

## CLAUSE 4.6 VARIATION ASSESSMENT (HEIGHT OF BUILDINGS) – 5 UHRIG ROAD, LIDCOMBE

This request has been prepared in support of a development application for a residential development at 5 Uhrig Road, Lidcombe (the site) and seeks an exemption to the height of buildings standard applying to the site under *Auburn Local Environmental Plan 2010* (ALEP 2010).

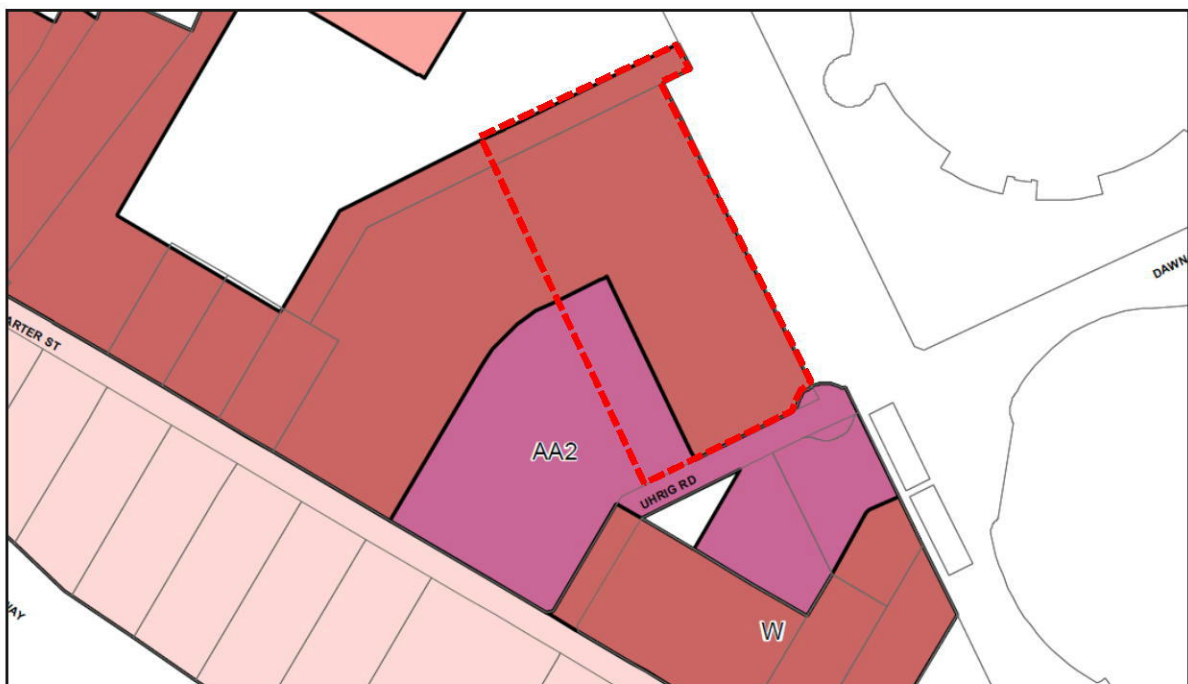
### 1. DEVELOPMENT STANDARD

Clause 4.3 (2) of ALEP 2010 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.*

As shown in **Figure 1** the Height of Buildings Map sets a height of buildings standard of 42m and 72m across the site. The residential flat buildings proposed as part of this DA are subject to the maximum 42m height control.

