

Attachment C

<p>Clause 4.6 Variation Request – Height of Buildings</p>
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ANNEXURE D

Clause 4.6 Variation – Building Height





Clause 4.6 Variation Statement – Maximum Height (SLEP Clause 4.3 and Housing SEPP Section 16(3))

1. Height of Buildings standard

Clause 4.3(2) of *Sydney Local Environmental Plan 2012* (SLEP 2012) relates to the maximum height requirements and refers to the Height of Buildings Map. The relevant map identifies the subject site as having a maximum height of 15m.

It is noted however that this application is made pursuant to *Part 2 Development for affordable housing, Division 1 In-fill affordable housing, Section 16 Affordable housing requirements for additional floor space ratio*, subsection (3) of the Housing SEPP. Specifically, this application seeks to benefit from the 21% floor space ratio (FSR) and building height bonuses under Section 16(3) of the Housing SEPP, where affordable housing is provided to 10.5% of the total gross floor area (GFA) for a minimum 15-year period. Accordingly, and per the Housing SEPP, the subject site is therefore permitted a maximum building height of 18.15m (where the 15m limit applies).

Building height is defined as:

building height (or height of building) means—

(a) *in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*

(b) *in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*

including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

The relevant map [sheet HOB_0021] indicates that the subject site contains a maximum building height of 15m, as demonstrated in **Figure 20** below. As identified above, when applying the 21% building height bonus afforded by Section 16(3) of the Housing SEPP, a maximum height of 18.15m is permitted.

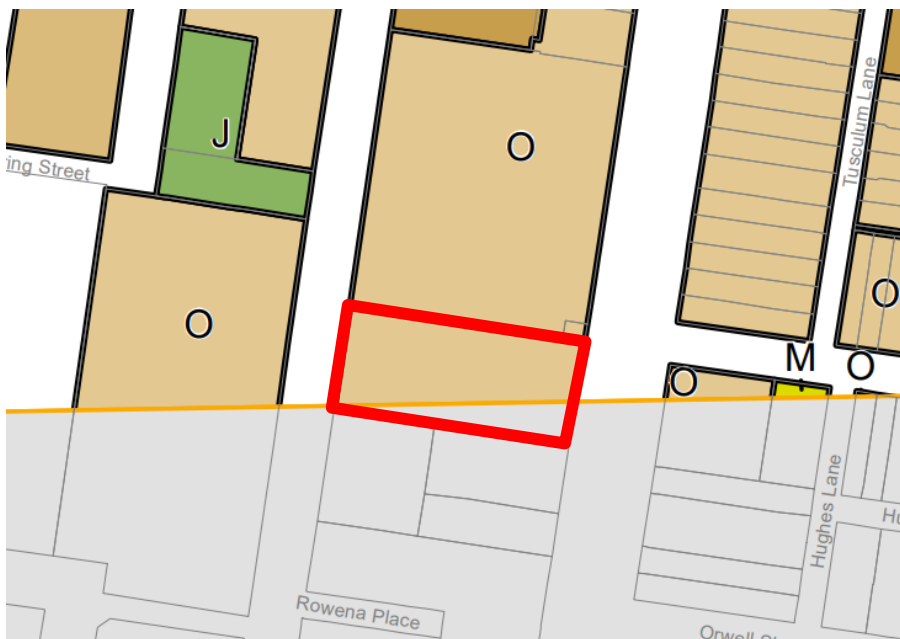


Figure 20 Extract from Height of Buildings Map [O=15m]

2. Proposed variation to height of buildings development standard

The proposed development has a maximum height of 24.88m as measured to the balustrades of the Level 08 private open space, addressing Brougham Street, from the existing ground level, and is therefore non-compliant. This is consistent with the definition of building height contained within the SLEP, in which it has been measured from the existing ground level.

Accordingly, the proposal is non-compliant 18.15m building height development standard set by the Housing SEPP Section 16(3), and seeks for a maximum variation of 6.73m or 37%.

Table 6 below provides an analysis of the maximum building height when measured against 16(3) of the Housing SEPP. For completeness, Table 6 also assesses the maximum building height against the base standard as a precautionary measure, should this be required by the consent authority. However and for the purposes of this Clause 4.6, the maximum building height has been assessed against the bonus permitted by 16(3) of the Housing SEPP.

Table 6 Maximum building heights			
Component	Building Height	Housing SEPP Bonus Height	Variation (Base Standard)
Victoria Street			
Parapet edge fronting Victoria Street	15.4m	Compliant	0.4m or 2.6%
Planter boxes fronting Victoria Street	16.2m	Compliant	1.2m or 8%
Balustrades fronting Victoria Street	18m	Compliant	3m or 20%
Brougham Street			
Roof form, Level 04 apartments	16.6m	Compliant	1.6m or 10.6%
Awning structures, Level 05 apartments	19.8m	Non-compliant, 1.65m or 9%	4.8m or 32%



Table 6 Maximum building heights			
Roof form, Level 06 apartments	20.4m	Non-compliant, 2.25m or 12.4%	5.4m or 36%
Balustrades, Level 08 apartments	24.88m	Non-compliant, 6.73m or 44.8%	9.88m or 65.8%
Roof form, Level 09	19.7m	Non-compliant, 1.55m or 10.3%	4.7m or 31.3%
Centrally within site			
Lift core	22.9m	Non-compliant, 4.75m or 26.1%	7.9m or 52.6%
Stair core	21.6m	Non-compliant, 3.45m or 19%	6.6m or 44%
Balustrades to swimming pool	21.35m	Non-compliant, 3.2m or 17.6%	6.35m or 42.3%
Balustrades to communal open space	19.2m	Non-compliant, 1.05m or 5.7%	4.2m or 28%

The above measurements are from the existing ground level, where set by the lowest excavated floor level of the existing building. Where the landform has not been previously modified, it is measured from the existing topography. This method for measurement is consistent with the findings of *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC158*.

Of relevance to this application, the existing building is also non-compliant with the development standard as measured from the existing ground level, if the 18.15m maximum height were to apply. Specifically, the following is noted:

Brougham Street

- o Maximum height of 30.8m (12.65m or 69.69%) to the roof top element (RL45.31) addressing Brougham Street;
- o Height of 30.5m (12.35m or 68%) to the upper parapet edge (RL42.35) addressing Brougham Street;
- o Height of 22.6m (4.45m or 24.5%) to the parapet edge (RL 34.61) fronting Brougham Street.

