



- An appropriate transition to surrounding heritage items and the broader HCA is achieved, as confirmed by the HIS appended to the SEE notwithstanding the variation.
- Views from key public vantage points and surrounding buildings will not be negatively impacted by the proposed variation.
- The proposal generally replicates the prevailing maximum height of surrounding buildings and therefore does not impact height transitions between Central Sydney and adjoining lower density areas.

### 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]. 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.

#### 3.3.1 Provision of Communal and Private Open Space

It is reiterated that the additional built form provided above the prescribed maximum height substantively comprises the lift/stairs overrun for equitable accessing to the rooftop, as well as balustrades and planters framing the communal and private open spaces on said rooftop. As aforementioned in **Section 3.2.2**, the provision of these areas is in direct alignment with the provisions of the NSW ADG, the principal function of which is to maximise residential amenity in all new apartment buildings through providing Design Criteria as well as a set of Design Guidance principles to acknowledge where rigid numerical controls (the criteria) are not always able to be achieved due to various site-specific constraints.

As has been detailed throughout this Clause 4.6 variation request and within the relevant sections of the SEE, the site's inherent constraints have necessitated that the provision of communal open space must be on the partially provided on the rooftop, as this most appropriately harmonises residential amenity and the broader development's responsiveness to its surrounding context. As such, notwithstanding the proposed variation, the additional proposed height will support the use of the roof as a high amenity open space for all residents, enabling the broader development scheme to achieve the objectives of the NSW ADG, which is given statutory effect by SEPP 65.

To this end, it is considered that achieving a substantial provision of communal and private open space is a sufficient environmental planning ground to warrant a variation of the maximum building height provision.

#### 3.3.2 No adverse visual impacts

The proposed additional height will not have an adverse visual impact when viewed from public domain areas surrounding the site. Principally, this is a result of the overrun's setback from the parapet, which, as can be seen below in **Figure 6**, means that the portion of the development exceeding the height limit is indiscernible from the public domain.





**Figure 6 Proposed development as viewed from Liverpool Street**

Source: Woods Bagot

Whilst the balustrades and planters atop the parapet technically vary the height provision as well, these represent a negligible protrusion above the development standard and are not considered to give rise to any adverse impacts. The planters will facilitate rooftop landscaping which will enhance and embellish the building, providing an improved sustainability outcome.

As such, it can be concluded that the proposed variation does not generate any adverse visual impacts.

### 3.3.3 Substantive compliance with other built form controls

The desired future character expressed for the site in the LEP planning controls is a maximum 22m height limit as well as a maximum 3:1 FSR (under Clause 4.4 of the Sydney LEP 2012). As aforementioned, the LEP controls for the locality provide for no consistency in building heights and are varied in immediate proximity to the site (see **Figure 1**).

Further, when measured to the top of the parapet, the proposed development presents a height of 22.05m which is a negligible exceedance to the maximum building height control, and it is noted that the proposal also maintains compliance with the maximum 3.0:1 FSR control. As such, notwithstanding the height variation, the proposed development remains consistent with the bulk and scale of the site envisaged through the principal development standards under the Sydney LEP 2012. The proposed variation to the maximum building height standard therefore does not contribute to a development outcome that is inconsistent with the built form capacity afforded to the site under the planning controls.

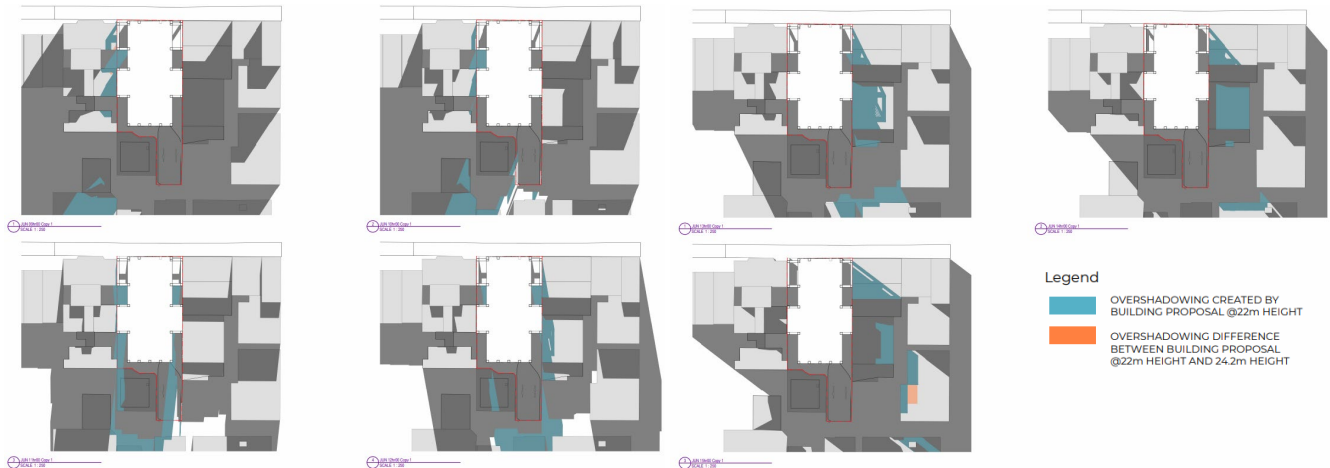
The variation of the development standard in this instance:

