

# **CLAUSE 4.6 VARIATION REQUEST**

**STATE ENVIRONMENTAL PLANNING POLICY  
(AFFORDABLE RENTAL HOUSING) 2009 - CL. 30 (1) (H)  
STANDARDS FOR BOARDING HOUSES**

**1 COWPER STREET,  
RANDWICK**

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# 1. INTRODUCTION

This Clause 4.6 variation request has been prepared by Urbis on behalf of the University of New South Wales (UNSW), the applicant for a development application for student accommodation at 1 Cowper Street, Randwick.

The request seeks an exemption from the strict application of development standards contained in Clause 30 of *State Environmental Planning Policy (Affordable Rental Housing) 2009*, specifically Clause 30 (1)(h):

*(1) A consent authority must not consent to development to which this Division applies unless it is satisfied of each of the following:*

*....(h) at least one parking space will be provided for a bicycle, and one will be provided for a motorcycle, for every 5 boarding rooms.*

Clause 4.6 (3) of Randwick Local Environmental Plan (RLEP) 2012 states:

*(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.*

Accordingly, this variation request is made pursuant to Clause 4.6 (2) of the RLEP 2012.

A Traffic and Parking Assessment has also been prepared by Taylor Thomson Whiting and is submitted at **Attachment 2** within this overall submission. The report should be read in conjunction with this Clause 4.6 variation request.

## 2. ASSESSMENT FRAMEWORK

### 2.1. CLAUSE 4.6 OF RLEP 2012

Clause 4.6 of RLEP 2012 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of Clause 4.6 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 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 achieve better outcomes for and from the development.

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:

- a) Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- b) 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:

- 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 Secretary before granting concurrence.*

[Note: Concurrence is assumed pursuant to *Planning Circular No. PS 18-003 Variations to Development Standards* dated 21 February 2018].

This document forms a Clause 4.6 written request to justify the contravention of the parking standard contained within Clause 30(1)(h), specifically as it relates to motorcycle parking. The assessment of the proposed variation has been undertaken in accordance with the requirements of the RLEP 2012 Clause 4.6 Exceptions to Development Standards.

### 2.2. NSW LAND AND ENVIRONMENT COURT: CASE LAW

Several key New South Wales Land and Environment Court (NSW LEC) planning principles and judgements have refined the manner in which variations to development standards are required to be approached.

The correct approach to preparing and dealing with a request under clause 4.6 is neatly summarised by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118:

*[13] The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.*

*[14] The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl*

4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5 at [28]; *Winten Property Group Limited v North Sydney Council* (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].

- [15] The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard 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 (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.
- [16] As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe v Pittwater Council* at [42]-[51]. 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.
- [17] The first and 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: *Wehbe v Pittwater Council* at [42] and [43].
- [18] A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: *Wehbe v Pittwater Council* at [45].
- [19] A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: *Wehbe v Pittwater Council* at [46].
- [20] A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: *Wehbe v Pittwater Council* at [47].
- [21] A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: *Wehbe v Pittwater Council* at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in *Wehbe v Pittwater Council* at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.
- [22] These 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, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.
- [23] As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is

not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

- [24] 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].
- [25] The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant’s written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). As I observed in *Randwick City Council v Micaul Holdings Pty Ltd* at [39], the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant’s written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant’s written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction: see *Wehbe v Pittwater Council* at [38].
- [26] 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 particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant’s written request has adequately addressed the matter in cl 4.6(4)(a)(ii).
- [27] The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development’s consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).
- [28] The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary’s concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.
- [29] On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41].



## 3. SITE AND LOCALITY

### 3.1. SITE ANALYSIS

The site is located at 1 Cowper Street, Randwick and is located within the Randwick local government area (LGA). The site comprises two allotments legally described as Lot 7 in DP 758867 (northern portion) and Lot 4 in DP 758867 (southern portion). The location of the site is illustrated in Figure 1.

The existing characteristics of the site are described below:

- An overall site area of approximately 8,606sqm;
- Frontages to King Street to the north (47.62m), Mulwarree Avenue to the east (181.65m) and Cowper Street to the south (47.17m);
- A row of mature Hills Weeping Fig trees along the eastern boundary to Mulwarree Avenue;
- The northern portion of the site, which is the main focus of this DA, is generally vacant except for a small waste shed along the King Street frontage;
- The balance of the site is currently occupied by a four-level student housing development, comprising 14 buildings oriented around central courtyards. This site currently accommodates 185 student beds and was developed in accordance with Development Consent No. 103/1992; and
- An undercroft level adjacent to the western boundary and accessed from Cowper Street. The undercroft area includes car parking, bicycle parking, waste storage area and communal laundry.

Figure 1 – Aerial Plan



Source: Near Map

## 3.2. SURROUNDING CONTEXT

Randwick is located 7.6km south-east of the Sydney CBD. Major landmarks within the surrounding area include UNSW's Kensington and Randwick Campuses, Randwick Racecourse, Prince of Wales Hospital, Centennial Park and Coogee and Maroubra beaches.

Development in the immediate locality is characterised by residential land uses comprising a mix of single storey dwellings, semi-detached dwellings and three to four storey residential flat buildings. The area immediately surrounding the site includes:

- **North:** Immediately north on the opposite side of King Street is the Randwick bus depot and UNSW Randwick Campus and Randwick TAFE.
- **East:** Across Mulwarree Avenue to the east of the site are a mix of two, three and four storey dwellings and residential flat buildings.
- **South:** To the south is a mix of two and four storey residential buildings fronting Cowper Street. Further to the south-west along Alison Road is Randwick Racecourse.
- **West:** The northern portion of the site adjoins 37 King Street, which is occupied by a single storey dwelling house. This site together with the three adjoining sites to the west, also accommodating single storey dwellings, form an under-utilised development site. The western boundary adjoins residential properties fronting William Street, which are occupied by three, four and five storey residential flat buildings. Further to the west is the Royal Randwick Racecourse and the new South-East Light Rail currently under construction.

The architectural package provided at **Attachment 1** includes a diagram illustrating the relationship between the building scale and massing arrangement of the proposed development and the existing development in the immediate vicinity.

## 3.3. PLANNING CONTEXT

A Traffic and Parking Report prepared by Taylor Thomson Whiting is also submitted at **Attachment 2**. This Report provides the results of 5 separate on-site vehicle occupancy surveys as well as 2 separate on-line surveys of residents of the existing development. Collectively, this provides robust and reliable data to determine the maximum future projected demand for motorcycles on the site in response to the proposed additional student accommodation, especially having regard to the convenience of the light rail project which is yet to become operational.

The online surveys were undertaken with current residents to determine travel habits and vehicle ownership details. The initial survey received 36 responses over two weeks, representing approximately 20% of the existing 185 residents. Following discussions with Council relating to the survey methodology and results, an additional survey was undertaken to reach a broader student audience. The second survey received 57 responses over 2 weeks, representing approximately 30% of the existing student group. In relation to motorcycle usage specifically, ownership was higher in the second survey. Accordingly, the results of the second survey were used to forecast the anticipated demand for motorbike parking, providing a conservative outcome.

## 4. THE PROPOSED DEVELOPMENT

### 4.1. DEVELOPMENT OVERVIEW

This DA seeks consent for the following works:

- Construction of a four-storey development for the purposes of student housing, comprising 152 beds in cluster modules and communal areas, laundry and open space.
- Reconfiguration of existing undercroft car parking area, including a reduction in the number of car parking spaces (58 to 33) and increase in bicycle parking spaces (48 to 89).
- Reconfiguration of the site's waste storage and management procedures.
- Tree works to the significant Hills Weeping Fig Trees and site landscaping works.

The existing Mulwarree Apartments within the site currently provide 185 student beds, with 30 of these to be demolished as part of the Early Works DA. The proposed development will provide 152 student beds, resulting in a net increase of 122 beds and a total provision of 307 beds across the site.

Architectural Plans prepared by Nettleton Tribe are provided at Attachment 1. Key numeric aspects of the proposal are provided in Table 1 and the various components of the proposed development are described in the following sections.