Victoria Street

- o Height of 21.2m (3.05m or 16.8%) to the roof element (RL49.11) fronting Victoria Street; and
- o Height of 18.8m to 19m (0.65m to 0.85m or 4.6%) to the building core (RL 45.01 to 46.43) fronting Victoria Street.

Figures 21 to 24 below are height blanket diagrams as measured from existing finished floor level when comparing the existing and proposed buildings, against the 15m base and 18.15m bonus standards.

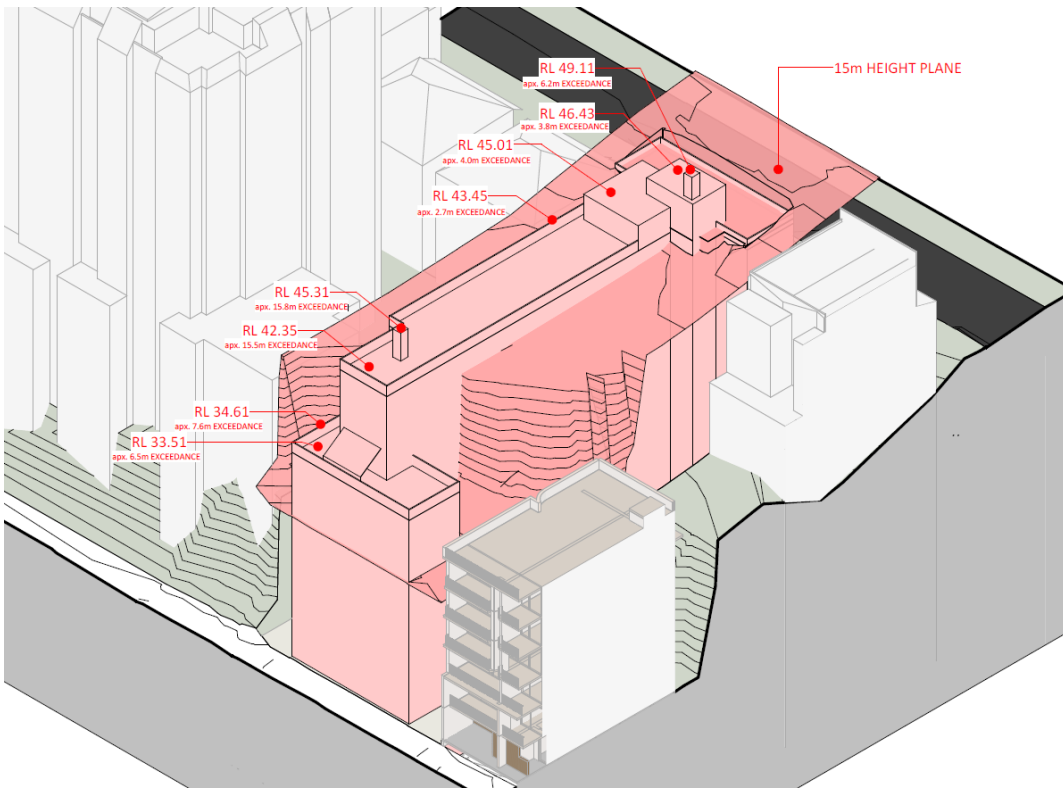


Figure 21 Height blanket diagrams of existing building (15m height plane)

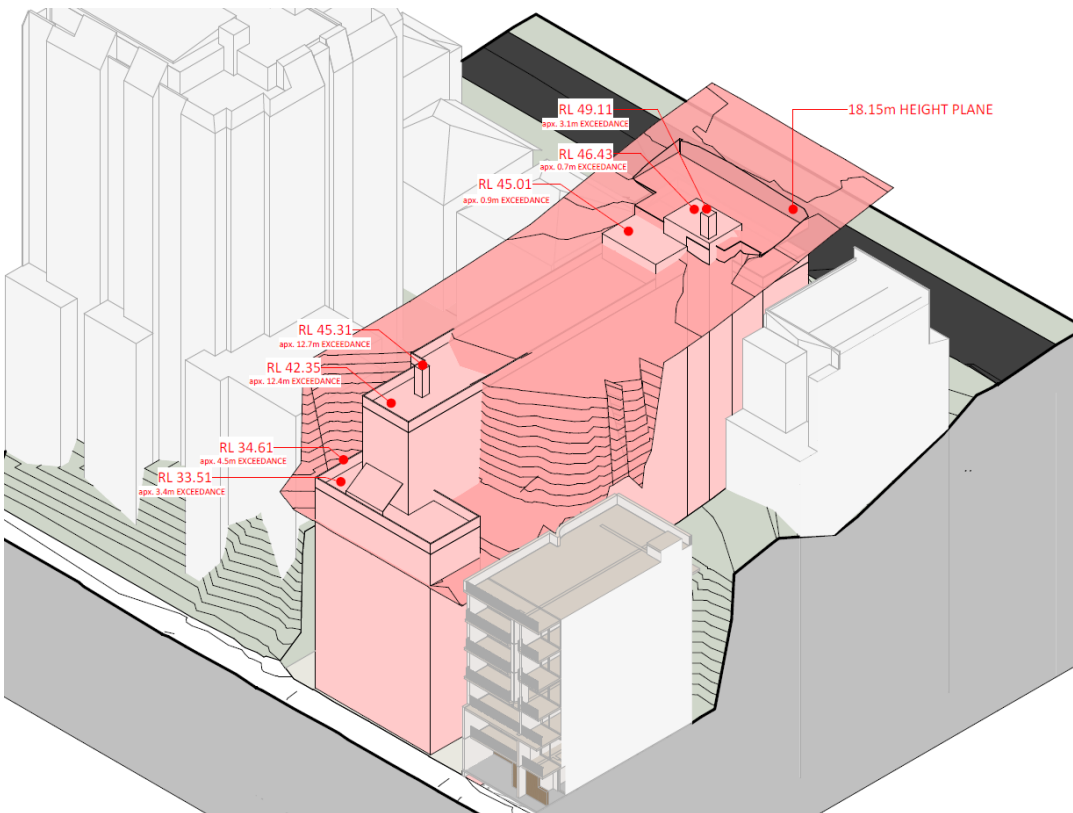


Figure 22 Height blanket diagrams of existing building (18.15m height plane)