Figure 1 – Height of Building Map



Source: ALEP 2010

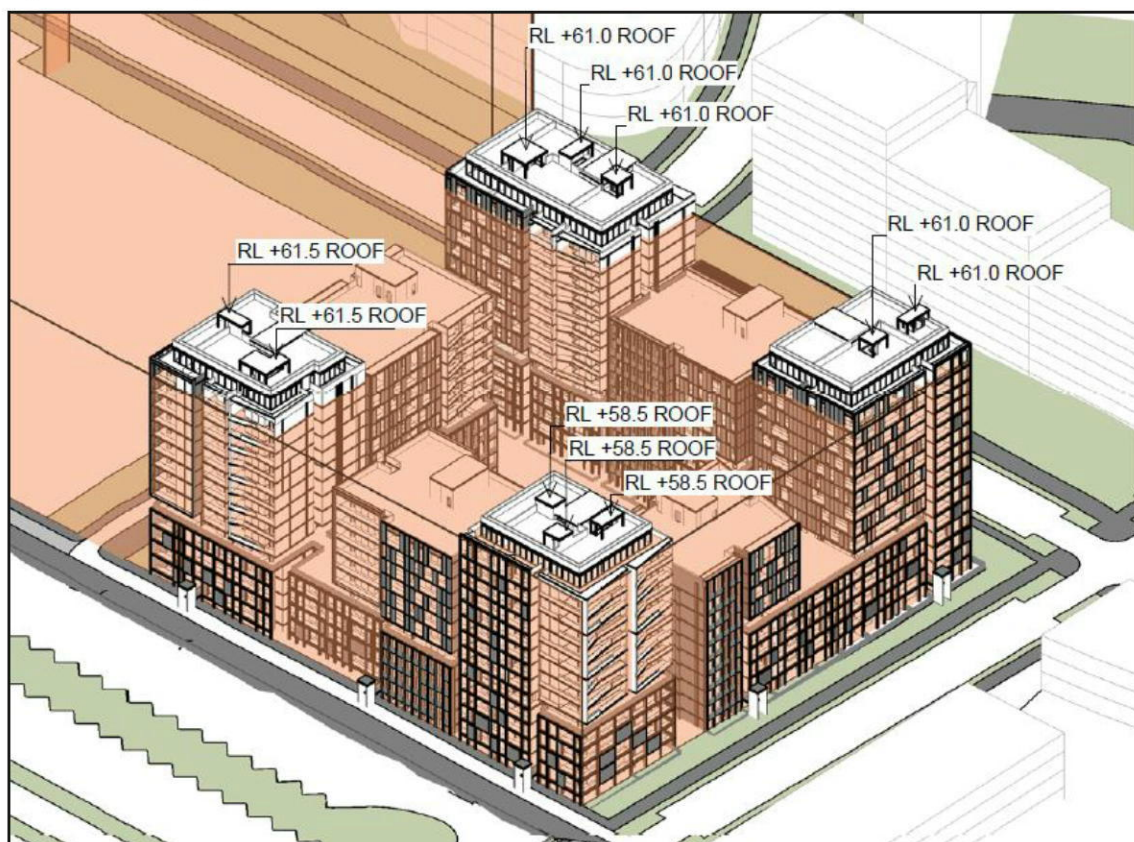
## 2. PROPOSED VARIATION

The height of the proposed buildings are summarised in Table 1 and illustrated in Figure 2.

Table 1 – Proposed Maximum Heights

Building	Height Standard	Maximum Height Proposed			Compliance
		Roof	Lift Overrun	Roof Terrace Canopy	
Building NA	42m	47.9m	48.9m	50.6m	No
Building NB		36.7m	39.75m	N/A	Yes
Building NC		47.8m	48.8m	50.5m	No
Building ND		48.1m	49.1m	50.8m	No

Figure 2 – 3D Height Plane



### **3. PRINCIPLES OF EXCEPTIONS TO DEVELOPMENT STANDARDS**

#### **3.1. CLAUSE 4.6 EXCEPTION TO DEVELOPMENT STANDARDS**

Clause 4.6 of ALEP 2010 provides flexibility in the application of development standards allowing the consent authority to grant development consent for developments that do not comply with certain development standards, where it can be shown that flexibility in the application of the standard would achieve better outcomes for and from the development.

This assessment to demonstrate the planning merits of the development as proposed to be modified including the variation of the development standard.

