

Exception to Development Standards Request Waverley LEP 2012, clause 4.3 - Height of buildings

59-75 Grafton Street, Bondi Junction (Shop top housing development)

Submitted to
Waverley Council

Prepared on behalf of Clygen Pty Ltd
14 December 2018 | 15082

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1.0 Preliminaries

1.1 Land to which this variation applies and proposed development

This exception to development standards request is provided in support of a development application (DA) seeking approval for the following development at 59-75 Grafton Street, Bondi Junction (**the site**):

1. Demolition of the existing commercial office building and other structures on the site
2. Construction of a shop top housing development comprising:
 - (a) 17 storeys of residential accommodation incorporating 78 dwellings on Levels 1 to 17
 - (b) Three retail/two commercial levels located on the Lower Ground and Upper Ground Levels with a gross floor area (**GFA**) of 475.8m²
 - (c) A eight level mechanical car parking system accommodating 84 cars, accessed from Grafton Street
 - (d) A pedestrian through site link connecting Hegarty Lane and Grafton Street
 - (e) Communal recreation space on the roof and at Level 5
 - (f) Substation to Grafton Street
 - (g) Ancillary facilities comprising storage space, garbage rooms and plant rooms.

This document has been prepared by Robinson Urban Planning Pty Ltd (**RUP**) and should be read in conjunction with the Statement of Environmental Effects (**SEE**) and Supplementary Statement of Environmental Effects (**SSEE**) that accompanies the DA.

1.2 Relevant environmental planning instrument

This exception to development standards request relates to Waverley Local Environmental Plan 2012 (**WLEP 2012**).

1.3 Relevant development standard

This exception to development standards request relates to the height of buildings standard at cl. 4.3(2) of WLEP 2012 which states:

4.3 Height of buildings

...

- (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 standard for the site is 60m, as shown on **Figure 1**.