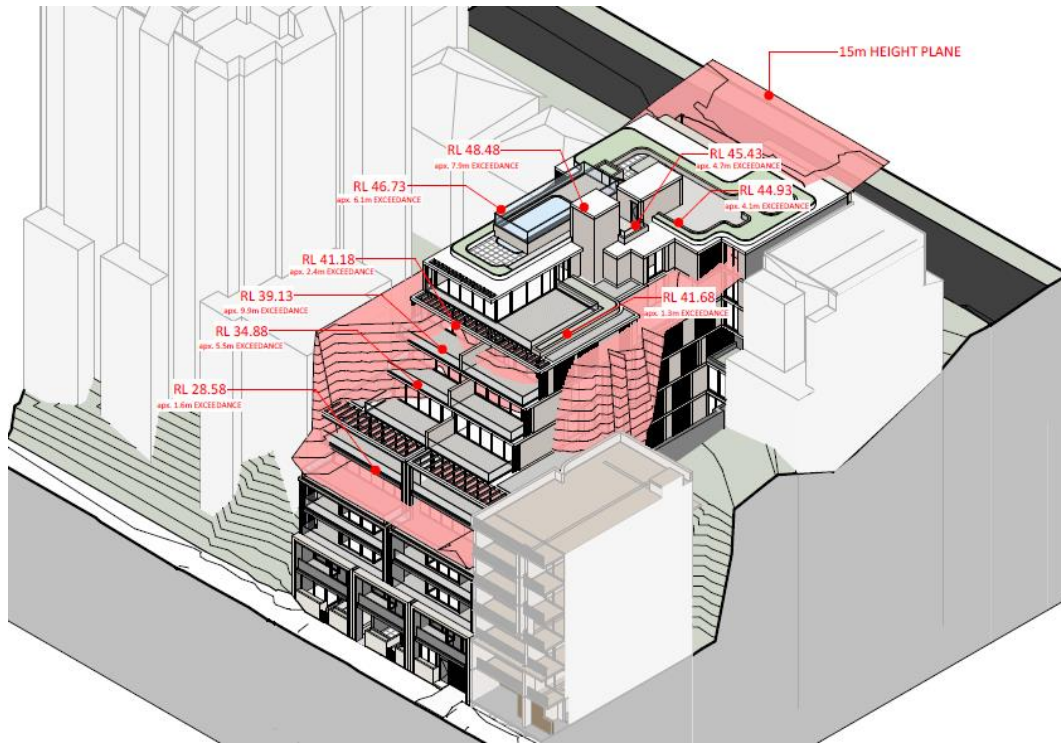


Figure 23 Height blanket diagram of proposed building with base (15m) standard

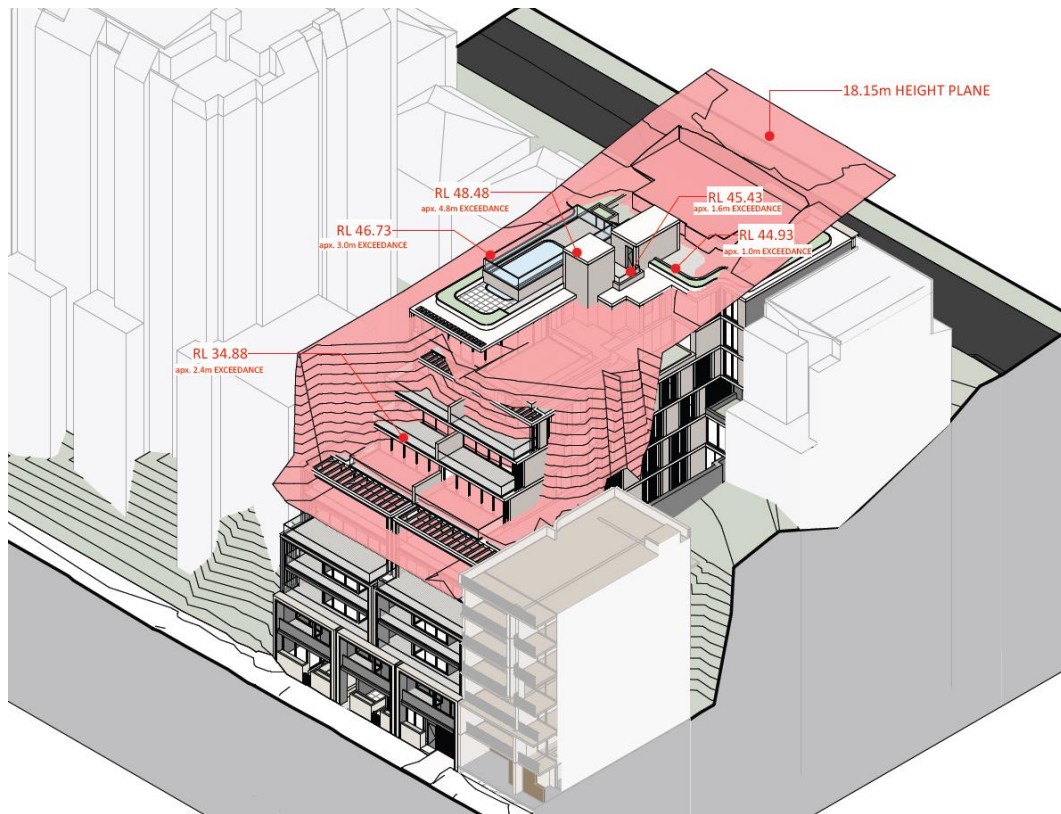


Figure 24 Height blanket diagram of proposed building with bonus (18.15m) standard

3. Clause 4.6 to SLEP 2012

The objectives and provisions of clause 4.6 are as follows:

(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 to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*

(a) *compliance with the development standard is unreasonable or unnecessary in the circumstances, and*

(b) *there are sufficient environmental planning grounds to justify the contravention of the development standard.*

Note— *The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).*

(4) *The consent authority must keep a record of its assessment carried out under subclause (3).*

(5) *(Repealed)*

(6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—*

(a) *the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*

(b) *the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

(7) *(Repealed)*

(8) *This clause does not allow development consent to be granted for development that would contravene any of the following—*