Table 1 – Numeric Overview of Proposal

Parameter	Proposal
Total site area	8,606sqm
Total gross floor area (GFA)	Existing GFA: 3,665sqm (Buildings 1-12) Proposed GFA: 7,857sqm
Floor space ratio (FSR)	Existing FSR: 0.51:1 Proposed FSR: 0.91:1
Maximum building height	Roof parapet: RL 51.200 Lift overrun: RL 52.300 Access Stairs: RL 53.750
Total number of student beds across site	Existing: 185 beds Proposed: 307 beds (net increase of 122)
Car parking	Existing: 58 spaces (no accessible spaces) Proposed: 33 spaces (three accessible spaces).
Bicycle parking	Existing: 48 spaces Proposed: 89 spaces
Motorcycle parking	Existing: 0 spaces Proposed: 5 spaces

## 4.2. DESIGN OBJECTIVES

The design objectives of the proposal are summarised below:

- *Contextually respond to the tree lined site and neighbourhood;*
- *Respond to the local scale and built form context;*
- *Foster a community environment;*
- *Integrate landscaping;*
- *Incorporate sustainable design initiatives;*
- *Provide a safe and secure environment; and*
- *Architectural language that is contextually responsive and contemporary.*

## 4.3. STUDENT ACCOMMODATION

The 152 student rooms are clustered into modules comprising four to seven student rooms each. Each module provides a communal living room and kitchen, bathroom facilities and small open space. The student rooms are 10sqm in area and provide space for a king single bed, desk, bedside table and wardrobe. The ground floor also comprises a communal lounge area, laundry and outdoor drying area, communal study and communal open space.

## 5. EXTENT OF CONTRAVENTION

### 5.1. CLAUSE 30 (1)(H) – STANDARDS FOR BOARDING HOUSES

Clause 30 of AHR SEPP stipulates development standards that must be satisfied prior to a consent authority granting development consent. This request specifically seeks an exemption from Clause 30 (1)(h) which stipulates the following:

*(h) at least one parking space will be provided for a bicycle, and one will be provided for a motorcycle, for every 5 boarding rooms.*

Clause 30(1)(h) of ARH SEPP requires the provision of 1 motorcycle parking space on site for every 5 boarding rooms. For a development of 307 student beds, 62 motorcycle parking spaces are required to be provided on site. The proposed development provides a total of five motorcycle parking spaces. It is important to note there is currently no formal motorbike parking area.

This request seeks an exemption from the strict application of Clause 30(1)(h) of AHR SEPP.



## 6. CLAUSE 4.6 VARIATION REQUEST: STANDARDS FOR BOARDING HOUSES

The following sections of the report provide an assessment of the request to vary the development standard relating to the standards for boarding houses in accordance with Clause 30(1) (h) of the AHR SEPP.

### 6.1. CLAUSE 30(1)(H) OF AHR SEPP

Clause 30(1)(h) of ARH SEPP requires the provision of 1 motorcycle parking space on site for every 5 boarding rooms. The AHR SEPP does not include specific objectives for motorcycle parking rates. Notwithstanding this, the objective is presumably linked to anticipated transport mode for boarding house residents where the boarding house is privately operated or operated by a social housing provider.

### 6.2. KEY QUESTIONS

#### Is the Planning Control a Development Standard?

The development standards prescribed under Clause 30 (1)(h) of the AHR SEPP is a development standard capable of being varied under Clause 4.6 of RLEP 2012.

#### Is the Development Standard Excluded from the Operation of Clause 4.6?

The development standard is not excluded from the operation of Clause 4.6 as it is not listed within Clause 4.6(6) or Clause 4.6(8) of RLEP 2012.

#### What is the Underlying Object or Purpose of the Standard?

As discussed above, the AHR SEPP does not include specific objectives for motorcycle parking rates however the underlying objective is presumably linked to anticipated transport mode for boarding house residents where the boarding house is privately operated or operated by a social housing provider.

It is important to note the intent of the AHR SEPP is to facilitate the increased supply and diversity of affordable rental and social housing in New South Wales. Whilst by default the proposed student housing development is considered a boarding house and therefore subject to the provisions under the AHR SEPP, the profile of student residents anticipated to be living at the site is very different to the profile of residents anticipated to live in general affordable housing developments. For example, the majority of student residents do not own motorcycles, utilise public transport, will not permanently reside at the site, and will spend the majority of their time on campus.

### 6.3. CONSIDERATIONS

#### 6.3.1. Clause 4.6(3)(a) – Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are listed within the 'five-part test' outlined in *Wehbe v Pittwater [2007] NSWLEC 827*. These tests are outlined in Section 2.2 of this letter (paragraphs [17]-[21]).

An applicant does not need to establish all of the tests or 'ways'. **It may be sufficient to establish only one way**, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way

The development is justified against **two** of the Wehbe tests as set out below.

##### ***Test 1: The objectives of the development standard are achieved notwithstanding non-compliance with the standard***

The underlying objective of Clause 30 (1)(h) is to provide motorcycle parking for building users and visitors, presumably where the boarding house is privately operated or operated by a social housing provider. As discussed, the motorcycle parking rates identified in Clause 30 (1)(h) typically apply to affordable housing developments whereby members of the general public reside. The proposed development is specifically for

student housing. The profile of residents will differ to the types of lodgers typically envisaged living in boarding houses as demonstrated by the existing student housing on site. Notwithstanding this, the proposal satisfies the objectives of the development standard for the reasons outlined below:

- The limited motorcycle parking will more than cater for the likely and demonstrated demand. The site is well serviced by sustainable modes of transport, including walking, cycling and the use of public transport. Surveys demonstrate that the student residents lead more active and healthy lifestyles which improves overall amenity in the area.
- Based on recent traffic and parking studies, the vast majority of existing student residents do not own a motorbike. Based on the forecast total of 307 residents, five spaces are required and the proposal satisfies this expected demand.
- The proposal supports integrated transport and land use options by providing an abundance of bicycle parking to encourage the use of bikes and links to public transport.

In summary, the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

***Test 2: The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary***

As discussed above, the underlying objective of the standard is applicable to general boarding house lodgers, as opposed to student residents specifically. In summary, the underlying objectives of the development standard are not relevant because:

- The Mulwarree Apartments are generally considered a more affordable housing option (the cheapest self-catered accommodation at UNSW) and therefore students are less likely to own a motorcycle;
- As the proposal does not represent a permanent form of long-term accommodation (it is student housing used for shorter term stay), the likelihood of using or storing motorcycles on site is reduced – this is reflected in the survey results; and,
- The majority of existing and future residents are students and typically spend most of their day on campus. The site is a short walk to the UNSW Kensington campus (14 minutes) and Randwick campus (4 minutes).

Accordingly, the underlying objectives of the development standard are not relevant because the majority of existing and future residents do not own motorcycles and a vast majority of student residents attend tertiary education facilities within walking distance or will use public transport. Furthermore, residents will not be permanent residents of the site.

***Test 3: The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable***

Not relied upon.

***Test 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***

Not relied upon.

***Test 5: The zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary***

Not relied upon.

### **6.3.2. Clause 4.6(3)(b) - Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard?**

There are sufficient environmental planning grounds to justify the proposed variations to the development standard, including the following:

- No on-site motorcycle parking is currently provided on-site. The proposed development provides five motorcycle spaces which is considered sufficient to meet forecast demand.
- Existing parking at the current site is underutilised, despite UNSW not charging residents for on-site parking. The provision of 62 motorcycle spaces is considered excessive given recent parking studies suggest that of the current 185 beds, there is only demand for three motorcycle spaces. Accordingly, based on a provision of 307 beds, a total of five spaces is required at most.
- The lack of motorcycle parking will encourage more sustainable modes of transport including walking, cycling and public transport. There is an abundance of bicycle parking provided on-site (81 spaces) and 33 car parking spaces. The proposed capacity for each vehicle type remains equal or greater than the forecast maximum demand and therefore the provision is considered appropriate.
- The site is well-serviced by public transport and located close to the major destination for residents (UNSW Kensington Campus) so private vehicle travel demand is limited.
- Two online surveys were undertaken with current residents to determine travel habits and vehicle ownership details. In relation to vehicle usage and parking demand, vehicle ownership was higher in the first survey and motorcycle ownership was higher in the second survey. Accordingly, the results of the second survey were used to forecast the anticipated demand for motorbike parking, providing a conservative outcome. The proposed number of motorcycle spaces is considered more than enough based on existing and future demand.

In conclusion, there are sufficient environmental planning grounds to justify convening the development

### **6.3.3. Clause 4.6(4)(a)(ii) – Will the Proposed Development be in the Public Interest Because it is Consistent with the Objectives of the Particular Standard and Objectives for Development within the Zone in Which the Development is Proposed to be Carried Out?**

The proposal is in the public interest as the development is consistent with the objectives of the development standard as outlined in Section 6.3.1 of this Request. The proposal is also consistent with the land use objective that applies to the site under RLEP as demonstrated within Table 2 below. The site is located within the R3 Medium Density Residential zone.