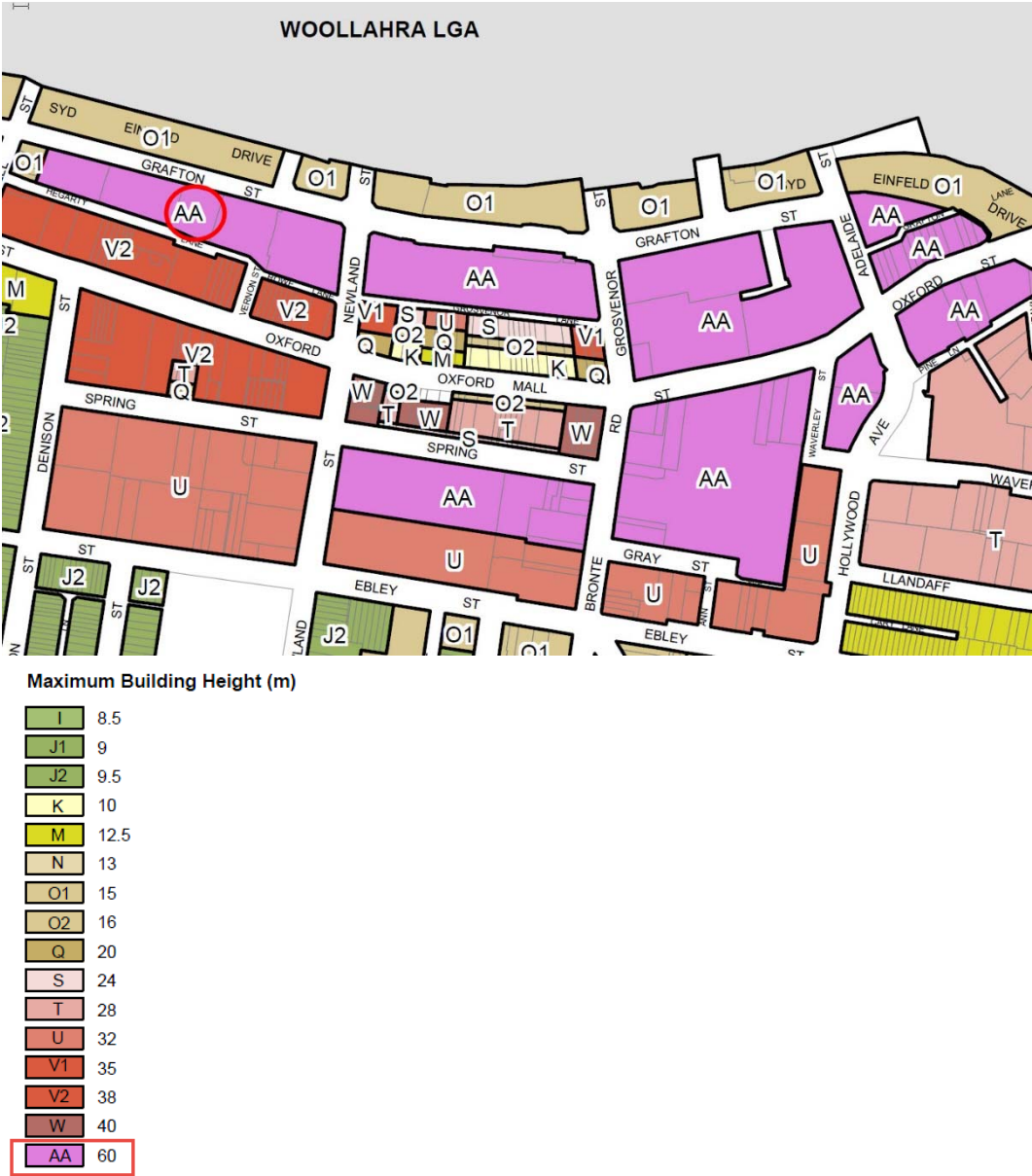


Figure 1 – WLEP 2012 Height of Buildings Map

1.4 Proposed variation to the standard

The proposal has 19 storeys (all levels) and a *building height*¹ of:

- 58.45m to the parapet at Hegarty Lane
- 62.1m to the top of the highest residential level above Grafton Street
- 62.7m to the parapet above Grafton Street
- 65.1m measured from existing ground level to the top of the lift motor room (maximum height proposed 8.5% departure).

Figures 2 to 4 illustrate the extent of non-compliance from the 60m height standard showing that the non-complying elements comprise:

- The roof terrace communal open space which is serviced by a lift and disabled unisex WC to provide equitable access
- Lift over run and plant
- A small portion of apartment area at Level 17.

A photomontage of the proposal is provided at **Figure 5**.

¹ Pursuant to WLEP 2012:

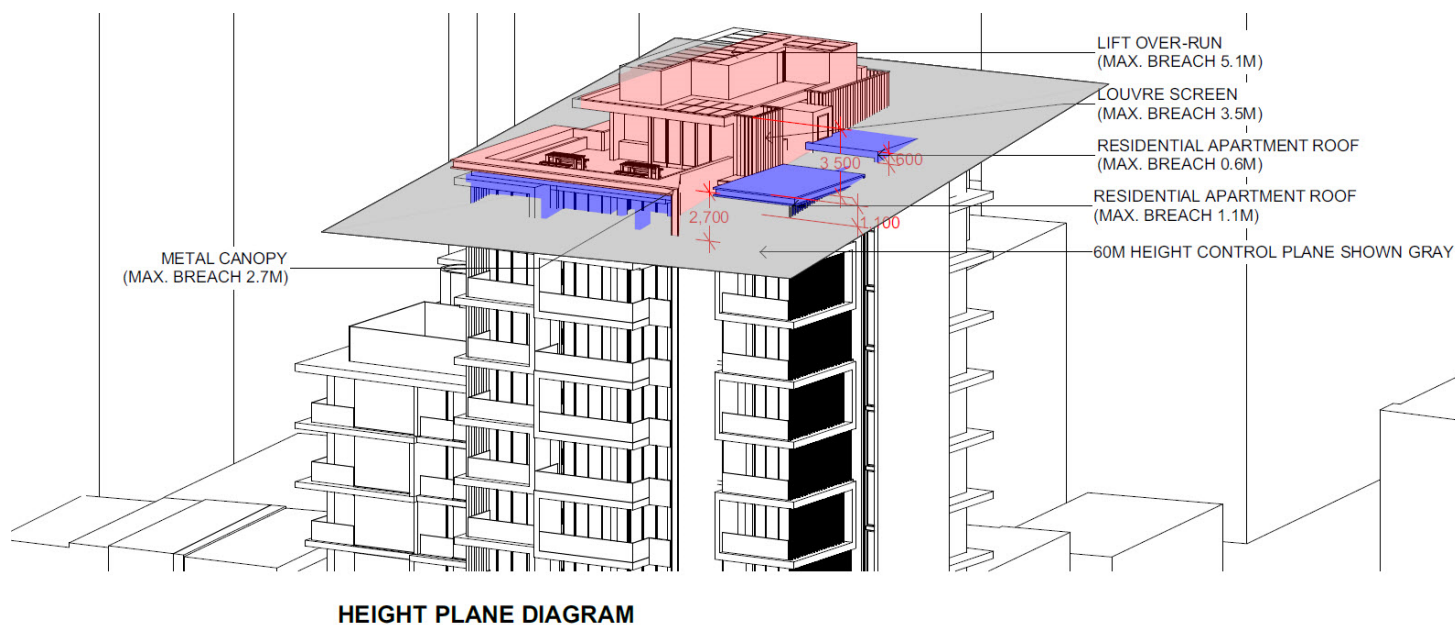
building height (or height of building) means:

(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