(a) *a development standard for complying development,*

(b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*

- (c) clause 5.4,
- (caa) clause 5.5,
- (ca) clause 4.3 (Height of buildings), but only in relation to land shown as being in Area 1 or Area 2 on the Height of Buildings Map,
- (cab) clause 4.5A (Balconies on certain residential flat buildings),
- (cb) clause 5.3A (Development below ground level in Zone RE1),
- (cc) clause 6.10 (Heritage floor space),
- (cd) clause 6.11 (Utilisation of certain additional floor space requires allocation of heritage floor space),
- (cda) clause 6.11A (Temporary alternative heritage arrangements in relation to allocation of heritage floor space),
- (cdb) clause 6.16 (Erection of tall buildings in Central Sydney),
- (ce) clause 6.17 (Sun access planes),
- (cf) clause 6.18 (Overshadowing of certain public places), unless the additional overshadowing is caused by playground equipment, a shade structure, an awning, a sculpture or artwork, a community notice or a public information sign,
- (cg) clause 6.19 (View planes), except in relation to the Martin Place View of western sky view protection plane,
- (cga) clause 6.26 (AMP Circular Quay precinct),
- (cgb) clause 6.29 (58–60 Martin Place, Sydney),
- (cgc) clause 6.33 (230–238 Sussex Street, Sydney),
- (cgd) clause 6.35 (45 Murray Street, Pyrmont), but only if the development is an alteration or addition to an existing building,
- (cge) clause 6.36 (12–20 Rosebery Avenue, 22–40 Rosebery Avenue and 108 Dalmeny Avenue, Rosebery),
- (cgf) clause 6.37 (296–298 Botany Road and 284 Wyndham Street, Alexandria),
- (cgg) clause 6.41 (7–15 Randle Street, Surry Hills),
- (cgh) clause 6.42 (102–106 Dunning Avenue, Rosebery),
- (cgi) clause 6.40 (2–32 Junction Street, Forest Lodge),
- (cgj) clause 6.43 (Danks Street South Precinct),
- (cgk) clause 6.52 (1–11 Oxford Street, Paddington),
- (cgl) clause 6.55—4–22 Wentworth Avenue, Surry Hills,
- (cgm) clause 6.56—24–40 Wentworth Avenue, Surry Hills,

- (cgn) clause 6.58—187–189 Thomas Street, Haymarket,
- (ch) Division 1 of Part 7 (Car parking ancillary to other development),
- (ci) clause 6.19A (Views of Sydney Harbour),
- (cj) clause 6.21E(2) and (5) (Tower cluster areas),
- (ck) clause 6.60C—2 Chifley Square, Sydney,
- (cl) clause 6.60D—Oxford Street Cultural and Creative Precinct,
- (cm) clause 6.60E—Flinders Street and Oxford Street,
- (cn) clause 6.60G—15–23 Hunter Street and 103–107 Pitt Street, Sydney,
- (co) clause 6.60H—Hunter Street Metro Station,
- (cp) clause 6.60I—85–93 Commonwealth Street, Surry Hills.

The development standards in Clause 4.3 are not “expressly excluded” from the operation of Clause 4.6.

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

Of relevance to Clause 4.6(3)(a), in *Wehbe v Pittwater Council (2007) NSW LEC 827* Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

“ An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.”

The judgement goes on to state that:

“ The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 and 5 for the purposes of this Clause 4.6 variation [our underline]):

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 of 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 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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 16), Preston CJ makes reference to Wehbe and states:

“...Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.”

Clause 4.6(3)(a) requires that the written request to vary a development standard demonstrate that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case. Requiring strict compliance with the standard is unreasonable or unnecessary because the development is consistent with the standard objectives, even with the proposed variation, as discussed in further detail below.

In addition to the above and in accordance with 5 of *Wehbe V Pittwater Council*, strict compliance with all current planning provisions, namely building height (including the Housing SEPP bonuses), is incompatible as it applies to land that should have not been included in the zoning. That is, at the time the SLEP 2012 was adopted, the existing development on the site and numerous developments within the surrounding locality, did not comply with the maximum building height of 15m. The adopted SLEP 2012 did not take into account the height of the existing built forms, and importantly, that it is improbable that existing buildings of this scale would be demolished and rebuilt with a compliant building height of 15m. If the SLEP 2012 was prepared with detailed consideration of the existing building heights in the locality, it would have included controls which are more reflective of that already established on-site and within the surrounding locality.

In this regard, the current 15m to 18.15m maximum building height is illogical and inappropriate at the time it was implemented as part of the SLEP 2012, failing to consider the context of the locality and contribution of the existing building on-site to the height of buildings development standard.

The objectives and relevant provisions of Clause 4.3 of SLEP 2012 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.*

In order to address the requirements of subclause 4.6(3)(a), each of the relevant objectives of Clause 4.3 are addressed in turn below. It is noted that objectives (d) and (e) do not apply to the proposal and are therefore not considered.

In addition, whilst it is noted that there are no objectives for the height bonus afforded by the Housing SEPP, the objective of *Division 1 In-fill affordable housing* of the Housing SEPP is also addressed.

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

The subject site is located within the *Potts Point Heritage Conservation Area*, within 300m walking distance to Kings Cross Railway Station. The site and surrounding locality is permitted an increase in density, per the Housing SEPP, to encourage affordable, transit orientated development.

The proposal has undertaken detailed site and contextual analysis to ensure that the proposed height variations are an appropriate response to the conditions of the site and surrounding context. Furthermore, the proposal has also considered the building envelope, footprint and height of existing building, which has been in-situ for a considerable period of time and has established a height which is appropriate to the immediate and wider context of the locality. Similarly, the height and context of surrounding development, including those both existing and recently approved, have also been considered.

As discussed, the non-compliant elements as they address Brougham Street predominantly relate to open form balcony elements, awning structures, glazing and louvers, which are contained within a recessive built form and are designed as open and light-weight structures. These design measures and consistency with the established building heights, both existing and neighbouring, ultimately limits the visual and physical impact of the variations as viewed from the public domain. This is considered to be an appropriate response to the conditions of the site and surrounding context. To Victoria Street, the proposal is compliant with the building height and has been designed to provide a parapet edge which is consistent with the neighbouring heritage items. Centrally, the non-compliances as they pertain to the building core and roof top communal open spaces are setback from the compliant envelope below therefore mitigating impact and ensuring appropriateness of bulk and scale in the locality.

As detailed, the proposal is designed with a maximum building height which ensures a consistency in streetscape and built form character of the locality. That is, as the built form addresses both frontages, the proposal will either comply with the development standard and where it is exceeded, be compatible with the surrounding development in a well-designed form as to minimise impact. As a result, the perceived height, bulk and scale of the development is consistent with (or lesser) that which is existing and is appropriate to the locality. It is prudent to note that to Brougham Street, the existing building contains a sheer, nine storey façade with significant height non-compliance to physical built form. This is substantially reduced as part of the proposed scheme and replaced with balcony elements, awning structures, louvers and glazing, within a recessive form, which are open and light weight in nature.

