

**A M E N D E D**

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Waverley Council

Application No: DA-155/2018

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# **CLAUSE 4.6 VARIATION - HEIGHT OF BUILDINGS**

## **47-55 GRAFTON STREET, BONDI JUNCTION**

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## TABLE OF CONTENTS

<b>1.</b>	<b>Introduction .....</b>	<b>4</b>
<b>2.</b>	<b>Relevant Assessment Framework .....</b>	<b>5</b>
<b>3.</b>	<b>Extent of Variation .....</b>	<b>7</b>
3.1.	The Height Standard .....	7
3.2.	The Proposed Variation .....	7
<b>4.</b>	<b>Consideration .....</b>	<b>9</b>
4.1.	Clause 4.6(3)A – Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case .....	9
4.2.	Clause 4.6(3)(B) – Are there sufficient environmental planning grounds to justify contravening the development standard? .....	10
4.3.	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? .....	13
4.4.	Clause 4.6(5)(A) – Would non-compliance raise any matter of significance for state or regional planning? .....	14
4.5.	Clause 4.6(5)(B) – Is there a public benefit of maintaining the development standard? .....	14
4.6.	Clause 4.6(5)(C) – Are there any other matters required to be taken into consideration by the secretary before granting concurrence? .....	14
<b>5.</b>	<b>Conclusion .....</b>	<b>15</b>
	<b>Disclaimer .....</b>	<b>16</b>

### No table of contents entries found.**Figures:**

Figure 1 – Height Plane (Looking South-east) .....	8
Figure 2 – Height Plan (Looking North-east) .....	8
Figure 3 – East-West Section showing height non-compliances .....	11
Figure 4 – Recent approved height variation adjacent to the subject site.....	12
Figure 5 – Recent approved height variations in Bondi Junction .....	13

### **TABLES:**

Table 1 – Maximum Building Heights Proposed .....	7
Table 2 – Assessment of consistency with Zone Objectives.....	13

# 1. INTRODUCTION

This variation request has been prepared pursuant to Clause 4.6 of *Waverley Local Environmental Plan 2012* (WLEP 2012).

The proposed development at 47-55 Grafton Street, Bondi Junction (**the site**) exceeds the 60m height of building standard prescribed by Clause 4.3 of the WLEP 2012 of between 0.93m to 9.05m.

The request has been updated since the initial DA lodgement as a result of formal amendments to the DA and changes to the arrangement of uses on the upper levels of the building, with the height breach now relating principally to the lift core, plant, elements of the roof parapet and communal open space areas.

The height breach has been influenced by unique topographical and subterranean conditions specific to the site (which includes a basement that is constrained by Sydney Rail Tunnels), which has limited the extent of excavation and parking below ground. Coupled with general adherence to the Council's built form controls and providing generous side and rear setbacks (some beyond the ADG) this has created challenges with being strictly compliant with the height standard in these circumstances.

Ultimately, the variation to the height standard variation still results in a development which preserves the environmental amenity of neighbouring properties and public spaces, as well as the sharing of views.

This variation request demonstrates that:

- Compliance with the height development standard is unreasonable or unnecessary in the circumstances of the case as the objectives of the height development standard are achieved notwithstanding the non-compliance
- There are sufficient environmental planning grounds to justify contravening the development standard; and
- Notwithstanding the variation to the development standard, the proposed development is in the public interest.

## 2. RELEVANT ASSESSMENT FRAMEWORK

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

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

### Waverley Local Environmental Plan 2012

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

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

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

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

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

1. Whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
2. The public benefit of maintaining the development standard, and
3. Any other matters required to be taken into consideration by the Secretary before granting concurrence.

[Note: We understand that concurrence is currently assumed]

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 SLEP 2012, Clause 4.6 Exceptions to Development Standards.

### NSW Land and Environment Court: Case Law (Tests)

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

- *Varying development standards: A Guide*, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court. The *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 court judgement is the most relevant of recent case law. Contrary to previous caselaw, the position is now that a lack of adverse amenity impacts can of itself be a means of justifying a development contravening a development standard, for the purposes of cl 4.6(4)(a)(ii). Preston CJ held that “one way of demonstrating consistency with the

objectives of a development standard is to show a lack of adverse amenity impacts” [94]. Commissioner Preston confirmed (in this judgement):

- The consent authority must, primarily, be satisfied the applicant’s written request adequately addresses the ‘unreasonable and unnecessary’ and ‘sufficient environmental planning grounds’ tests:

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

- On the ‘Five Part Test’ established under *Wehbe v Pittwater Council* [2007] NSWLEC 827:

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

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

*“The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole”* [26]

- That clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development:

*“Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard will have a better environmental planning outcome than a development that complies with the development standard.”* [88]

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

## 3. EXTENT OF VARIATION

### 3.1. THE HEIGHT STANDARD

Clause 4.3 (2) of the WLEP 2012 states:

*(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

The Height of Building Map sets a height standard of 60m for the site. The 60m building height standard has been measured in accordance with the WLEP 2012 definition:

**building height** (or height of building) means:

- (a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or
- (b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

### 3.2. THE PROPOSED VARIATION

The proposed variation is summarised in **Table 1** and illustrated in **Figure 1** and **Figure 2**.