,*

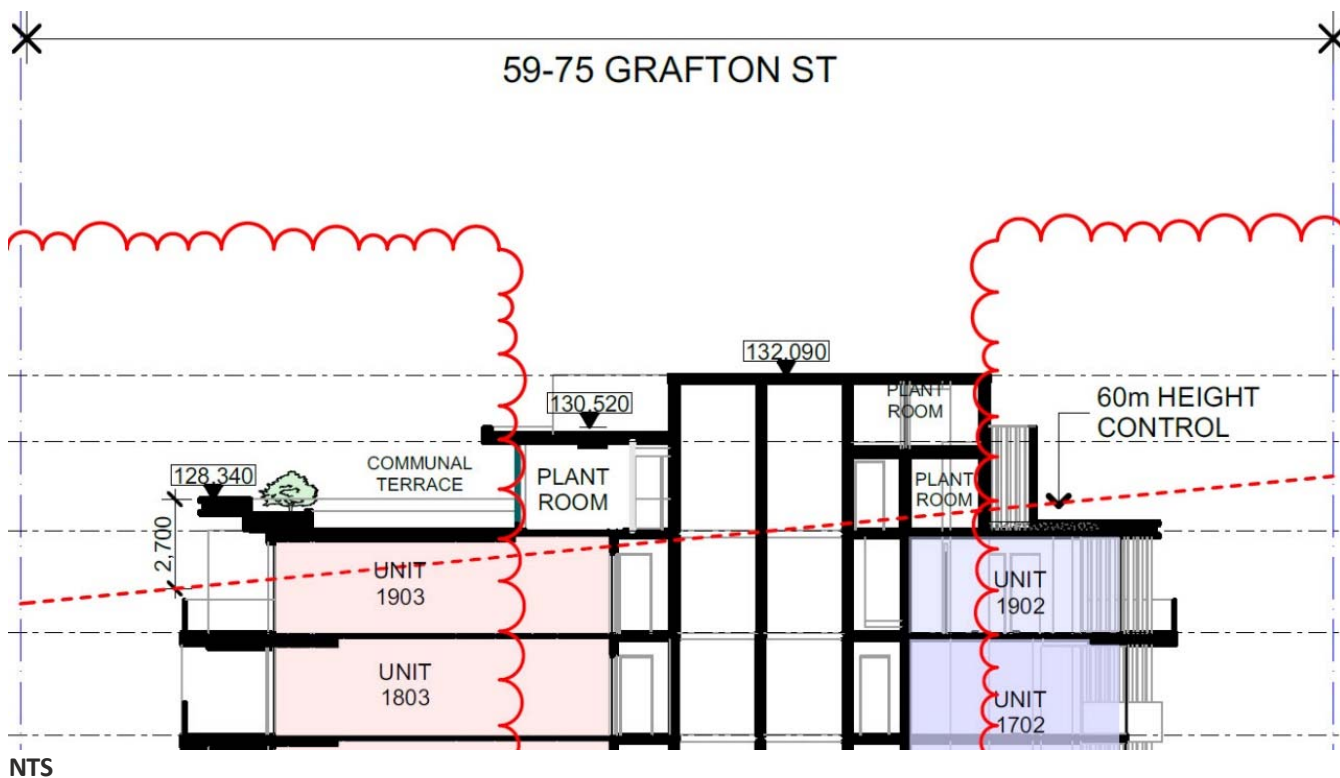
including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