- Is not significant or material;
- continues to ensure that the overall height of the development is appropriate for the site and its context; and
- does not generate any direct adverse visual or heritage related impacts.

### 3.3.4 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, the variation will not result in significant additional overshadowing impacts to the surrounding public realm or existing residential receivers surrounding the site. The shadow diagrams provided as part of the Architectural Plans (refer **Appendix A** and **Figure 7**) provides a comparison of the shadows cast by the development at the 22m height and at the proposed 24.2m height. This provides that on 21 June (being the worst case scenario) the additional height only casts minor additional shadow at 3pm onto the roof of the building at 3-5 Darley Street. Therefore, the additional height does not contribute to the proposal's shadowing extent on the public domain or neighbouring properties windows and private open space. This is by virtue of its location within the central portion of the rooftop.



**Figure 7 Additional shadowing created by height variation**

Source: Woods Bagot

In regard to privacy for surrounding residential receivers, it is noted that the trafficable areas of the rooftop are well setback from the boundaries with both 347 and 355-357 Liverpool Street, ensuring overlooking to residential receivers is minimised. Irrespective, it is also noted that both adjoining buildings present largely inactive facades to the interface with the site, and as such do not have high sensitivity to overlooking and privacy impacts.

In regard to view impacts, there are no known views obtained over the existing site. Accordingly, the additional height will not disrupt views from surrounding properties.

#### Consistency with Objectives 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 1** we consider the proposal is broadly consistent with each object, notwithstanding the proposed variation of the height development standard.

**Table 1 Consistency with the objectives 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 proposed height variation will promote the social and economic welfare of future residents by delivering usable and equitably accessible rooftop space that contributes to a significantly improved level of residential amenity on the site.
(b) to facilitate ecologically sustainable development by	The proposed variation allows for building services and ancillary site facilities (communal open space and structures) to be located above the mapped maximum

Object	Comment
<i>integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment</i>	height limit. It will facilitate the equitable usability of the rooftop terrace by future residents, providing a highly sustainable development outcome. Further, the building height variation will have no negative impact on environmental and social considerations and will support the economic health of Sydney.
<i>(c) to promote the orderly and economic use and development of land</i>	<p>The site is strategically located, in close proximity to existing heavy rail, bus and light rail to service future residents. Strict compliance with the maximum building height control would be a lost opportunity to enable communal and private open space and broader utility of the rooftop which will contribute to the exceptional residential amenity provided by the proposed development. Reduction of the building by one floor to comply with the height standard, would also below the site's environmental capacity (X:1) and represent a lost opportunity for additional dwellings in the Sydney housing market.</p> <p>The proposal with a variation to the maximum building height control is a balanced and orderly design outcome that responds to the unique characteristics of the site and does not represent the over intensification of land.</p>
<i>(d) to promote the delivery and maintenance of affordable housing</i>	The proposed variation does not directly relate to the provision of affordable housing. Affordable housing contributions will be payable and are based on the floorspace/yield of the development. A higher contribution is therefore payable for a development achieving the site FSR (3:1) and in this instance a minor variation of the height,
<i>(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats</i>	The proposal, inclusive of height variation, will not have any impact on threatened species or ecological communities.
<i>(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)</i>	The proposal, inclusive of height variation, will not impact built or cultural heritage. This is further detailed at <b>Section 5.7</b> of the SEE, as well as the HIS provided at <b>Appendix H</b> .
<i>(g) to promote good design and amenity of the built environment</i>	The proposal will promote good design and amenity of the built environment by exhibiting a high quality and sculptured design which adds to the architectural diversity of Darlinghurst. The proposed height variation has drawn on contextual cues from adjacent residential flat buildings as well as the maximum building height controls in the locality in order to deliver a development outcome that intrinsically fits in to the neighbourhood context. The proposal, and height variation better responds to and completes the streetwall of Liverpool Street.
<i>(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants</i>	The proposal, inclusive of height variation, will comply with the relevant provisions of the BCA through allowing equitable rooftop access and will promote the health and safety of occupants.
<i>(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State</i>	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 residential development in Darlinghurst and more broadly City of Sydney.
<i>(j) to provide increased opportunity for community participation in environmental planning and assessment</i>	The proposed development and this Clause 4.6 variation will be publicly exhibited in accordance with the requirements of Council's Community Participation Plan.