As a result, the proposal has been designed to ensure compatibility with the existing and desired character of the locality, including the existing building on-site and within the surrounding locality. The proposal provides a strategic response to the conditions of the site and neighbouring properties and is compliant with the development standard where it has the most bearing on character. The proposed variation is suitably designed so that it will not have any adverse visual or physical impact to the locality.

Therefore Objective (a) is achieved.

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

The subject site is within the vicinity of numerous heritage items and is located within the *Potts Point Heritage Conservation Area*. The proposal has been designed to provide an appropriate balance providing a complementary, modern form, with an urban fabric and architectural design which is compatible with eclectic mix of neighbouring properties, including those heritage listed (and not). As it relates to building height, the proposed development is

designed to maintain (or reduce) that established on the subject site. That is, the building envelope and form which has the most bearing on the streetscape, conservation area and heritage items, to Victoria Street, is compliant with the 18.15m development standard and aligns with the neighbouring properties, which is considered acceptable.

Whilst varying the standard to Brougham Street, the non-compliances are designed so that they consistent with that existing on the subject site and neighbouring properties, both existing and approved. They are generally open in form, light-weight in nature and include necessary setbacks to minimise any impact to bulk, scale or character. Where the non-compliances pertain to internalised gross floor area, this is very minor and is concealed by the described light weight elements and retreat suitably from the public domain, thus ensuring an appropriate transition of height to the surrounding locality. In fact, the proposal represents significant, wholesale improvements when compared to the existing building, which is identified as a detracting item per SDCP and contains a sheer, unarticulated nine storey façade to Brougham Street.

Importantly, the portion of the development which has the most bearing on the character of the heritage conservation area and surrounding heritage items, to Victoria Street, is compliant with the standard, and where variations are present centrally within the site, they are concealed. Subsequently and as set out in this Variation, the non-compliant elements form part of a recessive design and are consistent with the existing building and surrounding locality, to mitigate any impact to the transition of height within the locality. The recessed nature of the non-compliances is correlated with simplified architectural design, geometry and materiality, to ensure there will be a negligible impact to the character and significance of the heritage conservation area and items.

For the reasons discussed above, the extent of the height breach is appropriate and the consistent with Objective (b).

(c) to promote the sharing of views outside Central Sydney,

In terms of view loss, the proposed variations will not result in any significant loss of views or outlook when compared to the existing building. The proposed development, as described, is designed to maintain the established bulk, scale and height, albeit within a high quality, contemporary design. Where changes to the envelope are proposed throughout the development (where they are non-compliant), these has been sensitively designed as to mitigate any adverse view loss from the surrounding properties or public domain. Importantly, the bulk of changes to building envelope are located below the maximum building height and is therefore considered acceptable as discussed in the Statement of Environmental Effects.

In terms of the height which exceeds the development standard, this forms part of the envelope which addresses Brougham Street and centrally within the site. Importantly and as detailed, the building envelopes are purposefully designed as recessive to ensure that views from surrounding properties will be maintained, or in some instances, improved. The non-compliances to balcony spaces, awnings, communal open space elements and built form is strategically designed so that there will be no adverse impact to iconic views. This is shown in the View Loss Assessment prepared by *Planning Ingenuity* and View Impact Imagery prepared by *Urbaine*. In this regard, the additional building height is located centrally within the site, is appropriately setback from the site boundaries and will not create any adverse view loss to the surrounding properties.

It is also prudent to note that the current building, as it addresses the neighbouring properties, contains unarticulated, sheer facades where non-compliant with the standard. The proposal will rectify this through the provision of a highly articulated contemporary development. This ensures that the visual impact of the development is significantly reduced, thus enhancing the visual amenity of neighbouring properties.

As such, any potential view impact is a result of the proposed building envelope which complies with the development standard and is consistent with the building footprint established on the subject site. Whilst the proposal will increase the maximum building height in portions of the site, as shown in the supporting documentation, these non-compliant elements will not result in any additional adverse view loss. It is therefore considered that the proposal satisfies objective (c).

In accordance with *Division 1 In-fill affordable housing* of Housing SEPP, 15A *Objective of division* is reproduced and considered below.

The objective of this division is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.

The proposed development, including the non-compliant building height, will facilitate the delivery of new in-fill affordable housing which will meet the needs of very low, low and moderate income households. To request strict compliance and require deletion of floor area, or associated private and communal open spaces, will reduce the provision of affordable residential accommodation (and associated facilities), without any benefit to streetscape character or amenity of neighbouring properties. The proposed distribution of floor space is strategic and has considered the site constraints and relationship to neighbouring properties. The proposed non-compliance is a result of the site constraints and relationship to the existing building on-site and neighbouring properties, both existing and approved. As such, the proposal will satisfy the objective of *Division 1 In-fill affordable housing* despite non-compliance.

5. Sufficient environmental planning grounds (Clause 4.6(3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard. Specifically, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (paragraph 24) states:

*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].*

The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* and *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248* whereby Justice Pain ratified the original decision of Commissioner Pearson. The following planning grounds are submitted to justify contravening the maximum building height:

- 1. The proposal will deliver affordable housing in accordance with the Housing SEPP.**
 - a. The proposal will seek to benefit from the 21% bonus height and floor space afforded by the Housing SEPP, in lieu of delivering affordable housing. The proposed development, including the non-compliant building height, will seek to distribute floor space centrally within the site, to deliver the most appropriate streetscape outcome and balance the amenity of future residents and neighbouring properties. Whilst the development will result in non-compliance with the 18.15m standard, the following is noted:
 - i. The proposed development is fully compliant along Victoria Street;





- ii. Centrally, the built form exceeds the 18.15m standard to the lift overrun, fire stairs and communal open space, which provides a high quality area with high levels of amenity, including solar access, privacy and views. The lift overrun and stairs also provide equitable access and enable safe exit (in the event of a fire) and to remove these elements to improve compliance, would be an inferior outcome; and
 - iii. The non-compliances to Brougham Street are a result of the steeply sloping topography and generally limited to light-weight, open balcony elements and minor building slabs. The increased height reduces the extent of non-compliance as it pertains to internalised floor area and is therefore an improved outcome.
- b. Object 1.3(d) of the EP&A Act is to “*promote the delivery and maintenance of affordable housing*”. The proposal will deliver a distinctive public benefit through the provision of 5 affordable housing apartments, which will be allocated for a period of 15 years to a registered community housing provider, in accordance with the Housing SEPP. The considerable public benefit afforded by delivering a high quality contemporary development, with an appropriate quantum of affordable housing, must be considered in this variation request. To require strict compliance with the bonus height would significantly impact the provision of affordable housing, communal open space and high quality apartments.

