Attachment B

Clause 4.6 Variation Request - Height of Buildings

89 Macleay Street, Potts Point – Height of Building

Clause 4.6 Variation Statement – December 2024

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INTRODUCTION

Overview

This Clause 4.6 Variation request has been prepared pursuant to Clause 4.6 of Sydney Local Environmental Plan 2012 (**SLEP 2012**) in support of the development application for the new alterations and additions to the site at 89 Macleay Street, Potts Point (**the site**).

This Clause 4.6 Variation has been submitted in conjunction with the Statement of Environmental Effects (SEE) that assessed the proposed works as described above. The request for variation of the development standard has been prepared in accordance with the requirements of Clause 4.6 of the Sydney LEP 2012 (SLEP 2012) which has the following aims and objectives:

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.*

The proposed variations to development standards for the proposed development are in relation to Clause 4.3 Height of Buildings of the SLEP 2012. In summary the following variations are proposed:

Sydney LEP 2012 Clause	**SLEP 2012 Development Standard**	**Proposed Development Non-Compliance**	**% of Variation**
Clause 4.3 Height of Buildings	Maximum 22m	23.28m	5.8%

In accordance with Clause 4.6 of the SLEP 2012 Council is required to consider the following:

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.*

This Clause 4.6 Variation request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards.

This variation request demonstrates that:

- The variation to the development standard is in the public interest because it is consistent with the objectives for the zone and the development standard itself.
- Compliance with the height development standard is unreasonable or unnecessary in the circumstances of the case.
- There are sufficient environmental planning grounds to justify contravening the development standard.

RELEVANT ASSESSMENT FRAMEWORK

This section of the report outlines the environmental planning instruments relevant to the proposed development, including the aims and objectives, maximum building height control and the assessment framework for seeking a variation to a development standard.

Some relevant planning principles and judgements issued by the Land and Environment Court regarding the assessment of developments seeking exceptions to development standards are also provided.

Sydney Local Environmental Plan 2012

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

(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.

Clause 4.6 provides flexibility in the application of planning provisions by allowing the Consent Authority to approve a development application that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would satisfy the requirements of clause 4.6.

In determining whether to grant consent for development that contravenes a development standard, Clause 4.6 requires that the Consent Authority consider a written request from the applicant, which demonstrates that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
- There are sufficient environmental planning grounds to justify contravening the development standard.

Furthermore, the Consent Authority must be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone, and the concurrence of the Secretary has been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary consider:

1. Whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

2. The public benefit of maintaining the development standard, and

3. Any other matters required to be taken into consideration by the Secretary before granting concurrence.

[Note: Concurrence is to be assumed as per the applicable planning circular, discussed further below.]

This document forms a Clause 4.6 written request to justify the contravention of the Building Height development standard in Clause 4.3. Also forming part of this request are the architectural drawings that have been submitted in connection with the amended development application. The assessment of the proposed variations has been undertaken in accordance with the requirements of the SLEP 2012, Clause 4.6 Exceptions to Development Standards.

NSW Land and Environment Court: Case Law (Tests)

The following sections of the report provide an assessment of the request to vary the development standards relating to the maximum building height in accordance with Clause 4.6 of SLEP 2012. Consideration has been given to the following matters within this assessment:

- *Varying development standards: A Guide*, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court. The *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 court judgement is the most relevant of recent case law. Justice Preston confirmed (in this judgement):
    - The consent authority must, primarily, be satisfied the applicant's written request adequately addresses the 'unreasonable and unnecessary' and 'sufficient environmental planning grounds' tests:

"that the applicant's written request … has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case … and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard …" [15]

    - On the grounds for a finding that the strict application of a standard is 'unreasonable or unnecessary' established under *Wehbe v Pittwater Council [2007] NSWLEC 827:*

"The five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way…" [22]

    - That, in establishing 'sufficient environmental planning grounds', the focus must be on the contravention and not the development as a whole:

"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" [26]

    - That 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:

"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 will have a better environmental planning outcome than a development that complies with the development standard." [88]

This clause 4.6 variation has specifically responded to the matters outlined above and demonstrates that the request meets the relevant tests with regard to recent case law.

THE EXTENT OF VARIATION

Relevant Development Standards

The development standards being requested to be varied are Clause 4.3 Height of Buildings of the SLEP 2012.

1.1 The Height Standard

Clause 4.3 (2) of the SLEP 2012 states:

(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.