ground level (existing) means the existing level of a site at any point.



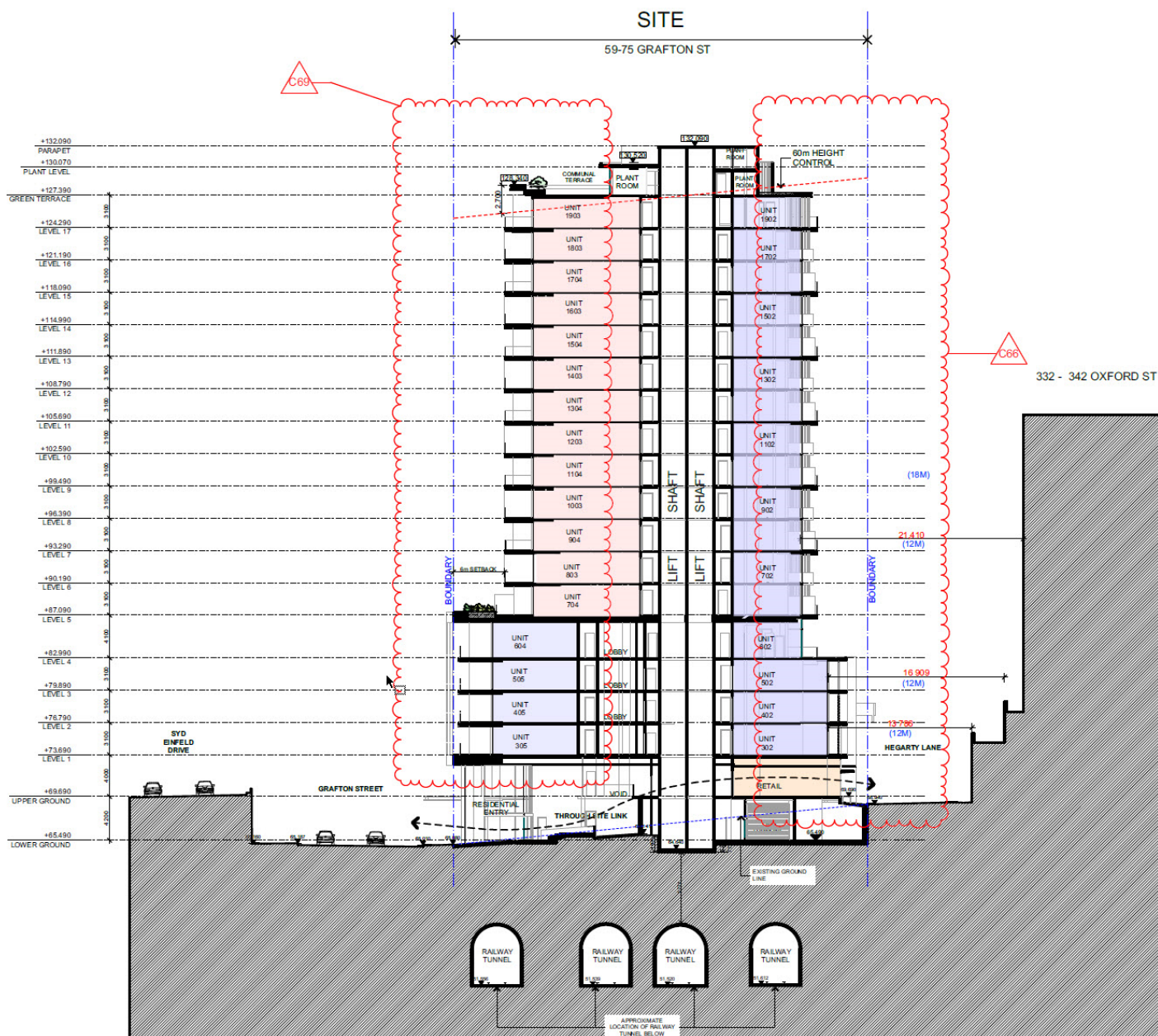
NTS

Figure 2 – Proposed departure from 60m height standard: North Elevation (Source: Cottee Parker JPRA, DA 9005_C)



NTS

Figure 3 – Proposed departure from 60m height standard: Section - zoom (Source: Cottee Parker JPRA, DA 2200_C)



NTS

Figure 4 – Proposed departure from the 60m height standard: Section (Source: Cottee Parker JPRA, DA 2200_C)

EXISTING



PROPOSED



Figure 5 – Existing photograph and proposed photomontage (Source JPRA: DA2700_C)



- 1 Westfield Bondi Junction Tower 2
- 2 Meriton Suites Bondi Junction
- 3 Meriton Suites Bondi Junction
- 4 Eastgate Bondi Junction
- 5 81 Grafton Street
- 6 79 Grafton Street
- 7 310-330 Oxford Street
- 8 45-57 Grafton Street
- 9 43 Grafton Street

Figure 6 – Existing height context: Bondi Junction Skyline as viewed from Cooper Park