Table 2 – Assessment of Compliance with Land Use Zone Objectives

<i>To provide for the housing needs of the community within a medium density residential environment</i>	As discussed above, existing parking at the current site is underutilised. For the proposed site capacity of 307 rooms, this would generate an equivalent demand of 5 motorcycle spaces. The capacity of the proposed basement car park meets this demand and therefore provides for the housing needs of the community.  This site is also well-serviced by public transport and located close to the major destination for residents (UNSW Kensington Campus) so private vehicle travel demand is limited.
<i>To provide a variety of housing types within a medium density residential environment</i>	The proposed development will facilitate greater housing choice within the Randwick LGA by providing high quality and affordable housing targeted specifically for students. The development includes a range of communal and open space areas which will enhance the amenity for residents and has excellent access to the UNSW campuses, public transport, recreation, local shopping centres and community services.
<i>To enable other land uses that provide facilities or services to meet the day to day needs of residents</i>	N/A.
<i>To recognise the desirable elements of the existing streetscape and built form or, in precincts undergoing transition,</i>	N/A.



<i>that contribute to the desired future character of the area</i>	
<i>To protect the amenity of residents</i>	N/A.

The proposal is considered to be in the public interest as the development is consistent with the objectives of the development standard, and the land use objectives of the zone.

#### **6.3.4. Clause 4.6(5)(a) - Would Non-Compliance Raise any Matter of Significance for State or Regional Planning?**

The proposed non-compliance with the development standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

#### **6.3.5. Clause 4.6(5)(b) - Is There a Public Benefit of Maintaining the Planning Control Standard?**

The proposed development achieves the objectives of the development standard and the land use zoning objectives despite the non-compliance. There is no public benefit in maintaining strict compliance with the motorcycle parking development standard as the existing car park is currently underutilised, the majority of existing and future residents do not own private vehicles/motorcycles and the site is well serviced by public transport.

#### **6.3.6. Clause 4.6(5)(c) – Are there any other matters required to be taken into consideration by the Secretary before granting concurrence?**

Concurrence can be assumed. Nevertheless, there are no known additional matters that need to be considered within the assessment of the Clause 4.6 Request and prior to granting concurrence, should it be required.

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This report has been prepared with due care and diligence by Urbis and the statements and opinions given by Urbis in this report are given in good faith and in the reasonable belief that they are correct and not misleading, subject to the limitations above.





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# **CLAUSE 4.6 VARIATION REQUEST**

**STATE ENVIRONMENTAL PLANNING POLICY  
(AFFORDABLE RENTAL HOUSING) 2009 - CL. 30 (1)(E)  
STANDARDS FOR BOARDING HOUSES**

**1 COWPER STREET,  
RANDWICK**

**URBIS STAFF RESPONSIBLE FOR THIS REPORT WERE:**

Director	Peter Strudwick
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Project Code	SA7019
Report Number	Clause 4.6_SA7019_Final

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# 1. INTRODUCTION

This Clause 4.6 variation request has been prepared by Urbis on behalf of the University of New South Wales (UNSW), the applicant for a development application for student accommodation at 1 Cowper Street, Randwick.

The request seeks an exemption from the strict application of development standards contained in Clause 30 of *State Environmental Planning Policy (Affordable Rental Housing) 2009*, specifically Clause 30(1)(e):

*(1) A consent authority must not consent to development to which this Division applies unless it is satisfied of each of the following:*

*....(e) if the boarding house has capacity to accommodate 20 or more lodgers, a boarding room or on site dwelling will be provided for a boarding house manager,*

Clause 4.6 (3) of Randwick Local Environmental Plan (RLEP) 2012 states:

*(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.*

Accordingly, this variation request is made pursuant to Clause 4.6 (2) of the RLEP 2012. This variation request should be read in conjunction with the Plan of Management previously submitted with the application.

## 2. ASSESSMENT FRAMEWORK

### 2.1. CLAUSE 4.6 OF RLEP 2012

Clause 4.6 of RLEP 2012 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of Clause 4.6 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 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 achieve better outcomes for and from the development.

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:

- a) Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- b) 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:

- 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 Secretary before granting concurrence.*

[Note: Concurrence is assumed pursuant to *Planning Circular No. PS 18-003 Variations to Development Standards* dated 21 February 2018].

This document forms a Clause 4.6 written request to justify the contravention of Clause 30(1)(e) requiring the provision on site accommodation for a boarding house manager. The assessment of the proposed variation has been undertaken in accordance with the requirements of the RLEP 2012 Clause 4.6 Exceptions to Development Standards.

### 2.2. NSW LAND AND ENVIRONMENT COURT: CASE LAW

Several key New South Wales Land and Environment Court (NSW LEC) planning principles and judgements have refined the manner in which variations to development standards are required to be approached.

The correct approach to preparing and dealing with a request under clause 4.6 is neatly summarised by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118:

*[13] The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.*

*[14] The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl*

4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5 at [28]; *Winten Property Group Limited v North Sydney Council* (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].

- [15] The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard 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 (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.
- [16] As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe v Pittwater Council* at [42]-[51]. 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.
- [17] The first and 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: *Wehbe v Pittwater Council* at [42] and [43].
- [18] A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: *Wehbe v Pittwater Council* at [45].
- [19] A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: *Wehbe v Pittwater Council* at [46].
- [20] A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: *Wehbe v Pittwater Council* at [47].
- [21] A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: *Wehbe v Pittwater Council* at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in *Wehbe v Pittwater Council* at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.
- [22] These 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, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.
- [23] As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is

not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

- [24] 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].
- [25] The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant’s written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). As I observed in *Randwick City Council v Micaul Holdings Pty Ltd* at [39], the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant’s written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant’s written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction: see *Wehbe v Pittwater Council* at [38].
- [26] 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 particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant’s written request has adequately addressed the matter in cl 4.6(4)(a)(ii).
- [27] The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development’s consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).
- [28] The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary’s concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.
- [29] On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41].



## 3. SITE AND LOCALITY

### 3.1. SITE ANALYSIS

The site is located at 1 Cowper Street, Randwick and is located within the Randwick local government area (LGA). The site comprises two allotments legally described as Lot 7 in DP 758867 (northern portion) and Lot 4 in DP 758867 (southern portion). The location of the site is illustrated in Figure 1.

The existing characteristics of the site are described below:

- An overall site area of approximately 8,606sqm;
- Frontages to King Street to the north (47.62m), Mulwarree Avenue to the east (181.65m) and Cowper Street to the south (47.17m);
- A row of mature Hills Weeping Fig trees along the eastern boundary to Mulwarree Avenue;
- The northern portion of the site, which is the main focus of this DA, is generally vacant except for a small waste shed along the King Street frontage;
- The balance of the site is currently occupied by a four-level student housing development, comprising 14 buildings oriented around central courtyards. This site currently accommodates 185 student beds and was developed in accordance with Development Consent No. 103/1992; and
- An undercroft level adjacent to the western boundary and accessed from Cowper Street. The undercroft area includes car parking, bicycle parking, waste storage area and communal laundry.

Figure 1 – Aerial Plan



Source: Near Map

## 3.2. SURROUNDING CONTEXT

Randwick is located 7.6km south-east of the Sydney CBD. Major landmarks within the surrounding area include UNSW's Kensington and Randwick Campuses, Randwick Racecourse, Prince of Wales Hospital, Centennial Park and Coogee and Maroubra beaches.

Development in the immediate locality is characterised by residential land uses comprising a mix of single storey dwellings, semi-detached dwellings and three to four storey residential flat buildings. The area immediately surrounding the site includes:

- **North:** Immediately north on the opposite side of King Street is the Randwick bus depot and UNSW Randwick Campus and Randwick TAFE.
- **East:** Across Mulwarree Avenue to the east of the site are a mix of two, three and four storey dwellings and residential flat buildings.
- **South:** To the south is a mix of two and four storey residential buildings fronting Cowper Street. Further to the south-west along Alison Road is Randwick Racecourse.
- **West:** The northern portion of the site adjoins 37 King Street, which is occupied by a single storey dwelling house. This site together with the three adjoining sites to the west, also accommodating single storey dwellings, form an under-utilised development site. The western boundary adjoins residential properties fronting William Street, which are occupied by three, four and five storey residential flat buildings. Further to the west is the Royal Randwick Racecourse and the new South-East Light Rail currently under construction.

The architectural package provided at **Attachment 1** includes a diagram illustrating the relationship between the building scale and massing arrangement of the proposed development and the existing development in the immediate vicinity.

## 4. THE PROPOSED DEVELOPMENT

### 4.1. DEVELOPMENT OVERVIEW

This DA seeks consent for the following works:

- Construction of a four-storey development for the purposes of student housing, comprising 152 beds in cluster modules and communal areas, laundry and open space.
- Reconfiguration of existing undercroft car parking area, including a reduction in the number of car parking spaces (58 to 33), an increase in bicycle parking spaces (48 to 89) and an increase in motorcycle parking spaces (0 to 5).
- Reconfiguration of the site's waste storage and management procedures.
- Tree works to the significant Hills Weeping Fig Trees and site landscaping works.

The existing Mulwarree Apartments within the site currently provide 185 student beds, with 30 of these to be demolished as part of the Early Works DA. The proposed development will provide 152 student beds, resulting in a net increase of 122 beds and a total provision of 307 beds across the site.