2. The building height has already been established for the subject site

- a. As measured from the existing ground level, the current building on-site is a maximum height of 30.9m (12.75m or 70%) to the roof element addressing Brougham Street, based on the 18.15m standard. Additional existing non-compliances range between 4.45m to 12.35m to the envelope and parapet edges of the building directly fronting Brougham Street. Orientated towards Victoria Street, an existing building height of 18.5m to 21.2m to the building core and roof top elements. As the existing building has been in-situ for a considerable period of time, the height, bulk and scale on the subject site has been established. The surrounding developments similarly exceed the maximum building height, namely, Nos. 101-115 Victoria Street to the north. This demonstrates that existing buildings exceeded the building height standard (of 15m) upon adoption of SLEP 2012. This results in an eclectic mix of heights and built forms. As such, flexibility to the standard should be applied as the height of buildings on site and within the locality pre-date the implementation standard.
- b. The proposal is therefore designed to ensure consistency with the established building height on-site and to the neighbouring properties, both existing and recently approved. Specifically, and orientated towards Brougham Street, the breach is at its greatest to the balustrades of the Level 08 private open space, as measured from the existing floor level, with a height of 24.88m, which is recessed from the public domain. There are additional variations to Brougham Street, ranging between 1.6m to 2.25m, which pertain to balcony and parapet elements, awnings and balustrades, all of which recess from the public domain as building height increases. Centrally, the proposal includes non-compliances of 22.9m to the lift overrun, 21.6m to the stair core and







21.35m to the communal open space elements. Importantly, the proposal is designed to comply to Victoria Street, with the parapet edges of the primary façade obtaining a maximum height of 15.4m. Whilst non-compliant, the extent of variations are reduced and specifically located and designed to provide a more suitable response to the streetscape, as is consistent with the neighbouring properties.

- c. Ultimately, the proposed development seeks to reimagine the character of the site through removing a detracting building, which exceeds the development standard, and provide a contemporary form which responds to surrounding developments and heritage character of the locality. The proposal will strategically relocate built form and floor area, as also permitted by the Housing SEPP, as to reduce the extent of variation and environmental impact, when compared to the existing building, through aligning with neighbouring properties and recessing the extent of non-compliances. As a result, the proposal achieves the following:
- The proposal considerably reduces the established building height, bulk and scale, as it opposes Brougham Street. The sheer nine storey façade and maximum building height of 30.3m to 30.9m addressing Brougham Street has been removed, with a recessed built form which responds to the topography. The proposal provides for a parapet height to Brougham Street, which is consistent with that recently approved Nos. 30A-34 Brougham Street. The non-compliances to the upper levels are then recessed and stepped as to reduce visual and physical impact. The non-compliances are located within a highly articulated form including vertical and horizontal elements, balcony, and glazed elements.
 - Centrally within the site, the proposed communal open space, including swimming pool, balustrades and building core, are appropriately setback from the public domain as to mitigate impact. Where the building envelope exceeds the maximum height (centrally within the site), this also forms part of an articulated form appropriate setback from the site boundaries, thus reducing adverse impacts; and
 - To Victoria Street, the proposal is compliant with the standard and is consistent with the building height of the neighbouring heritage item to the south, thus limiting any impact.

3. The topography contributes to the extent of non-compliance

- a. The topography is a site-specific reason that contributes to the extent of this variation. Specifically, the topography falls significantly from Victoria Street to Brougham Street by approximately 18.5m. Centrally and towards the western boundary, the site contains a steep topographical decline of 12m. This topographical decline directly results in, and exacerbates, the extent of non-compliance centrally within the site and towards the Brougham Street frontage. Specifically, the maximum extent of non-compliance, being 24.88m, is part of the site where the topography falls most steeply. This is a specific condition that the LEP height limit does not contemplate, in that the height limit applies equally to a vast area of the LGA with distinctly different topography and contributes to the extent of non-compliance.

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- b. Whilst the topographical variation increases the extent of non-compliance for a portion of the site, it is considered acceptable as the built form is designed to maintain the street frontage height of built form addressing both Victoria Street and Brougham Street. Further to this, the non-compliances, where visible from the public domain, are recessed, pertain to open, light-weight elements and are integrated into the contemporary design to mitigate any adverse impact to bulk and scale of the site. The provision of appropriate setbacks and a stepped built form similarly mitigates impacts to the surrounding developments. Importantly, the existing building contains variations to the maximum building height, which have been refined as part of this proposal.
 - c. To request strict compliance will require significant modification to the built form which will create an incoherent architectural design and will not provide for any distinctive benefits to the character of the locality or amenity of surrounding properties. Specifically, providing a strictly compliant form to Brougham Street and centrally will create detached and inefficiently designed built forms, for vehicle access and parking, provision of services, apartment layout and overall architectural design, which will not result in the delivery of a feasible development. The removal or further recessing of certain elements, such as balconies and awnings, is inferior as it will result in an inconsistent streetscape. Strict compliance is therefore considered to be both unreasonable and unnecessary in the circumstances of the development. As discussed, the remaining height non-compliances have been measured from the existing excavated ground levels, in which it is consistent with the existing buildings and surrounding developments.

4. The proposed non-compliances allow for the delivery of private open spaces and a roof top communal open space

- a. As described, the non-compliances primarily pertain to private open spaces (in the form of balconies), awning structures, glazing and a roof top open space. With regards to the balcony and ancillary elements, these are lightweight in nature and do not result in discernible increase to the bulk and scale of the development as viewed from Brougham Street. These elements play an important role of delivering generous, weather protected private open spaces for the use of future residents. To request strict compliance would require removal of the private open spaces which would not result in any benefits to the character of the locality and would ultimately impact the amenity of future occupants.
- b. In addition, the rooftop provides high quality communal open space which exceeds the 18.15m standard. In order to provide the optimal equitable access to this space, the lift overrun and building core must necessarily breach the height control, in this instance by 21.6m to 22.9m. The following alternatives are both considered to be inferior when compared to that proposed:
 - Provide access to the roof-top via a stair lift. This is suboptimal and should not be pursued given the operational inadequacies of a stair lift and minimal impact created by the lift overrun, as discussed in this Variation;