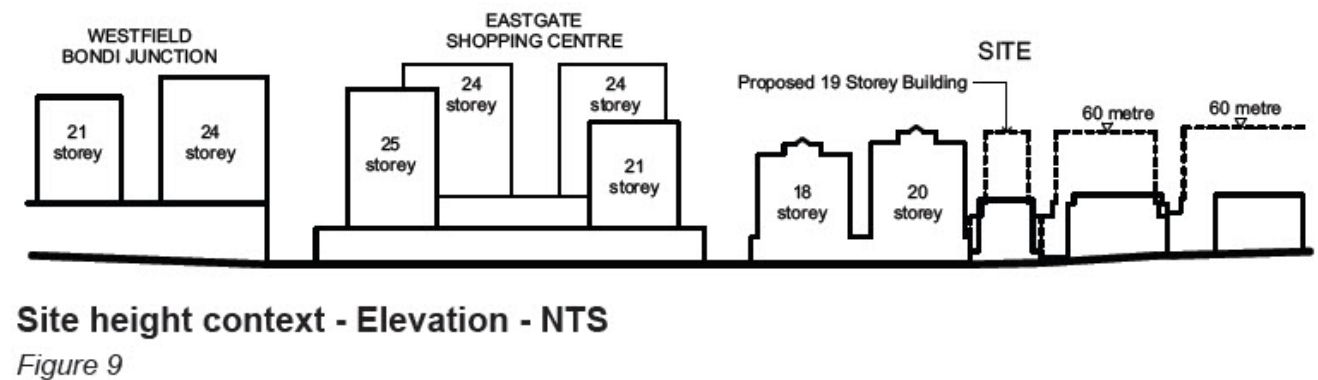
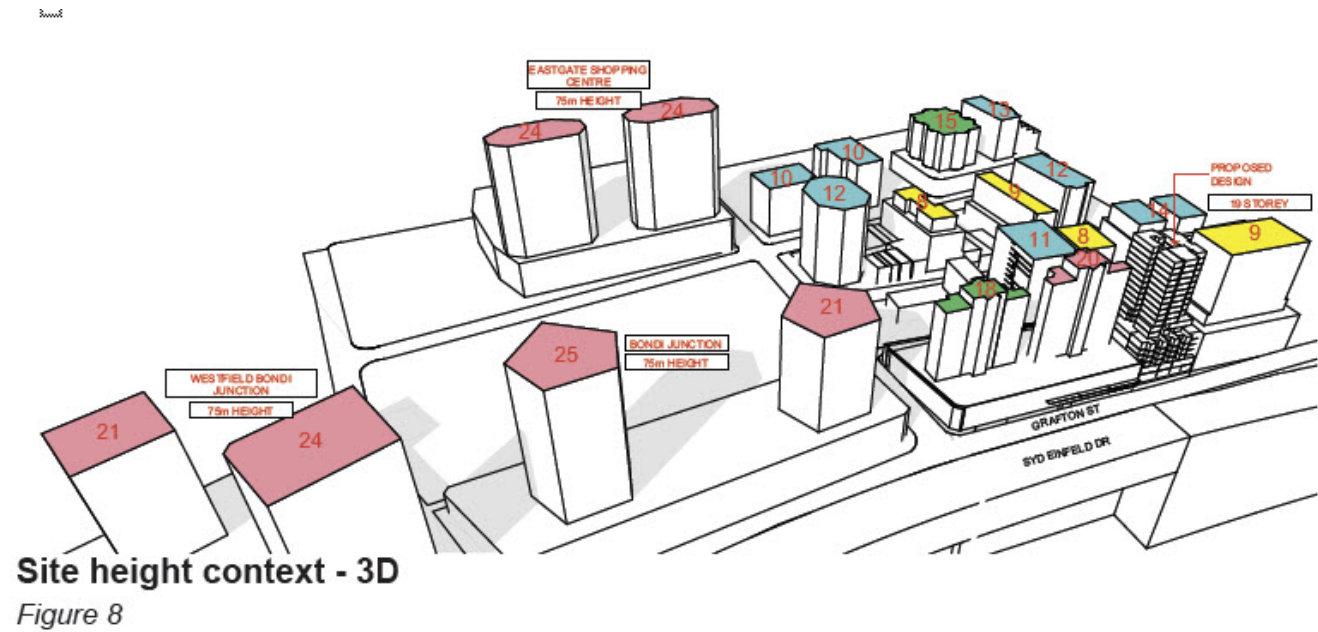


Figure 7 – Proposed height context (Source: Cottee Parker JPRA)

2.0 Justification for the exception and matters for consideration

Clause 4.6 of W2012 states:

4.6 Exceptions to development standards

- (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 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.*
- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Director-General has been obtained.*
- (5) *In deciding whether to grant concurrence, the Director-General must consider:*
 - (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*
- (6) *...*
- (7) *After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- (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.*

2.1 Land and Environment Court tests

This section of the written request assesses the proposed variation from the height standard against the cl. 4.6 considerations using the accepted tests for the assessment of development standard variations established by the NSW Land and Environment Court in:

- *Initial Action v Woollahra Municipal Council* [2018] NSWLEC 118
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 ('Four2Five No 3')
- *Wehbe v Pittwater Council* [2007] NSW LEC 82
- *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46).

2.2 Clause 4.6(3)

The applicant bears the onus to demonstrate that the matters in cl. 4.6(3) have been adequately addressed by the written request in order to enable the consent authority to form the requisite opinion of satisfaction. The applicant's written request seeking to justify the contravention of the development standard must adequately address both:

- That compliance with the development standard is **unreasonable or unnecessary** in the circumstances of the case (cl 4.6(3)(a)); and
- That there are **sufficient environmental planning grounds** to justify contravening the development standard (cl 4.6(3)(b)).