The Height of Building Map sets a height standard of 22m for the site. The 22m building height standard has been measured in accordance with the SLEP 2012 definition:

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.

1.2 Proposed Variation to Standards

The proposed variations to development standards for the proposed development are in relation to Clause 4.3 Building Height of the SLEP 2012. In summary the following variations to development standards are proposed:

Sydney LEP 2012 Clause	SLEP 2012 Development Standard	Proposed Development Non-Compliance	% of Variation
Clause 4.3 Height of Buildings	Maximum 22m	23.28m	5.8%

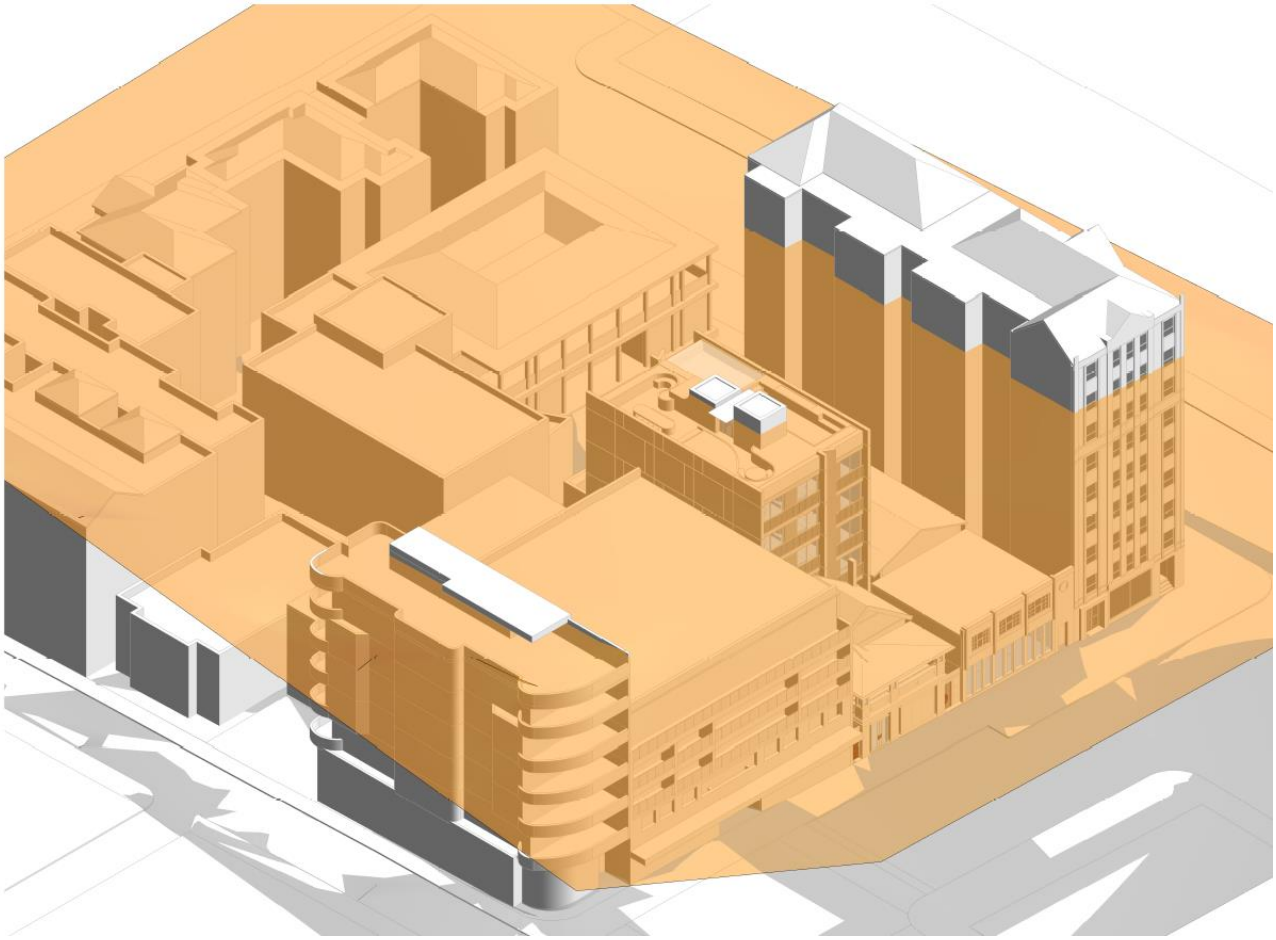

Figure 1: Height blanket diagram the proposed lift overrun non-compliance, and existing adjacent buildings height non-compliance.