The objectives of clause 4.6 Exception to development standards of ALEP 2010 are:

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

Clause 4.6(3)(a) and (b) of ALEP 2010 requires the variation request to demonstrate:

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

The consent authority when considering a request to vary a development standard must be satisfied that the proposed development will be in the public interest, that the proposed development is consistent with the objectives of the particular standard and the objectives of the zone in which the development is proposed to be carried out, and the concurrence of the Secretary has been obtained. The merits of the proposal are discussed below. The Secretary's concurrence has been delegated to the Sydney Planning Panel.

#### **3.2. NSW LAND AND ENVIRONMENT COURT: CASE LAW**

##### **3.2.1. Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46**

The decision of Justice Lloyd in *Winten Property v North Sydney Council* [2001] established the basis for the preparation of guidelines for varying development standards, prepared by the former Department of Planning and Infrastructure. Initially, this was applied to *State Environmental Planning Policy No. 1 – Development Standards (SEPP No1)*. These guidelines were later updated to address clause 4.6 of the Standard Instrument LEP.

The principles for assessment and determination of applications to vary development standards include the following:



- *Is the planning control in question a development standard?*
- *What is the underlying object or purpose of the standard?*
- *Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects contained within Section 5(a)(i) and (ii) of the Environmental Planning and Act 1979.*
- *Is compliance with the development standard unreasonable and unnecessary in the circumstances of the case? Is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case?*
- *Is the objection well founded?*

### **3.2.2. Wehbe v Pittwater Council [2007] NSWLEC 827**

The decision of Justice Preston in *Wehbe v Pittwater Council* [2007] expanded the findings of *Winten v North Sydney Council* [2001] and established a five (5) part test for consent authorities to consider when assessing an application to vary a development standard in order to determine whether non-compliance with the development standard is well founded.

The five (5) different ways in which an objection may be well founded are as follows:

- *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
- *The underlying objective or purpose of the standard not relevant to the development and therefore compliance is unnecessary;*
- *The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
- *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 reasonable;*
- *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.*

### **3.2.3. Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90**

More recently, *Four2Five v Ashfield Council* was initially heard by Commissioner Pearson, and upheld on appeal by Justice Pain the Court of Appeal. Commissioner Pearson's decision in this case (and Justice Pain's endorsement of the reasoning) requires an application to vary a development standard to go beyond the five (5) part test of *Wehbe v Pittwater Council* [2007] to demonstrate the following:

- *Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;*

- *The development standard is unreasonable or unnecessary on grounds other than the development achieved the objectives of the development standard and/or land use zone.*
- *There are sufficient environmental planning grounds particular to the circumstances of the proposed development that do not apply to any similar development on the site or in the vicinity.*

## 4. ASSESSMENT

The following provides an assessment of the height of buildings variation proposed.

### 4.1. IS THE REQUIREMENT A DEVELOPMENT STANDARD?

The maximum height of building control is a principle numeric development standard under clause 4.3 of ALEP 2010.

### 4.2. IS THE DEVELOPMENT STANDARD EXCLUDED FROM THE OPERATION OF THIS CLAUSE?

The proposed variation to the maximum building height control is not excluded from the operation of clause 4.6(8).

### 4.3. WHAT IS THE UNDERLYING OBJECTIVE OR PURPOSE OF THE STANDARD?

The proposed development is consistent with the objectives of clause 4.3 Height of buildings of ALEP 2010 as discussed below.

Objective	Assessment
<i>To establish a maximum height of buildings to enable appropriate development density to be achieved.</i>	<p>The proposed variation allows the planned density to be achieved.</p> <p>ALEP 2010 permits a maximum GFA of 101,955sqm across the totality of the site. The proposal complies with the FSR control, proposing a GFA of 48,574sqm. The balance of 53,381sqm GFA will be used as part of the DA for the southern block.</p> <p>As demonstrated in Table 10 of the SEE, the maximum permissible GFA has been equally distributed across the site. The 4,807sqm additional GFA allocated to the southern block can be attributed to the 72m height and 3.5:1 FSR controls that apply to the south west of the site.</p>
<i>To ensure that the height of buildings is compatible with the character of the locality.</i>	<p>The proposal is consistent with the use and density anticipated in this part of the Carter Street Priority Precinct (Priority Precinct).</p>

The Priority Precinct is intended to transition from its historical industrial character to a high density residential area with commercial, retail and business activities.