### 3.3.5 Conclusion of clause 4.6(3)(b)

In conclusion, there are sufficient environmental planning grounds to justify contravening the development standard as:

- The additional height supports the use of the rooftop as a communal and private open space, which will provide high quality spaces and amenity to the residents of the new building and is an essential aspect of residential development as interpreted by the NSW ADG and SEPP 65.

- The additional height will not result in adverse environmental impacts including overshadowing, privacy and views.
- The proposal demonstrates substantive compliance with other built form controls, which ensures that the proposed variation does not result in the proposal being out of character with the built form capacity afforded the site under the LEP development standards.
- The proposed variation maintains the development's consistency with the objectives of the EP&A Act.

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

As detailed above, 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 therefore in the public interest as 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 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 development standard, for the reasons discussed in **Section 3.2.2** of this report.

#### 3.5.2 Consistency with objectives of the zone

The objectives of the R1 – General Residential Zone are as follows:

- To provide for the housing needs of the community.
- To provide for a variety of housing types and densities.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To maintain the existing land use pattern of predominantly residential uses.

The proposed development has been assessed against these objectives for the R1 – General Residential Zone and it can be asserted that the departure from the height of building development standard does not result in any inconsistencies with said objectives. Notwithstanding the proposed variation, the proposed development satisfies the R1 – General Residential zone objectives for the following reasons:



- The proposal will continue to deliver additional, upgraded housing stock for the locality, in full alignment with the strategic objectives of the City of Sydney and the site's permitted FSR.
- The proposed variation does not preclude the development from delivering a variety of housing typologies that will serve the future housing needs of the community; and
- The proposed variation maintains the compatibility of the proposed development with the prevailing residential land use pattern of the locality.

### 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 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.*

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 development standard does not raise any matter of significance for State or regional planning. We do note, however, that the proposal is consistent with the Greater Sydney Region Plan – A Metropolis of Three Cities and the Eastern City District Plan in that it:

- Provides accommodation to meet the needs of the local population, both at the present time and in the future as Sydney's population grows and ages;
- Does not adversely impact on surrounding areas of local heritage; and
- Includes the redevelopment of an urban renewal site in proximity to public transport.

Further, the additional height proposed does not result in any adverse impact on the surrounding area, and results in an enhanced architectural design that facilitates the provision of high quality rooftop private and communal open space.

#### 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 variation of the development standard and it is considered to be in the public interest for the variation to be supported in this case. It is also considered that there is no public benefit in maintaining the numerical building height development standard in this instance. In fact, strictly adhering to the maximum height development standard would result in a worse public outcome for the site, given that it would necessitate deletion of the rooftop terrace and/or the top floor of residential accommodation and therefore eliminate the proposal's provision of communal and private open space and reduce the number of dwellings/floorspace to well below the allowable FSR control. Notably, this would significantly impact the residential supply and residential amenity offered by the site.

Given this, as well as the justification provided throughout this Clause 4.6 variation request, maintaining and enforcing the development standard in this case would unreasonably prevent the orderly and economic development of this detracting and underutilised site, and would unnecessarily encumber the various community benefits this development brings.

#### 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 assessment above demonstrates that compliance with the height development standard contained in clause 4.3 of the Sydney LEP 2012 is unreasonable and unnecessary in the circumstances of this case and that the justification for varying this development standard is well founded. The variation allows for the orderly and economic use of the land in an appropriate manner, and an improved outcome in planning terms.

This Clause 4.6 variation demonstrates that, notwithstanding the variation from the height development standard, the proposed development:

- Achieves the objectives of clause 4.3 of the Sydney LEP 2012 by:
  - Ensuring that the height of the development is in-keeping with the scale and character of neighbouring buildings and is of a form that will not result in any unreasonable environmental impacts.
  - Ensuring that an appropriate height transition is maintained between the higher density character of Central Sydney and neighbouring Darlinghurst.
  - Respecting the character, appearance and scale of the surrounding heritage conservation area (HCA) including the retained heritage fabric, and nearby heritage buildings.
- Will provide a landscaped rooftop terrace for both communal and private open space, in alignment with the objectives and provisions prescribed by the NSW Apartment Design Guide and SEPP 65;
- Will have an appropriate impact, in terms of its scale, form and massing.
- Will promote the orderly and efficient use of land, in accordance with the objects of the *Environmental Planning and Assessment Act 1979* (the Act).
- Is in the public interest in light of the numerous positive social, ecological, design and economic impacts it will deliver for the Site.

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