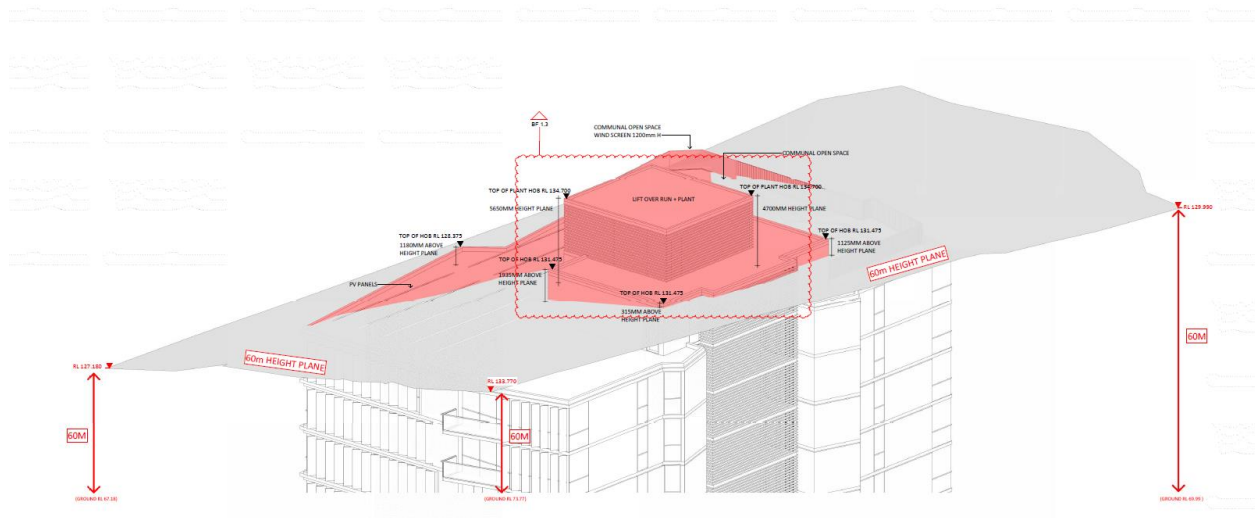
As shown in the elevations and sections below, the areas of exceedance relate to the proposed lift overruns, plant and communal open space wind screens. It is noted that with regard to this proposal, elements of the building located above the 60m height plane relate only to non-habitable elements of the development (shown in red in **Figures 1** and **2**). Other recently approved developments have included elements of habitable space as discussed and identified in **Section 4.2**.

Table 1 – Maximum Building Heights Proposed

Component	RL	Height (m)	Extent of Non-Compliance
Hegarty Lane			
Top of Plant	134.70	60.93m (Hegarty Lane Western Corner) - Ground RL 73.77	+0.93m
		64.51m (Hegarty Lane Eastern Corner) - Ground RL 70.19	+ 4.51m
Grafton Street			
Top of Plant	134.70	67.52m (Grafton Street Western Corner) - Ground RL 67.18	+ 7.52m
		69.05m (Grafton Street Eastern Corner) - Ground RL 65.65	+ 9.05m
Mid-Grafton Street (as nominated on plans)			
	134.70	68.3m (Mid-Grafton Street ground level survey point RL 66.4)	+ 8.30m

[illegible]

Figure 2 – Height Plan (Looking North-east)



## 8 EXTENT OF VARIATION

## 4. CONSIDERATION

### 4.1. 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*. 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 proposal achieves the objectives of the development standard**

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

The relevant objectives of the height standard are:

- (a) *to establish limits on the overall height of development to preserve the environmental amenity of neighbouring properties and public spaces and, if appropriate, the sharing of views,*
- (b) *to increase development capacity within the Bondi Junction Centre to accommodate future retail and commercial floor space growth,*
- (c) *to accommodate taller buildings on land in Zone B3 Commercial Core of the Bondi Junction Centre and provide an appropriate transition in building heights surrounding that land,*
- (d) *to ensure that buildings are compatible with the height, bulk and scale of the desired future character of the locality and positively complement and contribute to the physical definition of the street network and public space.*

Objectives (c) is not relevant to the subject site, so objectives (a) (b) and (d) are addressed below.