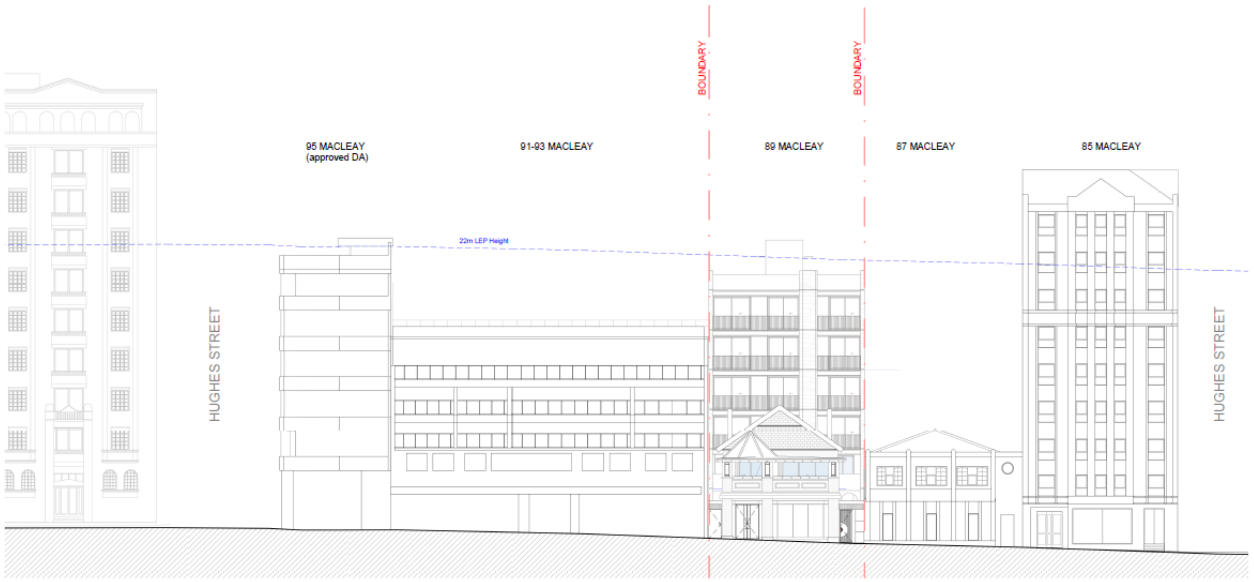

Figure 2: Blue dashed line denotes the 22m height limit, and white built form shows the extent of proposed non compliance and adjacent buildings non compliance.