Architectural Plans prepared by Nettleton Tribe are provided at Attachment 1. Key numeric aspects of the proposal are provided in Table 1 and the various components of the proposed development are described in the following sections.

Table 1 – Numeric Overview of Proposal

Parameter	Proposal
Total site area	8,606sqm
Total gross floor area (GFA)	Existing GFA: 3,665sqm (Buildings 1-12) Proposed GFA: 7,857sqm
Floor space ratio (FSR)	Existing FSR: 0.51:1 Proposed FSR: 0.91:1
Maximum building height	Roof parapet: RL 51.200 Lift overrun: RL 52.300 Access Stairs: RL 53.750
Total number of student beds across site	Existing: 185 beds Proposed: 307 beds (net increase of 122)
Car parking	Existing: 58 spaces (no accessible spaces) Proposed: 33 spaces (three accessible spaces).
Bicycle parking	Existing: 48 spaces Proposed: 89 spaces
Motorcycle parking	Existing: 0 spaces Proposed: 5 spaces

## 4.2. DESIGN OBJECTIVES

The design objectives of the proposal are summarised below:

- *Contextually respond to the tree lined site and neighbourhood;*
- *Respond to the local scale and built form context;*
- *Foster a community environment;*
- *Integrate landscaping;*
- *Incorporate sustainable design initiatives;*
- *Provide a safe and secure environment; and*
- *Architectural language that is contextually responsive and contemporary.*

## 4.3. STUDENT ACCOMMODATION

The 152 student rooms are clustered into cluster modules comprising four to seven student rooms each. Each module provides a communal living room and kitchen, bathroom facilities and small open space. The student rooms are 10sqm in area and provide space for a king single bed, desk, bedside table and wardrobe. The ground floor also comprises a communal lounge area, laundry and outdoor drying area, communal study and communal open space.

## 4.4. AMENITY

The development has been specifically sited and designed to consider its impacts on neighbours, notably: adjoining properties continue to enjoy reasonable durations of solar access at mid-winter and are sufficiently separated to preserve privacy; and the stand of significant figs within the eastern property boundary and the orientation of neighbouring buildings means the proposal does not unreasonably affect the primary outlook and view lines of adjoining properties.

Further, a Plan of Management has been prepared by UNSW to address the ongoing management and operational aspects of the student housing development. This POM has been submitted previously with the development application and will be implemented to ensure the proposed student housing will be operated and maintained in a manner that minimises impacts on neighbouring residents.



## 5. EXTENT OF CONTRAVENTION

### 5.1. CLAUSE 30 – STANDARDS FOR BOARDING HOUSES

Clause 30 of AHR SEPP stipulates development standards that must be satisfied prior to a consent authority granting development consent. This request specifically seeks an exemption from Clause 30(1)(e) which stipulates the following:

*(e) if the boarding house has capacity to accommodate 20 or more lodgers, a boarding room or on-site dwelling will be provided for a boarding house manager,*

Clause 30(1)(e) of ARH SEPP requires an on-site boarding house manager if the boarding house has capacity to accommodate 20 or more lodgers. No boarding house manager's unit is proposed. Management will be provided by the UNSW Student Accommodation Team, consistent with the existing arrangements at the site. Accordingly, this request seeks an exemption from the strict application of Clause 30 (1)(e) of AHR SEPP.

## 6. CLAUSE 4.6 VARIATION REQUEST: STANDARDS FOR BOARDING HOUSES

The following sections of the report provide an assessment of the request to vary the development standard relating to the standards for boarding houses in accordance with Clause 30(1)(e) of the AHR SEPP.

### 6.1. CLAUSE 30 (1)(E) OF AHR SEPP

Clause 30(1)(e) of ARH SEPP requires a boarding room or on-site dwelling to be provided for a boarding house manager if there are more than 20 rooms. There are no specific objectives for this development standard. Notwithstanding this, the objective is presumably linked to anticipated boarding house residents where the boarding house is privately operated or operated by a social housing provider.

### 6.2. KEY QUESTIONS

#### Is the Planning Control a Development Standard?

The development standards prescribed under Clause 30(1)(e) of the AHR SEPP is a development standard capable of being varied under Clause 4.6 of RLEP 2012.

#### Is the Development Standard Excluded from the Operation of Clause 4.6?

The development standard is not excluded from the operation of Clause 4.6 as it is not listed within Clause 4.6(6) or Clause 4.6(8) of RLEP 2012.

#### What is the Underlying Object or Purpose of the Standard?

The AHR SEPP does not include specific objectives for Clause 30(1)(e). Notwithstanding this, it can be assumed the underlying objective or purpose of the standard is to:

- *Provide a safe and secure environment for lodgers;*
- *Ensure no boarding room will be occupied by 2 adult lodgers;*
- *Undertake the day to day running of the boarding house;*
- *Ensure residential amenity internal and external to the boarding house is maintained;*
- *Provide residents with a point of contact should any issues arise.*

### 6.3. CONSIDERATIONS

#### 6.3.1. Clause 4.6(3)(a) – Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are listed within the 'five-part test' outlined in *Wehbe v Pittwater [2007] NSWLEC 827*. These tests are outlined in Section 2.2 of this letter (paragraphs [17]-[21]).

An applicant does not need to establish all of the tests or 'ways'. **It may be sufficient to establish only one way**, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way

The development is justified against two of the Wehbe tests as set out below.

##### ***Test 1: The objectives of the development standard are achieved notwithstanding non-compliance with the standard***

The AHR SEPP does not include specific objectives for Clause 30(1)(e). Notwithstanding this, it can be assumed the underlying objective or purpose of the standard is to:

- *Provide a safe and secure environment for lodgers;*

- *Ensure no boarding room will be occupied by 2 adult lodgers;*
- *Undertake the day to day running of the boarding house;*
- *Ensure residential amenity internal and external to the boarding house is maintained;*
- *Provide residents with a point of contact should any issues arise.*

It is important to note the intent of the AHR SEPP is to facilitate the increased supply and diversity of affordable rental and social housing in New South Wales. Whilst by default the proposed student housing development is considered a boarding house and therefore subject to the provisions under the AHR SEPP, the profile of student residents anticipated to be living at the site is very different to the profile of residents anticipated to live in boarding houses privately operated or operated by a social housing provider. Accordingly, on-site management procedures may vary. UNSW Student Accommodation (UNSW SA) is an experienced developer and operator of student accommodation and as outlined below, the underlying objectives of the standard can still be achieved:

- The property monitoring systems will ensure all students living at Mulwarree Apartments are provided with a safe and secure environment with electronic door locking systems and CCTV installed to monitor all site entry points and limit access to only student residents and staff members after hours. All staff will be trained in Emergency Response and Evacuation procedures, as well as Mental Health First Aid, Senior First Aid, and Dispute Resolution. A whole-of-site fire evacuation drill will be carried out twice a year, and all fire EWIS systems checked and maintained monthly.
- No more than one lodger will be permitted in each bedroom. This is stipulated in the Student Handbook provided to each resident and each student will be required to enter into a License Agreement with UNSW SA.
- UNSW SA will be responsible for the day to day running of Mulwarree Apartments. If any issues arise, UNSW Security and the UNSW SA General Manager Operations will be contactable 24 hours per day, 7 days per week with professional staff members and Community Assistants also available at various times during business hours.
- UNSW will keep a complaint register in which it will notate any significant incident or complaint made to the Police, Council or by surrounding residents and will endeavour to fully address any reasonable concerns of such persons.

In summary, the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

***Test 2: The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary***

As discussed above, the underlying objective of the standard is applicable to general boarding house lodgers, as opposed to student residents specifically. In summary, there are considered to be sufficient management procedures in place to remove the mandatory requirement for an on-site boarding manager. These are outlined in the Plan of Management previously submitted and include:

- Residents will be bound to enter into a License Agreement with UNSW SA and will be provided with a Student Handbook highlighting the rules of the Property including the Noise Policy, hours of operation and key contacts.
- Student residents and staff members will have access to the site seven days a week, 24 hours a day. Accordingly, a permanent on-site boarding house manager is not considered necessary.
- UNSW SA will be responsible for the running of Mulwarree Apartments. The staff profile will include Community Assistants (student employees), who will be responsible for the organisation of property events and activities to encourage interaction and participation amongst students.
- UNSW SA General Manager Operations will be contactable 24 hours per day, 7 days per week with professional staff members and Community Assistants also available at various times during business hours.

***Test 3: The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable***

Not relied upon.

***Test 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***

Not relied upon.

***Test 5: The zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary***

Not relied upon.