- (a) *to establish limits on the overall height of development to preserve the environmental amenity of neighbouring properties and public spaces and, if appropriate, the sharing of views***

We provide the following comments below:

- The proposed development provides for a slender tower form and generous setbacks (consistent with and in some instances in excess of the guidance in the ADG and Waverley DCP) from the surrounding properties to the east, west and south which provides an appropriate level of amenity to these properties with regard to privacy, shadowing and views.
- The proposal complies with the FSR control. The additional height proposed accords with this objective as it is a redistribution of mass, rather than an exceedance of anticipated built form not resulting in impacts on neighbouring properties greater than a compliant envelope.
- The height breach is confined to the lift core/plant area and some elements of the rooftop parapet and communal open space. The lift core provides for appropriate clearance height for DDA clearance to the roof-top communal areas.
- The area of exceedance above the 60m height standard has been examined, and in particular the plant areas around the lift core have been redesigned and arranged in a logical manner to reduce shadow impacts on surrounding properties (in particular residential apartments to the south of the site. From this analysis, there will be no additional shadow impacts (beyond that of a compliant height) on habitable spaces in the apartments directly to the south of the site. The exception is a very negligible shadow on the roof space of the building (which otherwise gets very good solar access at mid-winter). Refer to the proposed shadow diagrams in the application package.

- Accordingly, the proposal does not create any unreasonable impacts on the environmental amenity of neighbouring properties. From a view sharing perspective, the only affected properties to the south have a much smaller height limit (38m), so the height breach will not affect the potential future views available from this property as it is at a much higher level.
- It is noted that with regard to important views, these generally lie to the north of the site, meaning that potential view impacts, from this proposal or other future proposals would only affect properties to the south.
- The proposal does not create any unreasonable impacts on the amenity of public spaces in and around the subject site. In particular, there are no unreasonable shadow impacts to the south.

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

The proposed development (as amended) provides generous levels of retail and commercial floor space at both the Grafton Street and Hegarty Lane frontages which assist in providing additional local job opportunities and activation in the Bondi Junction Centre.

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

We provide the following comments below:

- The site and surrounding development along Grafton Street to the east of the site are zoned B4 Mixed Use, have a height standard of 60m and an FSR of 6:1.
- While a number of sites further to the east along Grafton Street are residential apartments which are strata titled, the subject site and the properties directly to the east (59 Grafton Street) and west (35-43 Grafton Street) comprise of commercial office buildings.
- 59 Grafton Street has a recently approved development application for a shop top housing development. The approved DA for that site has a proposed building height of RL132 (or a 5.1m exceedance above 60m). The building proposes a generally compliant built form envelope with a 6 storey podium, and setback tower form along Grafton Street. Council has clarified that the breach of height in relation to plant, lift cores and open spaces in that circumstance are acceptable.
- The proposed development adopts a similar podium and tower form consistent with WDCP 2012, but actually provides much larger separation distances given the larger site area comparative to 59 Grafton Street. Similarly, the height breach relates to plant, lift cores and communal open spaces and are not attributed to any residential GFA at this level.
- The proposal (and height breach) are compatible and generally consistent with the height, bulk and scale of the desired future character of the locality, and provide a human scaled podium, with high quality retail and commercial activation along Grafton Street and Hegarty Lane. This is further supported by the fact that the proposal complies with the FSR control.