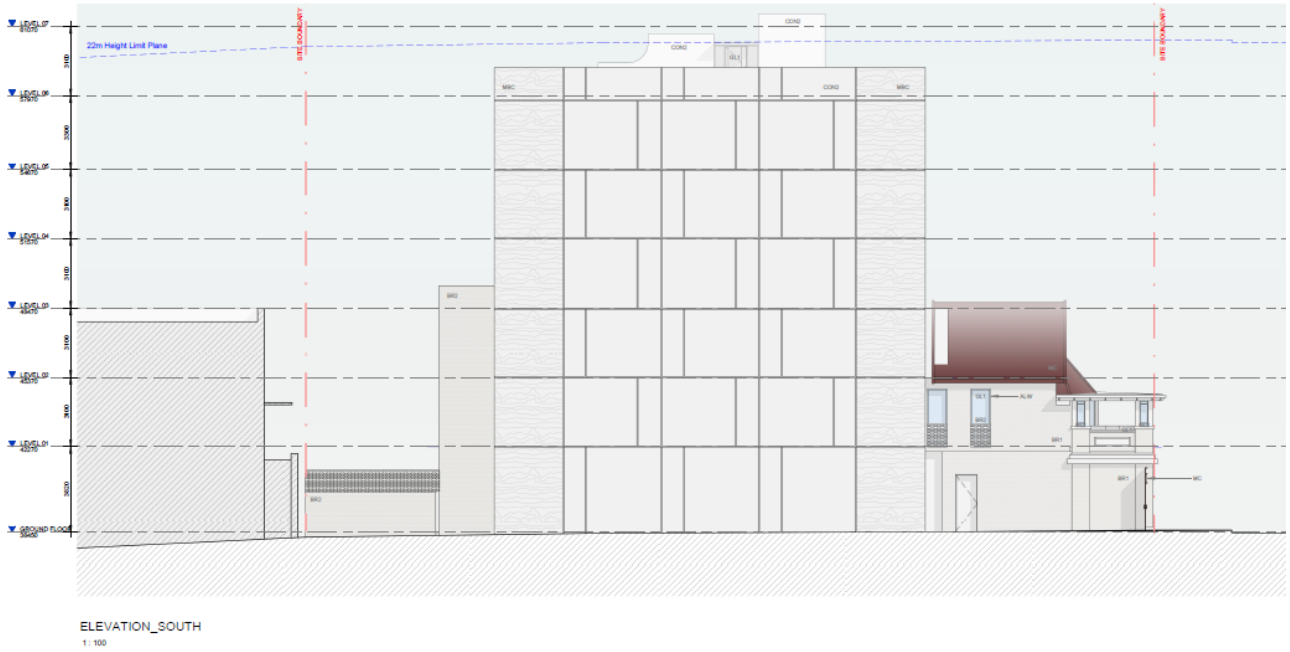

Figure 3: Blue dashed line denotes the 22m height limit, and white built form shows the extent of proposed non compliance.

CONSISTENT WITH THE OBJECTIVES OF THE PARTICULAR STANDARD AND OBJECTIVES FOR DEVELOPMENT WITHIN THE ZONE

2. Overview

The proposed development will be in the public interest because it is consistent with the objectives of the height control standard and the zone objectives.

2.1 The Proposal Achieves the Objectives of the Height Standard

The objectives of the building height control as listed within Clause 4.3 of the SLEP 2012 have been achieved as demonstrated below.

The objectives of Clause 4.3 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.

Notwithstanding the proposed variation to the standard, the proposed development is nevertheless consistent with these objectives:

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

- The proposed development is compatible with the built form and density of surrounding developments. It has been designed to incorporate a setback from the street to the upper levels to ensure it integrates with the scale and bulk of surrounding developments.
- The lift shaft and overrun and fire stairs which comprises the encroaching elements will not be readily discernible from the street by virtue of its setback from the front at Macleay Street.
- The lift cannot be constructed without an overrun. The lift provides equitable and convenient access to all of units and their associated amenities. Strict compliance with the standard would require the lift to terminate its service at a lower level to delete the lift overrun, making the uppermost level the least convenient. Requiring this would provide no perceivable benefit to the adjoining or neighbouring land but would result in a worse outcome for amenity and access arrangements for this development.
- The proposed development will be viewed as a six storey development from the streetscape and will not appear to exceed the height of the existing buildings on Macleay Street or its surrounds.

- The proposed variation will not affect the overall height of the development, the lift shaft, and fire stairs exceed the LEP height limit by 1.28m central to the roof top floor plate. Strict application of the height control would be unreasonable in the circumstances.
- The lift overrun and fire stairs will not add any discernable bulk or massing to the rooftop level as it is setback from the building edges and screened by vegetation in some places.
- The provision of a covered lobby to the lift lobby is essential for as there needs to be a guarantee that there is no possibility of water ingress to the lift shaft and this can only be provided by the installation of a water proof enclosure.
- The additional bulk and scale of the lift shaft, and fire stairs are only viewable from limited viewpoints in the surrounding locality, and the closer you get to the building the more it is not able to be observed.
- It is important to point out that there is no perceived privacy or overlooking impacts as a result of the proposed rooftop terrace.
- No additional overshadowing to private open space and habitable rooms are to occur from the proposed increased built form at the rooftop level. Refer to the shadows diagrams provided.

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

- The proposed alteration and additions of the property at 89 Macleay Street, Potts Point, will have an acceptable impact on the heritage significance of the Potts Point Heritage Conservation Area and heritage items in the vicinity.
- The proposed rear apartment addition has been designed to be sympathetic to the Potts Point HCA and nearby heritage items, by being readily identifiable as contemporary addition.
- The proposed building height and bulk is similar to nearby adjacent buildings with a similar or larger height and built form.
- Additional bulk or massing from the lift shaft is minimal and this is evidenced in Figure 1, 2 and 3.
- The attached Heritage Impact statement is supportive of the proposal and its heritage impacts.