The Finalisation Report prepared by the Department of Planning and Environment (DP&E) for the Priority Precinct states that the 30 storey towers within Sydney Olympic Park are to remain the dominant built form elements of the wider Olympic Peninsula. This objective informed the height controls included in ALEP 2010.

The proposed heights will not undermine this objective, with a number of State Significant DAs within Sydney Olympic Park having been lodged, approved or under construction that exceed 30 storeys. Building heights are also anticipated to increase with the draft Sydney Olympic Park Master Plan permitting 45 storey towers on the neighbouring site to the east.

In the context of the approved developments and likely future planning controls, the height of the proposal is considered appropriate and compatible with the future character of the locality.

#### **4.4. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?**

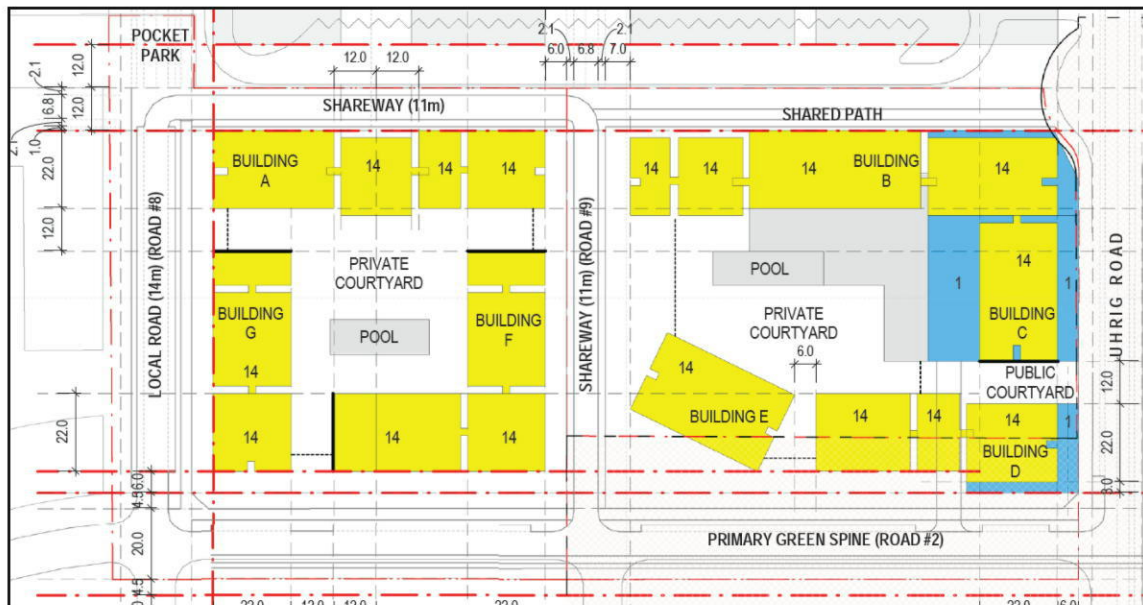
In applying the principles established in the NSW Land and Environment Court judgements outlined in Section 2, compliance with the building height standard is considered unreasonable or unnecessary as:

- The proposed modification is consistent with the objectives of the height of buildings development standard and is appropriate when the likely future character is taken into consideration, as discussed above.
- The proposed height of building variations allow achievement of the planned density for the site, whilst also permitting greater variation between the higher and lower elements of the buildings. This results in a better urban design outcome.
- The massing strategy for the site has been the subject of an extensive analysis to ensure a sound planning outcome is achieved. There has been a significant amount of consultation with Council staff and the DEAP prior to the submission of this DA. This consultation has informed the proposed height.
- The pre-lodgement submission to Council dated 30 August 2016 included three massing options for the totality of the site. Whilst each option complied with the maximum FSR, the building heights varied. As shown in **Figures 3, 4 & 5** these options included:



- **Scheme B:** All buildings comply with the 42m control. This option exhibited a uniform building height across the site.
- **Scheme C:** With the exception of the 72m tower element included in the southern part of the site, all buildings complied with the 42m height control to the parapet of each building. Minor variations associated with the lift overruns were proposed.
- **Scheme D:** Variations of up to a maximum of two storeys were proposed within the part of the site subject to the 42m height control. A tower element was positioned part within part of the site with split building height controls of 42m and 72m. The tower component complies with the 72m height control (as applicable).
- The massing options undertaken demonstrate that strict compliance with the 42m height control would result in a predominant 14 storey built form across the entirety of the site. This outcome is not considered appropriate for the site.
- Scheme D was considered most suitable by the proponent, the DEAP and Council staff. This massing option that has informed this proposal. As stated in the written feedback dated 28 September 2016 the DEAP were supportive of additional height via a clause 4.6 variation as it allowed for enhanced variation between the higher and lower elements subject it being demonstrated that:
  - Improved amenity outcomes for the residential units and the public domain result.
  - The additional height is not attributed to an increase in FSR.
- The solar analysis found that Scheme B could not achieve compliance with the minimum two hour solar access requirements to living rooms and 50% of communal open space on June 21. Solar access to the RE1 Public Recreation zone located to the south of the site was also restricted.
- By comparison, the proposal complies with the solar access requirements under the ADG. As demonstrated in Section 4.5 there are no adverse impacts on the public open space as a result of this variation.

Figure 3 - Scheme B



Picture 1 – Site Plan



Picture 2 – 3D Model





#### 4.5. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

The proposed variations do not result in any adverse environmental impacts. There are sufficient environmental planning grounds, for the reasons outlined below:

##### Overshadowing

- The shadow diagrams submitted to support the proposal demonstrate the additional impacts resulting from the part of the buildings that exceed the 42m height control. These diagrams also provide a comparison of the resulting shadow from a building that complies with the 42m or 72m height controls.
- The shadow diagrams demonstrate that the proposal overshadowing associated with the parts of the building above 42m has a negligible impact on surrounding properties and does not adversely impact existing or future public open space. It is also evident (shown in green) that the proposed massing results in an improved outcome to a development that strictly complied with the height control. The following observations are made:
  - At **9am** on June 21, a minor amount of additional shadow falls on future roads or on the property to the south. The additional shadow does not impact areas public open space (zoned RE1 Public Recreation) or the future bio-swale corridor.  
  
At the equinox, there is a reduction in the level of overshadowing when compared to a 14 storey (compliant) built form.
  - At **12noon** on June 21, the additional shadow is minor and is confined within the site boundary. This is offset by a commensurate reduction in shadow.  
  
At the equinox, there is a reduction in area of overshadowing when compared to a 14 storey (compliant) built form.
  - At **3pm** on June 21, the additional shadow is minor and falls within the area known as Bus Pod B. The additional shadow is offset by a commensurate reduction in shadow. The future uses for this site, as documented in the draft Sydney Olympic Park Master Plan include commercial, hotel or serviced apartments. These uses are not sensitive and would not be adversely impacted by the additional shadow.  
  
At the equinox, there is an overall reduction when compared to a 14 storey (compliant) built form.

##### Visual Impact

- The height variations allow for greater contrast in building height to be achieved across the site. This is considered an improved urban design outcome. If the proposal were to strictly comply with the 42m height control and still achieve the planned density, a uniform building height of 14 storeys would result.
- The contrasting building heights, facilitated by this clause 4.6 variation, in conjunction with the articulations promote visual interest and achieve a diverse built form outcome. These elements reduce the perceived bulk and scale of the development and result in a beneficial visual impact.