### **6.3.2. Clause 4.6(3)(b) - Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard?**

There are sufficient environmental planning grounds to justify the proposed variations to the development standard, including the following:

- There is currently no on-site boarding house manager living within the existing student accommodation development. The proposal seeks to maintain the status quo. Notwithstanding this, UNSW SA is a highly experienced developer and operator of student accommodation and all residents will be bound to enter into a Licence Agreement with UNSW SA.
- The development achieves the underlying objective of the development standard as all of the functions of an on-site boarding manager will still be fulfilled. As such, strict compliance with the development standard is not considered necessary. Outside of office hours, there will be Community Assistants living onsite that are available to support students with any administrative or pastoral care issues. In addition, UNSW SA General Manager Operations will be contactable 24 hours per day, 7 days per week.
- In regard to internal and external residential amenity, UNSW will keep a complaint register and monitor any significant incidents or complaints made to the Police, Council or by surrounding residents.
- Residents are not permitted to create any noise or nuisance in or around the room or any common areas that is likely to interfere with the enjoyment of any other residents, any other person using the Accommodation, any neighbours of the Accommodation or the public.
- Various measures are in place to ensure residential amenity of adjoining neighbours is protected. For example, the use of the outdoor areas is limited to certain times of the day and UNSW will operate a period of quiet hours between 10.00pm and 8.00am. These measures are embodied in the Plan of Management that will form part of the consent.
- The development is consistent with the objectives of the zone as set out in Section 6.3.3.

In conclusion, there are sufficient environmental planning grounds to justify convening the development

### **6.3.3. Clause 4.6(4)(a)(ii) – Will the Proposed Development be in the Public Interest Because it is Consistent with the Objectives of the Particular Standard and Objectives for Development within the Zone in Which the Development is Proposed to be Carried Out?**

The proposal is in the public interest as the development is consistent with the objectives of the development standard as outlined in Section 6.3.1 of this Request. The proposal is also consistent with the land use objectives that apply to the site under RLEP 2012 as demonstrated in Table 2 below. The site is located within the R3 Medium Density Residential zone.

Table 2 – Assessment of Compliance with Land Use Zone Objectives

<i>To provide for the housing needs of the community within a</i>	The proposal will add a further 122 beds to the student accommodation currently provided within the site and enhance the range of communal facilities available. This will increase the provision of student housing in
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<i>medium density residential environment</i>	a manner that contributes to the housing needs of the broader student community.
<i>To provide a variety of housing types within a medium density residential environment</i>	The proposed development will facilitate greater housing choice within the Randwick LGA by providing high quality and affordable housing targeted specifically for students.
<i>To enable other land uses that provide facilities or services to meet the day to day needs of residents</i>	The proposed development does not preclude the existing and future use of surrounding land from meeting the day to day needs of residents.
<i>To recognise the desirable elements of the existing streetscape and built form or, in precincts undergoing transition, that contribute to the desired future character of the area</i>	The development presents a predominantly numerically compliant building form to King Street and is consistent with the current and emerging character of the streetscape.
<i>To protect the amenity of residents</i>	The lack of an on-site boarding manager unit does not reduce the amenity of residents. As discussed above, various management procedures are in place to ensure the amenity of existing and future residents is maintained. These procedure are embodied in the Plan of Management that will form part of the consent.

The proposal is considered to be in the public interest as the development is consistent with the objectives of the development standard and the land use objectives of the zone.

#### **6.3.4. Clause 4.6(5)(a) - Would Non-Compliance Raise any Matter of Significance for State or Regional Planning?**

The proposed non-compliance with the development standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

#### **6.3.5. Clause 4.6(5)(b) - Is There a Public Benefit of Maintaining the Planning Control Standard?**

The proposed development achieves the objectives of the development standard and the land use zoning objectives despite the non-compliance. There is no public benefit in maintaining strict compliance with the requirement for an on-site boarding house manager as there is no on-site manager residing within the existing student accommodation development and all roles and responsibilities that would otherwise be carried out by an onsite manager will be fulfilled by UNSW SA team.

#### **6.3.6. Clause 4.6(5)(c) – Are there any other matters required to be taken into consideration by the Secretary before granting concurrence?**

Concurrence can be assumed. Nevertheless, there are no known additional matters that need to be considered within the assessment of the Clause 4.6 Request and prior to granting concurrence, should it be required.

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# **CLAUSE 4.6 VARIATION REQUEST RANDWICK LEP 2012 CL. 4.3 BUILDING HEIGHT**

## **1 COWPER STREET, RANDWICK**

**URBIS STAFF RESPONSIBLE FOR THIS REPORT WERE:**

Director	Peter Strudwick
Consultant	Charlotte Ryan
Project Code	SA7019
Report Number	Clause 4.6_SA7019_Final

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# 1. INTRODUCTION

This Clause 4.6 variation request has been prepared by Urbis on behalf of the University of New South Wales (UNSW), the applicant for a development application for student accommodation at 1 Cowper Street, Randwick. The request seeks to vary the building height development standard prescribed for the site under Clause 4.3 of Randwick Local Environmental Plan 2012 (RLEP).

By way of background, this variation request is based upon the most recent set of plans submitted at **Attachment 1** whereby eight student rooms have been removed from the northern portion of the original proposed development to allow for a predominantly compliant building height at the King Street frontage.

The variation request is made pursuant to Clause 4.6 of the RLEP. For a request to meet the requirements of Clause 4.6(3) of RLEP, it must:

1. “adequately” demonstrate “that compliance with the height standard is unreasonable or unnecessary in the circumstances” of the project on the site; and
2. “adequately” demonstrate “that there are sufficient environmental planning grounds” to justify contravening the height standard.

This request contains justified reasoning for the proposed height variation in respect of the above two matters, specifically that:

- Objectives of the development standard will be achieved, notwithstanding that the numerical limit of the height will be exceeded, and in doing so, establishes that compliance with the standard is unreasonable or unnecessary (*Initial Action* at [17]) – **Refer to Section 6.3.1 of this Request.**
- Notwithstanding the maximum height development standard will be exceeded (*Initial Action* at [24]), there are sufficient environmental planning grounds to support the proposed development, in that the development complies with the maximum floor space (FSR) standard permitted under the *State Environmental Planning Policy (Affordable Rental Housing) 2009*, presents a predominantly numerically compliant building form to King Street and is consistent with the current and emerging character of the streetscape – **Refer to Section 6.3.2 of this Request.**

As stated in *Initial Action* at [25], Clause 4.6(3) does not require the consent authority to form its own opinion of satisfaction regarding the matters identified in Clause 4.6(3)(a) and (b), but only indirectly must be satisfied that the applicant’s written request has adequately addressed those matters. This request does that and therefore the consent authority can be satisfied that subclause 4.6(3) has been met.

Following the receipt of concurrence from the Secretary, the remaining question for the consent authority is whether the proposed development will be in the public interest because:

- *It is consistent with the objectives of the development standard; and*
- *It is consistent with the objectives for development within the zone.*

While this request is not legally obligated to demonstrate satisfaction of Clause 4.6(4) and (5), **Sections 6.3.3-6.3.6** of this request provides material to assist the consent authority to reach satisfaction that the development is consistent with the objectives for development within the R3 Medium Density Residential zone and addresses the matters that the consent authority needs to address when exercising the function of the Secretary.

## 2. ASSESSMENT FRAMEWORK

### 2.1. CLAUSE 4.6 OF RLEP 2012

Clause 4.6 of RLEP 2012 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of Clause 4.6 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 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 achieve better outcomes for and from the development.

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:

- a) Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- b) 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:

- 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 Secretary before granting concurrence.*

[Note: Concurrence is assumed pursuant to *Planning Circular No. PS 18-003 Variations to Development Standards* dated 21 February 2018].

This document forms a Clause 4.6 written request to justify the contravention of the Building Height development standard in Clause 4.3. The assessment of the proposed variation has been undertaken in accordance with the requirements of the RLEP 2012, Clause 4.6 Exceptions to Development Standards.

### 2.2. NSW LAND AND ENVIRONMENT COURT: CASE LAW

Several key New South Wales Land and Environment Court (NSW LEC) planning principles and judgements have refined the manner in which variations to development standards are required to be approached.

The correct approach to preparing and dealing with a request under clause 4.6 is neatly summarised by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118:

*[13] The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.*

*[14] The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as*

to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5 at [28]; *Winten Property Group Limited v North Sydney Council* (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].

- [15] The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard 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 (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.
- [16] As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe v Pittwater Council* at [42]-[51]. 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.
- [17] The first and 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: *Wehbe v Pittwater Council* at [42] and [43].
- [18] A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: *Wehbe v Pittwater Council* at [45].
- [19] A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: *Wehbe v Pittwater Council* at [46].
- [20] A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: *Wehbe v Pittwater Council* at [47].
- [21] A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: *Wehbe v Pittwater Council* at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in *Wehbe v Pittwater Council* at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.
- [22] These 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, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.
- [23] As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.