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

- The portion of development which protrudes beyond the prescribed height limit comprises the lift overrun, fire stairs.
- There is no adverse view loss attributed the areas of additional height above the standard, as these elements being the lift overrun and fire stairs have no consequence on views as compared to the height compliant components of the building.
- No significant views from surrounding properties currently occur that will be impacted, and therefore no view sharing is required.

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

- The site is not located within Central Sydney or Green Square.

(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.

2.2 The Proposal Achieves the Objectives of the Zone

The site is currently zoned MU1 Mixed Use Zone under the Sydney LEP 2012.

The proposed new development is consistent with the MU1 zone objectives in that:

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

  The new works to the premises will improve the overall quality and functionality of the building. New employment opportunities will arise, other than during construction.

- *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*

The height non-compliance will not alter the appearance of the building from the streetscape. The façade works at ground level will improve the buildings overall appearance and street appeal.

- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*

No land use conflict will occur. The use of the site is not altered by the proposal.

- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*

The new ground floor street frontage improvements will improve and enhance overall street activation

- *To ensure land uses support the viability of nearby centres.*

The continued use of the site for commercial premises at ground level will contribute to Sydney's global economy. The residential component of the development will also support surrounding retail and commercial services.

- *To integrate suitable business, office, residential, retail and other land uses in accessible locations that maximise public transport patronage and encourage walking and cycling.*

The occupiers of the new residential apartments will utile sustainable transport methods in the locality and. The site is well serviced by public transport.

CLAUSE 4.6(3)A – COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNCECESSARY IN THE CIRCUMSTANCES OF THE CASE

Compliance with the development standard **is** unreasonable or unnecessary in the circumstances of the case.

Clause 4.6(3)(a) requires that this Variation Request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

Such compliance is unreasonable or unnecessary in the circumstances of the case.

In *Wehbe v Pittwater Council [2007] NSWLEC 827* Preston CJ set-out the five ways of establishing that compliance with a development standard is unreasonable or unnecessary in support of justifying a variation:

1. *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.*
2. *Establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.*
3. *Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.*
4. *Establish that 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. *Establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary".*

In applying the tests of **Wehbe v Pittwater Council** [2007] NSWLEC 827, only one of the above rationales is required to be established. Notwithstanding the proposed variation, as demonstrated in Sections 2.1 and 2.2, the proposed development is consistent with the underlying objectives of the standard for Building Height and the MU1 zone of SLEP 2012.

As addressed previously the proposal has demonstrated compliance with the relevant objectives of Clause 4.3 of the Sydney LEP 2012.

Undermining objectives of the EP&A Act

Section 1.3(g) of the Environmental Planning and Assessment Act 1979 (the EP&A Act) says that it is an objective of the legislation:

to promote the orderly and economic use and development of land

Requiring strict compliance with the height control would undermine the achievement of this objective of the legislation. This is because orderly and economic use and development of land is encouraged/supported by permitting development in accordance with the relevant development standards.

This is sufficient, by itself, to establish that requiring strict compliance is unreasonable or unnecessary in the circumstances of the case.

Disproportionate burden on the community

The severity of the burden placed on members of the community (by requiring strict compliance) would be disproportionate to the consequences attributable to the proposed non-compliant development (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 (at [15])).

The adverse consequences by requiring strict compliance have already been outlined.

It is unreasonable to expect the community to bear these adverse consequences in circumstances where there are no significant adverse impacts from allowing the height contravention.

This is sufficient, by itself, to establish that requiring strict compliance is unreasonable or unnecessary in the circumstances of the case.

CLAUSE 4.6(3)(B) – THERE ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY THE CONTRAVENTION OF THE DEVELOPMENT STANDARD

The requirement in clause 4.6(3)(b) is that there are sufficient environmental planning grounds to justify the contravention of the development standard, not that the development that contravenes the development standard has a better environmental planning outcome than a development that complies with the development standard.

Further, a lack of environmental impact does not in itself provide for sufficient environmental planning grounds to vary a standard. It is however noteworthy that the height breach itself does not cause any adverse view loss, does not introduce unreasonable privacy impacts, overshadowing and does not have any impact on the streetscape or character of the locality.