- As discussed above, in the context of the approved developments and likely future planning controls the development will achieve a transition from the dominant elements in Sydney Olympic Park through to the western extent of the Priority Precinct (refer **Figure 6**). This demonstrates that ANZ stadium will continue to remain the dominant built form prior to the redevelopment under the SOPA Masterplan 2030 and the impact of the additional height is negligible.

Figure 6 – Photomontage from Road 2



Source: BVN

Figure 7 – North Section



Source: BVN



#### Amenity

- The height variations provide for improved amenity to the future building occupants by allowing greater solar access than what would be achieved under an envelope that complied with the height control and achieved the maximum permissible FSR.
- The Wind Assessment finds that the wind conditions for the pedestrian footpaths surrounding the site will be suitable for pedestrians. To ensure compliance is met wind speeds at specific locations around the site can be quantified via Wind Tunnel Testing or Computational Fluid Dynamics (CFD) during the detailed design stage of the project.

#### Traffic

- There are no additional traffic impacts associated with the variation as the maximum permissible GFA across the totality of the site will not be exceeded as part of this application or the development on the southern part of the site.

### **4.6. WILL THE PROPOSED DEVELOPMENT 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?**

The residential flat buildings are proposed on land zoned R4 High Density Residential (R4). The relevant objectives of the R4 zone are:

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To encourage high density residential development in close proximity to bus service nodes and railway stations.*

The proposed development is consistent with these objectives as:

- Through the provision of 561 apartments, the proposal will provide high density residential development in close proximity to existing public transport infrastructure. Strict compliance of the height standard would result in a commensurate reduction in floor area and would significantly reduce the number of units.
- The proposal provides a mix of one, two, three and four bedroom apartments in a high density environment. The unit typology has been driven by the site's proximity to public transport and the demand for one and two bedroom apartments in the locality.
- The proposal will deliver an increase in housing in accordance with the vision for the Priority Precinct. The requirement to comply with the 42m control would compromise this objective.

#### **4.7. WHETHER OR NOT NON-COMPLIANCE WITH THE DEVELOPMENT STANDARD RAISES ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING?**

The non-compliance will not raise any matters of significance for state or regional environmental planning.

#### **4.8. THE PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD?**

No public benefit will be achieved by limiting the development on site to a compliant building height. The increase in building height will result in an improved urban design outcome by providing for greater height contrast. The height variation allows for an improved solar access outcome to the units and common open space and reduces potential solar impacts on surrounding sites.

#### **4.9. CONSIDERATION ARISING FROM WEHBE AND FOUR2FIVE.**

The five part test established by Preston J in *Wehbe v Pittwater Council* [2007] NSWLEC 827 and furthered in *Four2FivePty Ltd v Ashfield Council* [2015] NSWLEC 90 are considered in **Table 2** and **Table 3**.

Table 2 – Wehbe Five Part Test

<b>Question</b>	<b>Comment</b>
<i>Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives?</i>	Yes the approved development as proposed to be modified is consistent with the objectives of the Height of Buildings control and R4 High Density Zone objectives.
<i>Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary?</i>	No, the underlying objectives of the standard are relevant to the development. As demonstrated in this statement, the height of buildings variations satisfy the objectives of the standard.