- To remove the lift core and only allow access via the stairs from the uppermost apartments. This would result in a privatised the roof top terrace, reducing the amenity for the remainder of the apartments and is also suboptimal; and
 - To locate the communal open space at ground level would be inferior as it will achieve subpar amenity, namely solar access, privacy and outlook.
- c. There are additional non-compliances as they pertains to the swimming pool, balustrades, planter boxes and remaining area of the communal open space. Whilst removal of this element would improve compliance with the 18.15m development standard, it will result in the deletion of the communal open space and would be a detriment to the amenity of future occupants without any benefit to the character of the locality and amenity of neighbouring properties.
- d. The social benefits of providing access to a high quality private and communal open space within a contemporary residential flat building in a highly sought after location should be given weight in the consideration of the variation request. It would be a loss to the community (and contrary to the public interest) to deny the variation and require the removal of the building core and communal open space due to the existing site conditions and topography.
- e. The roof top communal open area provides a consolidated open space with good solar access for future residents as encouraged by the Apartment Design Guide (Part 3D). This is good design and amenity of the built environment (objectives of Act). To relocate this would also be an inferior outcome in terms of amenity.

5. The proposed non-compliances allow for the delivery of a well-considered, stepped built form

- a. The proposal is consistent with the building height already established on-site, however, conceals the extent of variations within a high quality, contemporary form, which is inclusive of appropriate architectural design elements and materiality. As detailed, the existing building varied the height standard upon implementation of SLEP and to request strict compliance will result in an inconsistent streetscape character, particularly when considering the relationship to the surrounding streetscape.
- b. Following the above, the non-compliances orientated towards Brougham Street form part of a recessive form, inclusive of increased setbacks and open form balcony elements, awning structures and glazing. Importantly, where the extent of non-compliance is greatest, this pertains to open form elements (as outlined above) thereby reducing the bulk and scale of the variations. The non-compliances as they pertain to internalised floor area are very limited and are also concealed and will therefore not be visually obtrusive or jarring as viewed from the public domain. It is important to note that the narrower width of Brougham Street, and considerable building height of neighbouring developments, namely Nos. 101-115 Victoria Street (to the north), limits the visual and physical impacts of the variation.



6. **The non-compliances achieve a high level of design excellence/good design, based on site analysis**

- a. As discussed, the majority of non-compliances are designed so that they are open in form, light-weight in nature and are appropriately setback to limit any adverse impact to the streetscape, as viewed from the public domain. This has been achieved through the provision of balcony elements, awning structures, glazing and louvers fronting the public domain, therefore reducing bulk, scale and visual impact.
- b. The site contains a steep topographical decline from Victoria Street to Brougham Street, of approximately 18.5m. Whilst the proposal remains non-compliant due to the steep topography, it is designed to reduce the extent of non-compliance. The proposal provides a stepped built form which incorporates increased setbacks from the street frontage boundaries, thus responding to the topography of the site. Furthermore, appropriate setbacks are also provided to the northern and southern (side) boundaries to mitigate impacts to neighbouring properties, particularly to the building core and ancillary elements. These design measures represent a significant improvement over the existing site conditions, are consistent with the character of surrounding developments and result in a reduction in non-compliances, which is a direct result of site analysis and iterative process.
- c. To Victoria Street, the proposal is compliant and is entirely compatible with the building height and character of neighbouring properties, particularly, the heritage items. The non-compliances as they pertain to the centrally located building core, balustrades and planter boxes, are appropriately setback from Victoria Street. This ensures that they will be obscured as viewed from the public domain, per **Figure 25** below.



Figure 25 Perspective as viewed from Victoria Street

- d. To Brougham Street, and as discussed, whilst the non-compliant elements will be visible from the public domain, they are lesser in height than the existing building (on-site), are consistent with the neighbouring approval at Nos. 30A-34 Brougham Street, and are subordinate to the rock outcrop and built form at Nos. 101-115 Victoria Street. The utilisation of light-weight, open form elements within a recessive built form (where non-compliant), ensures that the proposal will nestle comfortably when viewed from Brougham Street. **Figure 26** below shows the proposed development as viewed from Brougham Street, including the approved development at Nos. 30A-34. Finally, the centrally located building core and communal open space elements will be obscured as viewed from the public domain due to the proposed setbacks.



Figure 26 Excerpt from Visual Impact Imagery prepared by *Urbaine*

7. The non-compliance will contribute to the character of the locality

- a. Object 1.3(g) of the EP&A Act 1979 is “to promote good design and amenity of the built environment”. As detailed, the proposal will provide a built form which is consistent with (or lesser) the building height already established on-site, however, substantially improves and enhances architectural design and character. Whilst the proposal will remain as non-compliant to open form, building core and communal open space elements, there will be a significant improvement to the visual and physical appearance of the development, including a reduction of bulk and scale to Brougham Street where the existing non-compliance is most prevalent. This will reduce the apparent height, bulk and scale and ultimately contribute to the character of the locality, future residents and surrounding properties. Importantly, the existing building and its non-compliances are visually obtrusive and jarring and do not provide any benefit to the character of the locality. **Figure 27** below shows the visual improvement to views gained from Brougham Street, shown in purple.



Figure 27 Excerpt from Visual Impact Imagery prepared by *Urbaine*, showing views gained in purple.

- b. As considered in *Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115*, the desired future character is subjective and can be set by the existing, recently approved and proposed buildings within the neighbourhood. In this regard, the existing buildings and surrounding developments (existing and approved), which has been in-situ for a considerable period of time, have established the building height and character of development of the locality. Although the proposed development generally maintains the established height, bulk and scale, it provides an architectural design which will significantly improve the character of the development. As discussed in this Variation, the proposed development reduces the maximum building height of the development to Brougham Street, resulting in variations which are recessed and located centrally within the site. While the proposal will result in non-compliances with the development standard, this represents a more skilful design when compared to the existing building.
- c. Per 5 of *Wehbe V Pittwater Council*, the current 15m maximum building height (or 18.15m bonus) is illogical and inappropriate at the time it was implemented as part of the SLEP 2012, failing to consider the context of the locality and contribution of the existing building on-site to the height of buildings development standard. It is therefore unlikely that a building which contravenes the building height development standard to a significant degree, as is existing, will be demolished and rebuilt with a compliant height. As such, whilst the proposal is non-compliant, the significant improvements offered by this proposal are considered a superior outcome.
- d. Finally, the existing building on-site is identified as an 'detracting' item within the *Potts point Heritage Conservation Area*. The proposal will deliver a development which is to be identified as 'neutral' within the conservation area and appropriately relate to the surrounding heritage items.