- [24] 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].
- [25] The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant’s written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). As I observed in *Randwick City Council v Micaul Holdings Pty Ltd* at [39], the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant’s written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant’s written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction: see *Wehbe v Pittwater Council* at [38].
- [26] 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 particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant’s written request has adequately addressed the matter in cl 4.6(4)(a)(ii).
- [27] The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development’s consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).
- [28] The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary’s concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.
- [29] On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41].

## 3. SITE AND LOCALITY

### 3.1. SITE ANALYSIS

The site is located at 1 Cowper Street, Randwick and is located within the Randwick local government area (LGA). The site comprises two allotments legally described as Lot 7 in DP 758867 (northern portion) and Lot 4 in DP 758867 (southern portion). The location of the site is illustrated in Figure 1.

The existing characteristics of the site are described below:

- An overall site area of approximately 8,606sqm;
- Frontages to King Street to the north (47.62m), Mulwarree Avenue to the east (181.65m) and Cowper Street to the south (47.17m);
- A row of mature Hills Weeping Fig trees along the eastern boundary to Mulwarree Avenue;
- The northern portion of the site, which is the main focus of this DA, is generally vacant except for a small waste shed along the King Street frontage;
- The balance of the site is currently occupied by a four-level student housing development, comprising 14 buildings oriented around central courtyards. This site currently accommodates 185 student beds and was developed in accordance with Development Consent No. 103/1992; and
- An undercroft level adjacent to the western boundary and accessed from Cowper Street. The undercroft area includes car parking, bicycle parking, waste storage area and communal laundry.

Figure 1 – Aerial Plan



Source: Near Map

## 3.2. SURROUNDING CONTEXT

Randwick is located 7.6km south-east of the Sydney CBD. Major landmarks within the surrounding area include UNSW's Kensington and Randwick Campuses, Randwick Racecourse, Prince of Wales Hospital, Centennial Park and Coogee and Maroubra beaches.

Development in the immediate locality is characterised by residential land uses comprising a mix of single storey dwellings, semi-detached dwellings and three to four storey residential flat buildings. The area immediately surrounding the site includes:

- **North:** Immediately north on the opposite side of King Street is the Randwick bus depot and UNSW Randwick Campus and Randwick TAFE.
- **East:** Across Mulwarree Avenue to the east of the site are a mix of two, three and four storey dwellings and residential flat buildings.
- **South:** To the south is a mix of two and four storey residential buildings fronting Cowper Street. Further to the south-west along Alison Road is Randwick Racecourse.
- **West:** The northern portion of the site adjoins 37 King Street, which is occupied by a single storey dwelling house. This site together with the three adjoining sites to the west, also accommodating single storey dwellings, form an under-utilised development site. The western boundary adjoins residential properties fronting William Street, which are occupied by three, four and five storey residential flat buildings. Further to the west is the Royal Randwick Racecourse and the new South-East Light Rail currently under construction.

The architectural package provided at **Attachment 1** includes a diagram illustrating the relationship between the building scale and massing arrangement of the proposed development and the existing development in the immediate vicinity.

## 3.3. PLANNING CONTEXT

The proposal is for student accommodation which is best characterised as a boarding house development under RLEP 2012. The site is zoned R3 Medium Density Residential. Boarding houses are permissible with consent in the R3 zone.

The *State Environmental Planning Policy (Affordable Rental Housing) 2009* (ARH SEPP) aims to provide a consistent planning regime for the provision of affordable rental housing and to facilitate the effective delivery of new affordable rental housing by providing incentives by way of expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards. ARH SEPP applies to the site and therefore, the allowable FSR under Clause 29 (1) of ARH SEPP is 1.4:1. The proposed FSR of the development is 0.91:1. By virtue of Clause 29 (1), the development complies with the floor space ratio standard.

## 4. THE PROPOSED DEVELOPMENT

### 4.1. DEVELOPMENT OVERVIEW

This DA seeks consent for the following works:

- Construction of a part three and part four-storey development for the purposes of student housing, comprising 152 beds in cluster modules and communal areas, laundry and open space, noting the part three storey component is provided at the King Street frontage.
- Reconfiguration of existing undercroft car parking area, including a reduction in the number of car parking spaces (58 to 33) and increase in bicycle parking spaces (48 to 89).
- Reconfiguration of the site's waste storage and management procedures.
- Tree works to the significant Hills Weeping Fig Trees and site landscaping works.

The existing Mulwarree Apartments within the site currently provide 185 student beds, with 30 of these to be demolished as part of the Early Works DA. The proposed development will provide 152 student beds, resulting in a net increase of 122 beds and a total provision of 307 beds across the site.

Architectural Plans prepared by Nettleton Tribe are provided at **Attachment 1**. Key numeric aspects of the proposal are provided in Table 1 and the various components of the proposed development are described in the following sections.

Table 1 – Numeric Overview of Proposal

Parameter	Proposal
Total site area	8,606sqm
Total gross floor area (GFA)	Existing GFA: 3,665sqm (Buildings 1-12) Proposed GFA: 7,857sqm
Floor space ratio (FSR)	Existing FSR: 0.51:1 Proposed FSR: 0.91:1
Maximum building height	Roof parapet: RL 51.200 Lift overrun: RL 52.300 Rear Access Stairs: RL 53.750
Total number of student beds across site	Existing: 185 beds Proposed: 307 beds (net increase of 122)
Car parking	Existing: 58 spaces (no accessible spaces) Proposed: 33 spaces (three accessible spaces).
Bicycle parking	Existing: 48 spaces Proposed: 89 spaces
Motorcycle parking	Existing: 0 spaces Proposed: 5 spaces



## 4.2. DESIGN OBJECTIVES

The design objectives of the proposal are summarised below:

- *Contextually respond to the tree lined site and neighbourhood;*
- *Respond to the local scale and built form context;*
- *Foster a community environment;*
- *Integrate landscaping;*
- *Incorporate sustainable design initiatives;*
- *Provide a safe and secure environment; and*
- *Architectural language that is contextually responsive and contemporary.*

## 4.3. STUDENT ACCOMMODATION

The 152 student rooms are clustered into cluster modules comprising four to seven student rooms each. Each module provides a communal living room and kitchen, bathroom facilities and small open space. The student rooms are 10sqm in area and provide space for a king single bed, desk, bedside table and wardrobe. The ground floor also comprises a communal lounge area, laundry and outdoor drying area, communal study and communal open space.

## 4.4. URBAN DESIGN, MASSING AND BUILT FORM

The massing of the building has been arranged in a 'C-shape', with the bulk of the building footprint located towards the western boundary to minimise development near the row of fig trees along Mulwarree Avenue. The main entry is orientated towards the north, reinforcing King Street as the primary street frontage and responding to the existing access conditions. The building wraps around the communal open space, which forms the focus of student accommodation.

The building will have a maximum height of 15.65m (RL 53.750) at the tallest point, being the access stairs, located centrally at the rear of the building. Notwithstanding this, the majority of the front portion of the building presents as a numerically compliant three storey building form, providing a development that is consistent with the current and emerging character along King Street, providing an appropriate transition between the single storey dwellings to the west (yet to be developed) and three storey residential flat buildings to the east.

## 4.5. AMENITY

The development has been specifically sited and designed to consider its impacts on neighbours, notably: adjoining properties continue to enjoy reasonable durations of solar access at mid-winter and are sufficiently separated to preserve privacy; and the stand of significant figs within the eastern property boundary and the orientation of neighbouring buildings means the proposal does not unreasonably affect the primary outlook and view lines of adjoining properties.