<p><i>Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable?</i></p>	<p>If strict numerical compliance were required the achievement of building height objectives would be thwarted for the following reasons:</p> <ul style="list-style-type: none"> <li>• The additional building height facilitates an improved planning and urban design outcome by permitting the permissible GFA from being distributed in a manner that facilitates compliance with the solar access controls. The redistribution of permissible GFA results in a better planning and urban design outcome, when compared to a compliant built form.</li> <li>• If strict compliance with the standard were maintained the additional 4.5m setback to Road 2 could not be achieved with a commensurate reduction in GFA across the site. This would represent a departure from the planned density of the Priority Precinct and adversely impact the impact the population growth predictions.</li> <li>• A reduction in the planned population has the potential to undermine the delivery of State and local infrastructure in accordance with the Carter Street Development Contributions Plan 2016 and the State Infrastructure Contribution Levy.</li> </ul>
<p><i>Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that departs from the standard, making compliance with the development standard by others both unnecessary and unreasonable?</i></p>	<p>No, the development standard has been maintained as there have been no determinations made to date. However, as discussed it is evident that there is a disconnect between the permissible maximum height and FSR controls on this site.</p> <p>Since gazettal of the height controls significant changes to the controls affecting sites within Sydney Olympic Park have been exhibited. These draft controls demonstrate that there is a clear position to increase the height and development density in this locality. Whilst the proposal will not increase the density, it will provide for a more appropriate transition in scale from the Sydney Olympic Park precinct.</p>



	The proposed departures will result in an improved design outcome.
<i>Is the “zoning of particular land” unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently compliance with that development standard is unnecessary and unreasonable?</i>	No, the R4 zone is appropriate. No public benefit would be achieved through compliance with the building height standard.

Table 3 – Additional Considerations Arising from *Four2Five Pty Ltd*

Question	Comment
<i>Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP.</i>	As addressed above, the proposed variation is compliant with the considerations of clause 4.6 of ALEP 2010.
<i>That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity).</i>	<p>The planning grounds specific to the site and development have been considered, these include:</p> <ul style="list-style-type: none"> <li>• The proposed massing strategy for the site has been carefully considered and informed by an urban design analysis. Strict compliance with the 42m height control across the site would result in a uniform 14 storey built form outcome. This would result in an adverse visual impact, compromised solar access and additional shadow impacts on neighbouring sites.</li> <li>• The site is immediately adjacent Bus Pod B, which is subject to the controls provided in the Sydney Olympic Park Masterplan 2030. The draft Masterplan that has been exhibited would permit towers of up to 45 storeys on Bus Pod B. This is significantly greater than the height (16 storeys) proposed by this development. In this context, the additional two storeys above the height plane is considered appropriate.</li> </ul>

*That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs.*

As discussed above, the proposed development is compliant with the objectives for Height of buildings development standard and the R4 zone. Further the development as proposed to be modified goes beyond the consideration of consistency with the objectives of the standard and the land use zone for the following reasons.

- There are additional constraints applicable to the site that was not provided for in the making of ALEP 2010 or DCP 2016. The DCP 2016 requires a 20m wide road reserve for Road 2. However, RMS have indicated that they may require the width of this road to be increased to accommodate four lanes of traffic associated with an M4 off ramp.
- To accommodate the potential future widening of Road 2, a 10.5m setback to the face of the buildings has been provided. This equates to an additional 4.5m over what is required by DCP 2016.
- This approach allows road widening (up to 9m) to be equitably distributed between the site and adjoining YMCI site.
- The potential widening of Road 2 has resulted in a reduction in the net developable area. To achieve the planned density for the site, design excellence and solar access requirements it is necessary to vary the height standard.

## **5. CONCLUSION**

The development will have a high quality built form which is consistent with the objectives of both the building height control and the R4 zone. The proposed increase to the building height is the result of a comprehensive urban design analysis, whereby the permissible GFA has been distributed so that it achieves an improved built form outcome.

On balance the additional height above the 42m control results in an improved planning outcome, as it allows for a greater variation between the higher and lower elements of the buildings. As demonstrated in the shadow diagrams, the additional shadow generated by the parts of the building that exceed the control are offset by the reduction.

The proposed variation will not undermine the objectives of the Priority Precinct and is appropriate in the context of the additional site constraints that have resulted in a reduction in the developable site area.

Compliance with the development standard is unreasonable or unnecessary in the circumstances and that there are sufficient environmental planning grounds to justify variation to the standard.