As identified in the Heritage Impact Statement prepared by *Urbis*, the proposed architectural design and selected materiality will positively contribute to the streetscape character of the locality.

8. The range of amenity impacts have been established by the existing development

- a. As detailed, the proposed development will generally maintain the height, bulk and scale established by the existing building. Resultantly, the range of amenity impacts created by the proposed development, including the bonuses afforded by the Housing SEPP, are consistent with those already established on-site. That is, the non-compliance will not result in any adverse impact to the overshadowing, views or privacy of the surrounding locality beyond that created by the existing buildings.
- b. It is therefore considered that there is an absence of any significant material impacts attributed to the breach on the amenity or the environmental values of surrounding properties, the amenity of future building occupants and on the character of the locality. Specifically:
 - i. The extent of the additional height creates no adverse additional overshadowing impacts to adjoining properties when compared to the existing building envelope. That is, despite the additional shadow cast by the new non-compliances, this is relatively minor ensuring that the proposal will not impact the solar gain of the surrounding locality. The proposal will not create any adverse overshadowing impact to properties to the south, when considering the existing building and context of the locality. Per the Solar Impact Assessment, the development will create a minor solar impact to the private open space of Apartment 3 as located within No. 119 Victoria Street, from 1:00pm to 1:15pm. Whilst there will be an impact to this property, this is very minor and the private open space will retain 1 hour and 15 minutes of solar access during mid-winter, also noting that the living area will be unaffected by the proposal. Given the site orientation, and location of Apartment 3 on the lower levels of the neighbouring property, overshadowing is unavoidable. Notwithstanding, whilst the development will result in a minor loss of solar access (for a maximum of 15 minutes), a suitable quantum is maintained. In totality, the development will have a negligible impact to No. 119 Victoria Street, with all apartments maintaining appropriate solar access. As such and in totality, additional overshadowing caused by the non-compliant elements would be insignificant; and
 - ii. The height breach does not result in any adverse additional privacy impacts. Where non-compliant, appropriate setbacks are provided to both side boundaries, with landscaped elements, blank facades and privacy screens incorporated as a visual and physical buffer to the neighbouring properties. This ensures that that any additional loss of privacy caused by the non-compliant elements would be insignificant; and
 - iii. The height of building breach does not result in adverse view loss when compared to the existing building on-site. When considering the extent of view sharing, it is noted that the height breach is generally consistent with the existing building and the additional extent of

variation (centrally within the site) will not result in any adverse view loss to Sydney Harbour. This is confirmed in the View Loss Assessment prepared by *Planning Ingenuity* and View Impact Imagery prepared by *Urbaine*. As such, it is anticipated the extent of view loss caused by the non-compliant element would be insignificant or nil.

9. Orderly and economic use of the land

- a. Object 1.3(c) of the EP&A Act 1979 is “*to promote the orderly and economic use and development of land*”. A shorter building would unnecessarily result in a suboptimal provision of affordable housing and private and communal open space on the site. This would reduce the contribution of the development to meeting the R1 zone objective to ‘provide for the housing needs of the community’. The removal of residential apartments, inclusive of affordable housing, and communal open space will not only impact the overall architectural design resulting in inconsistency with the streetscape character of the locality, but will also reduce the quality of housing within the R1 zone. This will simply divert people to be residents in areas with reduced opportunity for access to transport links or an urban environment well-suited for walking and cycling.
- b. It would be a loss to the community to require strict compliance and ultimately stifle redevelopment. The current building is dilapidated and in a state of disrepair, with a subpar level of amenity for future occupants. To require strict compliance would result in a development retaining the existing built form, with tokenistic alterations and additions, as a fully compliant development would not be feasible. In contrast, submission of this application, requiring variation to maximum building height, will result in the delivery of 25 high quality residential apartments, inclusive of affordable housing, that will provide for a significant social benefit to the locality in terms of built form, landscaped network, sustainability, architectural merit and visual impact, which is significantly improved when compared to the existing, at the same time as appropriately managing amenity impacts.
- c. In addition, the social benefits of providing high quality communal open space within a well-designed development in a highly accessible area should be given weight in the consideration of the variation request. It would be a loss to the community (and contrary to the public interest) to deny the variation and require the removal of communal services due to the existing site conditions and topography.

10. The proposal meets aims and objectives of key planning documents

- a. The proposed development meets the objectives of the development standard, objectives of *Division 1 In-fill affordable housing* of the Housing SEPP and objectives of the R1 General Residential zone;
- b. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:
 - i. The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilised site for residential uses (1.3(c));



- ii. The proposal promotes the delivery and maintenance of affordable housing (1.3(d)); and
 - iii. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).
- c. The variation to the height of buildings development standard will give better effect to the aims of *Chapter 4 Design of residential apartment development*, of the Housing SEPP. In particular:
- i. The proposed variation will provide more sustainable housing in social and environmental terms and better achieve urban planning policies (clause 2(3)(a)(i));
 - ii. to achieve better built form and aesthetics of buildings and of the streetscapes and the public spaces they define (clause 2(3)(b));
 - iii. to contribute to the provision of a variety of dwelling types to meet population growth (clause 2(3)(f));
 - iv. Approval of the proposed variation will support a variety of housing types by providing a well-located and compact development that will be a better choice for families (clause 2(3)(g)).

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development, particularly given the established building height on the subject site, existing and desired future character of the locality and steep topography. Insistence on strict compliance with the 18.15m height will result in an incoherent architectural design and removal of private and roof top open spaces, including ancillary elements, which is a disproportionate outcome given the limited impacts of the proposal. Furthermore, to request strict compliance would also reduce the quantum of affordable housing provided on the subject site and would be detrimental to the benefit of the locality. The additional height does not significantly impact the amenity of the public domain or surrounding properties (when compared to the existing buildings) and has been designed in such a way to ensure the additional height is compatible with the public domain.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. 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.





As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

6. Conclusion

This application seeks to benefit from the building height and floor space bonuses afforded by *Part 2, Division 1 In-fill affordable housing, Section 16(3)* of the Housing SEPP. This written request has been prepared in relation to the proposed variation to the 18.15m maximum building height, inclusive of a 21% bonus afforded by Section 16(3) of the Housing SEPP, to the base 15m development standard contained within Clause 4.3 of SLEP.

Having regard to all of the above, it is our opinion that compliance with the maximum height development standard, as increased by the Housing SEPP in-fill affordable housing bonus, is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard. The proposal has also demonstrated sufficient environmental planning grounds to support the breach.

Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation supported.