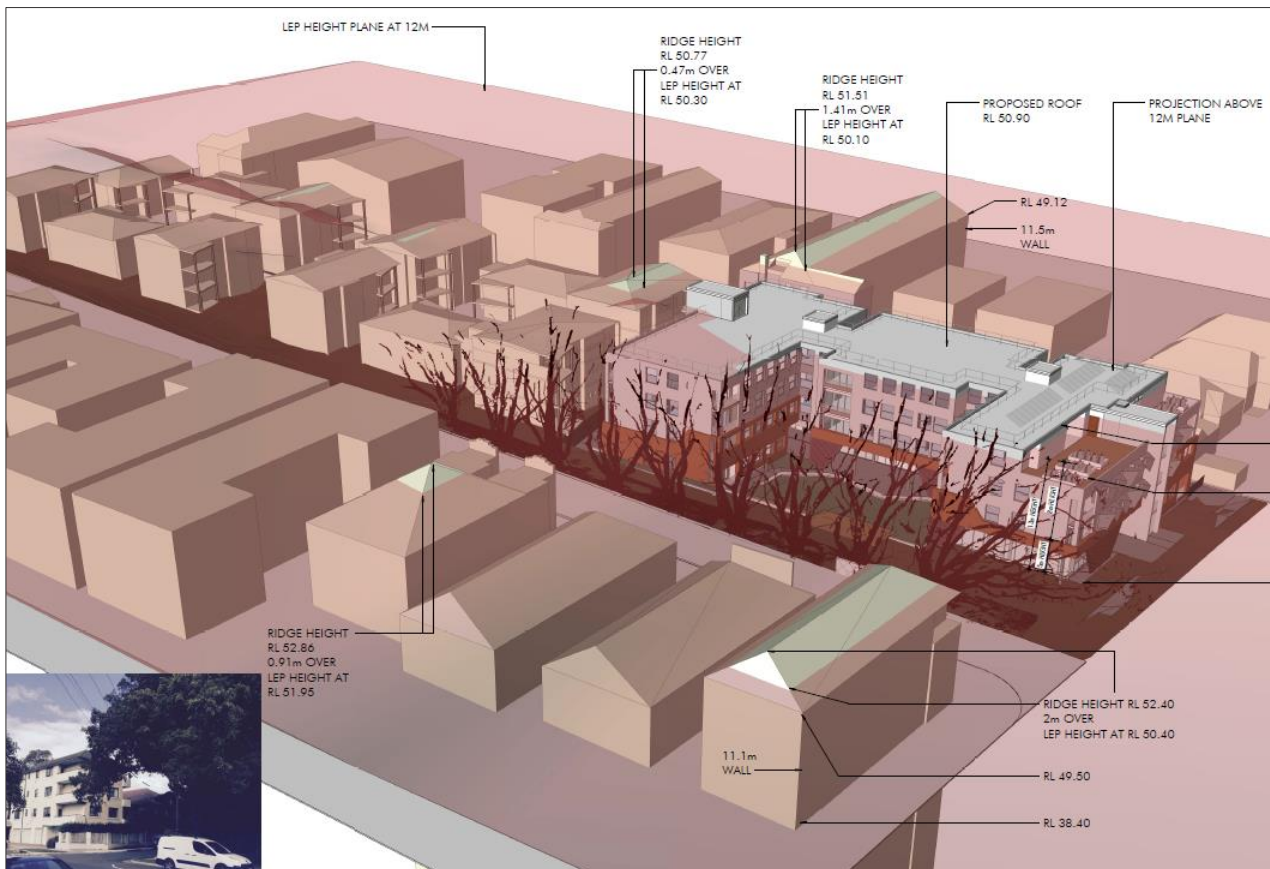
## 5. EXTENT OF CONTRAVENTION

### 5.1. VARIATION TO BUILDING HEIGHT

The proposed building has a maximum height that varies between 13.56m – 15.65m. The area of maximum non-compliance is 3.65 metres (30%) above the 12m height standard and relates to the small, centrally located access stair at the rear of the building.

A Height Plane Diagram has been prepared by Nettleton Tribe Architects, which clearly articulates the specific parts of the building which vary from the development standard. Figure 2 and the drawings submitted at **Attachment 1** detail the areas of non-compliance with the maximum 12m height of buildings development standard measured in accordance with the RLEP 2012 definition. As evident below, the front portion of the building presents a building height which is well below the 12m maximum, apart from a small projection of the parapet associated with the front stairwell.

Figure 2 – Height Analysis Diagram



The summary table below (Table 2) details the proposed maximum height of each component of the building against the RLEP 2012 development standard. The table shows the extent of the variations in numeric and percentage terms.

Table 2 – Proposed Building Heights and Variations (RLEP 2012)

Building	LEP Control (m)	Maximum Height (m)	Maximum Variance (m and %)
Roof Parapet	12m	13.56m	1.56m (13%)
Lift Overrun	12m	14.4m	2.4m (20%)
Rear Access Stair	12m	15.65m	3.65m (30%)

## 6. CLAUSE 4.6 VARIATION REQUEST: STANDARDS FOR BOARDING HOUSES

The following sections of the report provide an assessment of the request to vary the development standard relating to the building height in accordance with Clause 4.6 of RLEP 2012.

### 6.1. CLAUSE 4.3 BUILDING HEIGHT

The building height development standard under RLEP 2012 is 12m.

The objectives of the development standard as per subclause 4.3 of RLEP 2012 are as follows:

- a) *to ensure that the size and scale of development is compatible with the desired future character of the locality,*
- b) *to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item,*
- c) *to ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views*

### 6.2. KEY QUESTIONS

#### Is the Planning Control a Development Standard?

The building height control prescribed under Clause 4.3 of RLEP 2012 is a development standard capable of being varied under Clause 4.6 of RLEP 2012.

#### Is the Development Standard Excluded from the Operation of Clause 4.6?

The development standard is not excluded from the operation of Clause 4.6 as it is not listed within Clause 4.6(6) or Clause 4.6(8) of RLEP 2012.

#### What is the Underlying Object or Purpose of the Standard?

The objectives of the standard are clearly established in the relevant LEP as set out in Section 6.1 of this letter.

### 6.3. CONSIDERATIONS

#### 6.3.1. Clause 4.6(3)(a) – Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are listed within the 'five-part test' outlined in *Wehbe v Pittwater* [2007] NSWLEC 827. These tests are outlined in Section 2.2 of this letter (paragraphs [17]-[21]).

An applicant does not need to establish all of the tests or 'ways'. **It may be sufficient to establish only one way**, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way

The development is justified against **two** of the Wehbe tests as set out below.

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

The proposed development achieves the objectives of the development standard as outlined within Table 4.

Table 3 – Assessment of Achievement of Objectives of Development Standard

Development Standard Objective	Achievement of Objective
a) <i>to ensure that the size and scale of development is compatible with the desired future character of the locality,</i>	<p>The building size and scale is well within the maximum bonus FSR provided for in the AHR SEPP which incentivises boarding house development (FSR allowed: 1.4:1 - FSR proposed: 0.91:1). Compliance with the “deemed approval standard” in Clause 29 (1) of AHR SEPP means that the scale of the building must be taken to be acceptable.</p> <p>When viewed from the public domain and primary pedestrian viewpoint on King Street, the development will present a predominantly compliant, three storey building, well below the 12m height limit. Importantly, the areas of non-compliance relate to non-habitable areas, are set back from the street frontage and visually obscured by both the complying front element and by landscaping. Accordingly, the bulk and scale associated with the additional height is considered negligible and does not set an undesirable precedent for the future character of the area.</p>
b) <i>to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item,</i>	<p>The site does not contain a heritage item and is not located within a heritage conservation area. The areas of height non-compliance are well set back the eastern boundary and separated from the heritage items at 3 Mulwarree Avenue (I1419) and 2 Prince Street, Randwick (I1432) by the dense stand of fig trees along the Mulwarree Avenue frontage, which reach a height of approximately 20m. The fig trees largely restrict views of the proposed development from the east and will ensure the height non-compliance of the building does not detract from the heritage value and setting of these heritage items.</p>
c) <i>to ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views</i>	<p>The proposed development is well below the maximum FSR deemed approval standard for the site under ARH SEPP. Consideration has also been given to articulation, setbacks and building orientation to ensure the additional height does not adversely impact on the amenity of neighbouring properties.</p> <p><b>Privacy and visual bulk</b></p> <p>There can be no adverse impact on the amenity of the residential properties to the east given the presence of the fig trees which restrict views to and from the development. In terms of the properties to the west, the proposal complies with the RDCP 2013 setback requirements. If the visual privacy requirements of the ADG were applied, the proposal would also comply. The perforated sunshades also restrict views from the student rooms to the west, reducing opportunities for overlooking. Only the very top of some windows exceed the 12m height standard and therefore the height breach is not likely to reduce privacy of neighbouring dwellings or increase opportunities for overlooking.</p> <p>The proposed western elevation has been designed to minimise visual bulk. In particular, the vertical recesses modulate the built form while the angular expression of the brick base contrast with the masonry finish of the upper levels, providing definition and articulation that break down the overall massing. The windows and sunshades provide further depth and contrast to the façade</p>



Development Standard Objective	Achievement of Objective
	<p>and the screen planting along the western boundary will filter views to the building.</p> <p><b>Overshadowing</b></p> <p>The proposal will not adversely overshadow adjoining properties to the east given the separation provided by Mulwarree Avenue. As shown in Drawings DA056 and DA057 (<b>Appendix 1</b>), 7 Mulwarree Avenue will receive three hours of solar access between 12pm and 3pm at this time of year.</p> <p>As shown in Drawings DA058 and DA059, solar access to the east facing windows of 5A William Street will generally be limited to a 1.5-hour period between 9.30am and 11am. These windows are associated with bathrooms, kitchens and entry doors with living room windows located on the north-western side of the building. Given this apartment building is designed in a manner that has dual access to the west, these living rooms will enjoy (at least) a further 3 hours of direct solar access (i.e. from at least 12 noon until 3pm). The proposed development will therefore not restrict the living rooms of apartments within 5A William Street from receiving the required two hours of sunlight access between 9am and 3pm under the Apartment Design Guide (ADG) – if applied.</p> <p>As shown in Drawings DA061 and DA062, overshadowing from the proposed development onto 31-37 King Street will be limited to the early morning period, 8am to 10am. During the middle of the day between 12pm and 2pm, 53% of the private open spaces of 31 and 33 King Street will receive a minimum of two hours of sunlight access in accordance with the ADG – if applied.</p> <p>Under the future possible scenario, and as shown in Drawings DA067, overshadowing from the proposed development onto the eastern face of a potential building form on 31-37 King Street, will be limited to the early morning period. The proposed development does not unreasonably constrain the future development potential of the adjoining site as it allows sufficient flexibility for it to be developed in a manner containing living room windows on its eastern façade that will receive solar access for a 2- hour period.</p> <p>Having regard to the above, the proposal is considered to have negligible overshadowing, privacy and view impacts when compared to a compliant building height and therefore the objectives of the standard are achieved irrespective of compliance with the standard.</p>

In summary, the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

***Test 2: The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary***

Not applicable. The underlying objective or purpose of the development standard is relevant to the proposal and is achieved.