The following sections justify contravention of the height development standard using these tests.

2.2.1 Clause 4.6(3)(a) (Whether compliance with the development standard is unreasonable or unnecessary)

The common ways in which an applicant might demonstrate that compliance with a development standard is **unreasonable or unnecessary** are summarised by Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446. Although *Wehbe* concerned a SEPP 1 objection, the common ways to demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe* are equally applicable to cl 4.6. The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way.

The five ways to demonstrate that compliance with is unreasonable or unnecessary and the relevance to this written request are noted below:

1. **The objectives of the development standard are achieved notwithstanding non-compliance with the standard**

The objectives of the height standard (WLEP 2012 cl. 4.3(1)) are satisfied as noted below:

(a) *to establish limits on the overall height of development to preserve the environmental amenity of neighbouring properties,*

The proposal will not give rise to any unreasonable or unexpected adverse amenity impacts for surrounding properties (in terms of overshadowing, views and privacy impacts), as detailed at Section 6.0 of the SEE. Notably, view, privacy and shadow impacts do not arise from the height non-compliance.

(b) *to increase development capacity within the Bondi Junction Centre to accommodate future retail and commercial floor space growth,*

The proposal provides retail/commercial floor space on the Lower and Upper Ground Levels

(c) to accommodate taller buildings on land in Zone B3 Commercial Core of the Bondi Junction Centre and provide an appropriate transition in building heights surrounding that land,

N/A

(d) to ensure that buildings are compatible with the height, bulk and scale of the existing character of the locality and positively complement and contribute to the physical definition of the street network and public space.

The photomontage at **Figure 5** illustrates that proposal sits comfortably within the streetscape of Grafton Street. Within the wider Bondi Junction skyline, the height non-compliance would be imperceptible, as illustrated by the existing and proposed height context illustrations at **Figures 6 and 7**.

Given the above, it is unreasonable and unnecessary in this circumstance to comply with the height development standard.

2. The underlying objective or purpose of the development standard is not relevant to the development, so that compliance is unnecessary;

N/A

The underlying objective or purpose of the standard is relevant to the development and is achieved as outlined in (i) above.

3. Underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable

N/A

The underlying object or purpose of the standard would not be defeated or thwarted if compliance was required.

Residential amenity, however, would be diminished if compliance was mandated as it would necessitate removal of the proposed communal roof terrace which offers:

- A high standard of amenity for residents on the site in terms of functionality, views, solar and access
- A place to encourage social interaction between residents and their guests
- Equitable access (benefitting aged and disabled people and carers with young children).

4. The development standard has been abandoned by the council

N/A

5. The zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary (note this is a limited way of establishing that compliance is not necessary as it is not a way to effect general planning changes as an alternative to strategic planning powers).

N/A

2.2.2 Clause 4.6(3)(b) (Whether there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b))

“Sufficient environmental planning grounds” is a phrase of wide generality (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 [26]):

Subclause (3)(b) requires a written report to demonstrate that sufficient environmental planning grounds support the contravention of a development standard. The EPA Act or the

LEP do not define "sufficient" or "environmental planning grounds". As the Appellant submitted these phrases are of wide generality enabling a variety of circumstances or grounds to justify contravention of the particular development standard. The "sufficient ... grounds" must be "environmental planning grounds" by their nature. The word "environment" is defined in the EPA Act to mean "includes all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings".

The environmental planning grounds relied on in the written request under cl 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole [24].

Four2Five [31]:

Further support for the Commissioner's approach is derived from the use of the word "sufficient". Contrary to the Appellant's submission that this suggests a low bar, I draw the opposite inference, namely that the written report must address sufficient environmental planning grounds to inform the consent authorities finding of satisfaction in cl 4.6(4)(a)(i).