In this case there are sufficient environmental planning grounds to support a variation, including::

- The proposal is consistent with the objectives of the height development standard and the objectives of the zone.
- The design satisfies the Object 1(g) of the EP&A Act 1979 which seeks to promote good design and amenity of the built environment.
- The proposal introduces increased housing supply in a desirable location with excellent connection to public transport, employment and recreational facilities.
- The building generally complies with the relevant building envelope controls.
- There is no variation in height to the building when the lift overrun and fire stairs are excluded demonstrating that it meets the purpose of the height standard.
- The additional height is required to facilitate equitable access to all levels including the rooftop communal open space by allowing the fire stair and lift overrun to peak through the height plane.
- The lift cannot be constructed without an overrun. The lift provides equitable and convenient access to all of units and their associated amenities. Strict compliance with the standard would require the lift to terminate its service at a lower level to delete the lift overrun, making the uppermost level the least convenient. Requiring this would provide no perceivable benefit to the adjoining or neighbouring land but would result in a worse outcome for amenity and access arrangements for this development.
- The proposed development is compatible with the built form and density of surrounding developments. It has been designed to incorporate a setback to the upper levels to ensure it integrates with the scale and bulk of surrounding developments.
- The top level additions to the lift shaft and overrun and fire stair which comprises the encroaching elements will not be readily discernible from the street by virtue of its setback from the front at Macleay Street.
- The provision of a covered lobby to the lift shaft and fire stairs is essential as there needs to be a guarantee that there is no possibility of water ingress to the lift shaft or stair well and this can only be provided by the installation of a water proof enclosure.
- The proposed variation will not affect the overall height of the development, the lift shaft, and fire stairs exceed the LEP height limit by 1.28m central to the roof top floor plate. Strict application of the height control would be unreasonable in the circumstances.

- The lift overrun and fire stairs will not add any discernable bulk or massing to the rooftop level as it is setback from the building edges and screened by vegetation in some places.
- The additional bulk and scale of the lift shaft, and fire stair wall are only viewable from limited viewpoints in the surrounding locality, and the closer you get to the building the more it is not able to be observed.
- There is no perceived privacy or overlooking impacts as a result of the proposed rooftop terrace.
- No additional overshadowing to private open space and habitable rooms are to occur from the proposed increased built form at the rooftop level.
- The proposed rear apartment addition has been designed to be sympathetic to the Potts Point HCA and nearby heritage items, by being readily identifiable as contemporary addition.
- In light of the proposal's contribution to achieving the desired future character of the area, a reduction of height would serve no material planning purpose, other than numerical compliance with a generic Council control.

CLAUSE 4.6 (4) THE CONSENT AUTHORITY MUST KEEP A RECORD OF ITS ASSESSMENT CARRIED OUT UNDER SUBCLAUSE 3

Council can be satisfied that clause 4.6(4) will be met through their established administrative procedures that ensure a record is kept of their assessment.

On 1 November 2023, Clause 4.6(4) was subject to a significant amendment. The requirement under this subclause prior to this date, which required the consent authority to be satisfied the proposal will be in the public interest because it is consistent with the objective of the standard and zone, as well as concurrence requirements from the Secretary, was removed.

This 'public interest' test requirement was removed as it duplicated existing considerations when determining a development application or considering a variation request. Consideration of the zone objectives and public interest is already required when assessing a development application in both cl2.3 of the LEP, and s4.15(1)(e) of the EP&A Act.

The public interest test was previously confined to the requirements as set out in the decision of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*. An argument under section 4.15(1)(e) of the EP&A Act that approval of a development is in the public interest is not so confined and can take into account wider considerations.

As per Initial Action, the proposal is in the public interest given satisfaction of the zone objectives addressed previously in this report.

As for wider considerations available under s4.15(e) of the EP&A Act:

- The proposal will have no detrimental effect on the public interest, does not undermine the integrity of Council's controls, and provides an acceptable environmental planning outcome on the site.
- The proposal offers an appropriately scaled development that is sympathetic to the streetscape and public domain and make a positive contribution to the built and landscape character of the locality.
- The development delivers additional housing supply to meet the housing needs of the local community and to support the economic function of Potts Point as a thriving local centre.

It is therefore in the public interest to support this proposal.

This document demonstrates that the approval of the development is consistent with the requirements under Initial Action and due to wider considerations.

CONCLUSION

It is requested that council supports the proposed variation to Clause 4.3 of the SLEP 2012 for the following reasons:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.
- There are sufficient environmental planning grounds to justify contravening the development standard.
- The proposed variation allows for the provision of improved commercial floor space.
- No unreasonable environmental impacts are introduced as a result of the proposal.
- There is no public benefit in maintaining strict compliance with the standards.