***Test 3: The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable***

Strict compliance with the height development standard would defeat or thwart the achievement of underlying objectives of the standard for the reasons outlined below:

- A building which complied with the 12m height standard would not achieve a scale of development which is compatible with the desired future character of the locality because it would result in a development which would be significantly less than the density and scale allowed for a boarding house development in this locality.
- The proposal is consistent with the objectives of the development standard as provided in Clause 4.3 of the RLEP 2012.
- The proposal presents a predominately compliant three-storey street frontage height to King Street, providing an appropriate transition to the one to three storey developments along King Street while enabling a suitably scaled four-storey component behind.

***Test 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***

Not relied upon.

***Test 5: The zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary***

Not relied upon.

### **6.3.2. Clause 4.6(3)(b) - Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard?**

There are sufficient environmental planning grounds to justify the proposed variation to the development standard, including the following:

- The proposal supports the continued growth of the Randwick Health and Education Precinct by developing a vacant, under-utilised portion of the site for the purposes of affordable dwellings for students within proximity of public transport, active transport infrastructure, and tertiary education.
- The proposal would be unable to achieve a density and scale commensurate with the level which is sought to be encouraged and facilitated by ARH SEPP without the relaxation of the 12m height control unless it were to cover more of the site. This can only be achieved by the significant trimming of the mature fig trees.
- Development along King Street is characterised by three to four storey residential flat buildings, with the proposed development being of a similar scale to those buildings. The single storey dwellings are inconsistent with the sites zoning and are appropriate for redevelopment to achieve the desired three to four storey character. As discussed, the development will present a predominantly three storey-built form to King Street and therefore forms a consistent character with existing and likely future development along King Street.
- The proposed development is suitable in the context of the surrounding heritage items. The areas of non-compliance are well set back from the nearest heritage items and separated by the dense row of fig trees along Mulwarree Avenue.
- Potential impacts upon the amenity of the surrounding area will be minor or can be mitigated to an acceptable level.
- The variation will not adversely impact on the amenity of neighbouring properties in terms of visual impact, loss of views or overshadowing.
- The areas of noncompliance are located towards the centre of the building, relate to non-habitable spaces and obscured by landscaping. When viewed from the public domain, the development will present as a predominantly complaint envelope.
- The variation does not diminish the development potential of adjacent land and the visual impact associated with the additional height is negligible as discussed above.

- The development achieves the objectives of the development standard as outlined in Section 6.3.1 and is also consistent with those objectives as outlined in Section 6.3.3.

In conclusion, there are sufficient environmental planning grounds to justify convening the development

### **6.3.3. Clause 4.6(4)(a)(ii) – Will the Proposed Development be in the Public Interest Because it is Consistent with the Objectives of the Particular Standard and Objectives for Development within the Zone in Which the Development is Proposed to be Carried Out?**

The proposal is in the public interest as the development is consistent with the objective of the development standard and the land use objectives of the zone. The proposal is sympathetic to the significant fig trees within the site, consistent with the desired future character of the area and delivers a high-quality residential development to provide for the growing student population. The proposed height is therefore acceptable when balanced against the significant benefits of the proposal.

The proposed development is consistent with the objectives of the development standard as outlined in Section 6.3.1 of this Request. The proposal is also consistent with the land use objective that applies to the site under RLEP as demonstrated within Table 4 below. The site is located within the R3 Medium Density Residential zone.

Table 4 – Assessment of Compliance with Land Use Zone Objectives

<b>Objective</b>	<b>Consistency with Objective</b>
<i>To provide for the housing needs of the community within a medium density residential environment</i>	<p>There is high demand for student housing in the area due to the sites' proximity to the UNSW Kensington and Randwick Campuses, growing university population and competitive residential market. The site is also located within the Randwick Health and Education Precinct, where there is a focus on delivering affordable housing for student populations.</p> <p>The proposal will add a further 122 beds (net increase) to the student accommodation currently provided within the site and enhance the range of communal facilities available. This will increase the provision of student housing in a manner that contributes to the housing needs of the broader student community.</p>
<i>To provide a variety of housing types within a medium density residential environment</i>	<p>The proposed development will facilitate greater housing choice within the Randwick LGA by providing high quality and affordable housing targeted specifically for students. The development includes a range of communal and open space areas which will enhance the amenity for residents and has excellent access to the UNSW campuses, public transport, recreation, local shopping centres and community services.</p>
<i>To enable other land uses that provide facilities or services to meet the day to day needs of residents</i>	<p>The additional building height does not preclude the existing and future use of surrounding land from meeting the day to day needs of residents.</p>
<i>To recognise the desirable elements of the existing streetscape and built form or, in precincts undergoing transition, that contribute to the desired future character of the area</i>	<p>The bulk of the proposed development has been sited towards the west in response to the presence of the fig trees along Mulwarree Avenue and the significant contribution they make to the streetscape. The building has been appropriately set back from the trees to minimise pruning and disturbance to the root systems.</p> <p>The development is in a residential area undergoing change. Whilst there are single storey dwellings to the immediate west, the area is transitioning to a medium density environment with more recent four storey developments in William Street and along King Street. The proposed scale of the development is consistent with the desired future character for the area.</p>

*To protect the amenity of residents*

As discussed, the proposed variation to the height of buildings standard does not reduce amenity to neighbouring properties by way of visual impact, overshadowing or privacy issues. The proposed development will also offer future student residents a high level of residential amenity. The student accommodation is functional and the generous and flexible communal areas will encourage student interaction and a sense of community. A Construction Management Plan will be prepared for all site works to protect the amenity of the neighbourhood and existing residents within the site.

The proposal is considered to be in the public interest as the development is consistent with the objectives of the development standard, and the land use objectives of the zone and provides affordable housing in order to achieve the aims of the AHR SEPP and the aims of the Randwick LEP which include encouraging the provision of affordable housing (Clause 1.2).

#### **6.3.4. Clause 4.6(5)(a) - Would Non-Compliance Raise any Matter of Significance for State or Regional Planning?**

The proposed non-compliance with the development standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

#### **6.3.5. Clause 4.6(5)(b) - Is There a Public Benefit of Maintaining the Planning Control Standard?**

The proposed development achieves the objectives of the height development standard and the land use zoning objectives despite the non-compliance. The contravention has been demonstrated to be appropriate and supportable in the circumstances of the case. There would be no public benefit in maintaining the development standard in this case as:

- Heritage values of the retained fig trees within the Mulwarree Avenue frontage have been maintained;
- Adequate setbacks are provided to the retained heritage items and to the site boundaries;
- Maintaining the standard would not deliver affordable and varied purpose-built student accommodation, and as such there would continue to be additional strain on the private rental housing market in the locality;
- It has been demonstrated that a complying scheme would require the removal of 37 rooms. An alternate scheme would also require a more horizontal and bulky development sited closer towards the heritage listed fig trees on Mulwarree Avenue;
- Given the proposed variation will enable the delivery of additional rooms, directly responding to the demand for affordable housing within the Randwick Health and Education Precinct and allow the ongoing health and retention of the fig trees that would otherwise be significantly impacted if compliance was to occur, there is no public benefit in maintaining the height development standard.

The proposed development achieves the objectives of the development standard and the land use zoning objectives despite the non-compliance.

#### **6.3.6. Clause 4.6(5)(c) – Are there any other matters required to be taken into consideration by the Secretary before granting concurrence?**

Concurrence can be assumed. Nevertheless, there are no known additional matters that need to be considered within the assessment of the Clause 4.6 Request and prior to granting concurrence, should it be required.

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