Using these test, there are **sufficient environmental planning grounds** to vary the height development standard in this instance given that:

- The proposal complies with the 6:1 FSR standard therefore the height non-compliance is not proposed to yield additional GFA on the site
- The non-complying elements largely comprise a roof terrace communal open space, plant, unisex disabled toilet and the lift structure which would provide equitable access to the roof terrace
- Only a very small area of non-compliance relates to Level 17 apartment GFA and this is located at the less sensitive northern end of the site
- The southern elevation of the proposal facing Hegarty Lane (which is most sensitive in terms of view and overshadowing impacts for existing apartments to the south) has a height of 58.45m and complies with the 60m height standard
- The site slopes from Hegarty Lane to Grafton Street
- Further excavation (to reduce height) is not possible on the site given the constraints imposed by the railway tunnel that traverses the site
- Increasing the tower floor plate, to accommodate more volume within the 60m height standard, is not desirable as it would reduce side boundary setbacks (noting that the ADG does not require any setbacks/separation for blank walls), increase bulk, diminish the potential to provide a slender tower and increase impacts for neighbouring dwellings (particularly view loss for dwellings to the south)
- The GFA distribution between the podium (38% of GFA) and tower (62%) is appropriate noting that podium efficiency is maximised by the provision of a mechanical car parking system. The provision of more GFA in the podium, to reduce building height, is not practicable
- The non-compliance with the development standard allows for an orderly use of the land and the proposal has been designed with consideration to the desired future character of the area.
- Additionally, the Objects of the Act are satisfied as:
 - The departure from the height standard in WLEP 2012 will have no negative consequences in terms of the proper management, development and conservation of

natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment; and

- The departure from the height standard in WLEP 2012 allows for the orderly and economic use of the site in a manner which otherwise achieves the outcomes and objectives of the relevant planning controls.

2.3 Clause 4.6(4)(a)

Clause 4.6(4)(a) establishes preconditions that must be satisfied before a consent authority (or the court exercising the functions of a consent authority) can exercise the power to grant development consent.

The first opinion of satisfaction in cl 4.6(4)(a)(i) is that the written request has addressed subclause (3). As demonstrated above at Section 2.3, the written request has addressed both parts of cl. 4.6(3). Demonstrating:

- That compliance with the height standard is unreasonable and unnecessary; and
- That there are sufficient environmental planning grounds to justify contravening the development standard.

The second opinion of satisfaction in cl 4.6(4)(a)(ii) is that the proposed development will be in the public interest because it is consistent with the objectives of the development standard that is contravened and the zone objectives. The consent authority must be satisfied that the development is in the public interest because it is consistent with these objectives, not simply that the development is in the public interest.

The consistency of the development with the objectives of the development standard is addressed above at Section 2.321.

The consistency of the development with the objectives of Zone B4 is noted below, demonstrating that the development is in the public interest

- *To provide a mixture of compatible land uses*

The proposal has retail/commercial uses at the Lower and Upper Ground Level with high density residential above.

- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling*

The location of the site close to Bondi Junction transport interchange, the provision of an efficient mechanical car parking system and bicycle parking for residents, visitors and workers promotes public transport usage, walking and cycling.

2.4 Clause 4.6(4)(b) (Concurrence of the Secretary of the Department of Planning and Environment)

The Secretary of the Department of Planning and Environment has granted concurrence to Waverley Council.

3.0 Conclusion

The proposal has 19 storeys and a *building height* of:

- 58.45m to the parapet at Hegarty Lane (complying with the 60m height standard)
- 62.1m to the top of the highest residential level above Grafton Street (2.1m above the height standard)
- 62.7m to the parapet above Grafton Street (2.7m above the height standard)
- 65.1m measured from *existing ground level* to the top of the lift motor room (6.51m above the height standard which is a maximum departure of 8.5%).

Consistent with the tests established by the Land and Environment Court, this cl. 4.6 written request to vary the height standard demonstrates that:

- Compliance with the development standard is unreasonable and unnecessary;
- There are sufficient environmental planning grounds to justify contravening the development standard; and
- The proposed development will be in public interest because it is consistent with the objectives of the development standard that is contravened and the zone objectives.