## **4.2. CLAUSE 4.6(3)(B) – ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?**

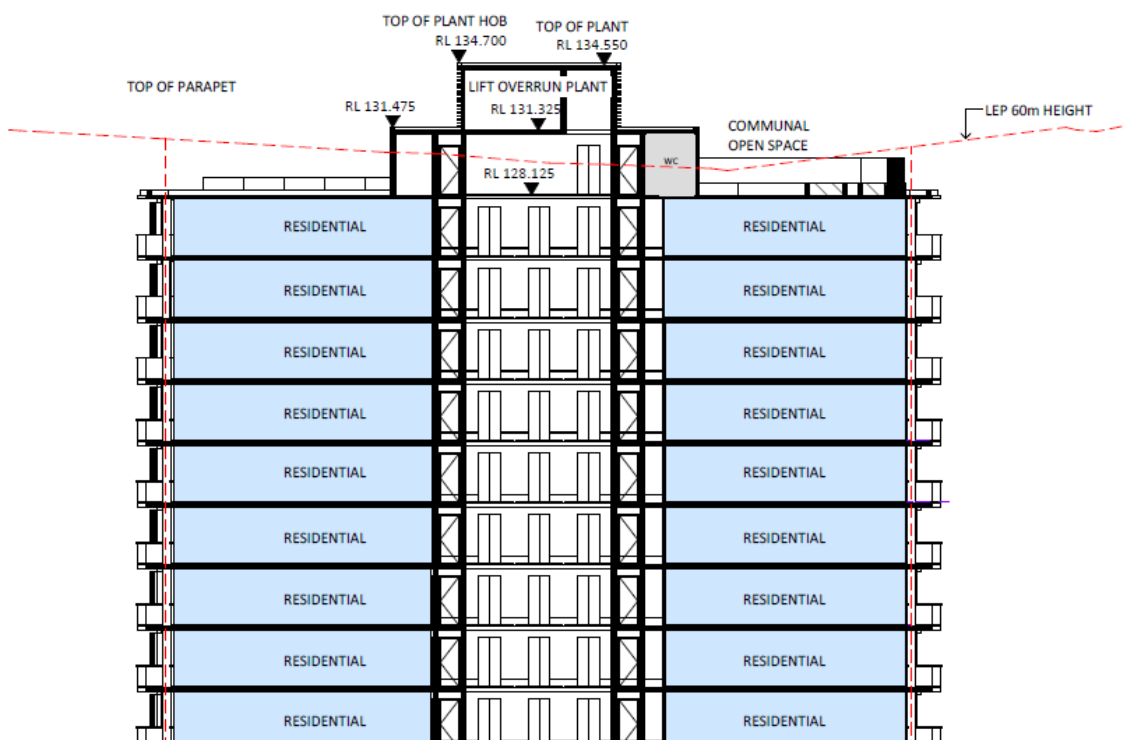
The proposed development demonstrates that there are sufficient environmental planning grounds in support of the contravention for the following reasons:

- As discussed above, the height breach is largely confined to areas of the roof plant, lift cores, and communal open spaces, and not to areas of habitable floor space. There are individual circumstances applicable to the site which have resulted in the contravention of the building height standard, which are discussed in further detail below.
- Firstly, the subject site is constrained by Sydney Rail Tunnels which significantly limit the extent of basement excavation to accommodate multiple levels of car parking below ground.
- This subterranean condition has dictated that the lift core is in a very specific, centralised location which sits between two of the rail tunnels, which has meant that the proposed development has had to carefully

manage the extent of basement excavation, which has limited the quantum of car parking available on the site (below the maximum parking requirements of WDCP).

- Secondly, the site has a significant slope of approximately 4.3m from north to south, and provides for a generous 6.6m floor to ceiling height at the Grafton Street frontage to create enhanced amenity and effectively “double height” retail space, which has been encouraged by Council’s Design Excellence Panel, and ultimately creates an enhanced ground plane.
- Thirdly, WDCP requires a podium treatment up to the 6th storey (of approximately another 12.9m above the ground floor level), with the ‘tower’ then only beginning above this (or approximately 19.5m above ground level at Grafton Street). Coupled with the generous tower setbacks of 12m, limited depth of tower floorplate, and typical floor to ceiling heights, this creates another 13 levels above the podium, which aligns with the parapet edge on the northern edge of the building (i.e. approx. 60m) which is consistent with the height standard for the site.
- In addition, a requirement of Council’s DCP to provide MRV access on site results in the need to have a higher floor to ceiling height for the ground level basement entry.
- However, given that the site slopes up towards the south, to ensure that another finished floor level is consistent with the 60m height standard on the southern side (i.e. on Hegarty Lane), this creates a negligible variation to the height standard on the northern side of the site.
- In addition, in order to centralise lift overruns, mechanical plant and services, these are proposed to sit slightly above the 60m height standard. As there is no unreasonable view, shadow or other amenity impacts as a result of this specific breach, we believe that this negligible variation is reasonable under the circumstances.
- As shown in Figure 3 below, there are areas where the proposed height is under the 60m height limit (i.e. particularly adjacent to Hegarty Lane).

Figure 3 – East-West Section showing height non-compliances



Source: Koichi Takada Architects

- In addition to the above, the proposed development complies with the maximum FSR standard applicable to the site, so there is no tangible nexus to the height breach and the proposed density for the site. Similarly, there is not habitable floorspace (GFA) above the height standard, this is simply servicing elements and communal open space elements that are well setback from the street frontages.

- The proposed variation is not unlike other recently approved developments in the area identified in below, where the variation was created by ancillary structures such as lift overrun and plant and plant equipment.
- Council and the Sydney Eastern City Planning Panel recently approved the development at 59-75 Grafton Street, located directly adjacent to the subject site. This approval also included a Clause 4.6 Variation relating to height which included non-habitable space and some elements of habitable space, as shown in blue in **Figure 4** below.

Figure 4 – Recent approved height variation adjacent to the subject site

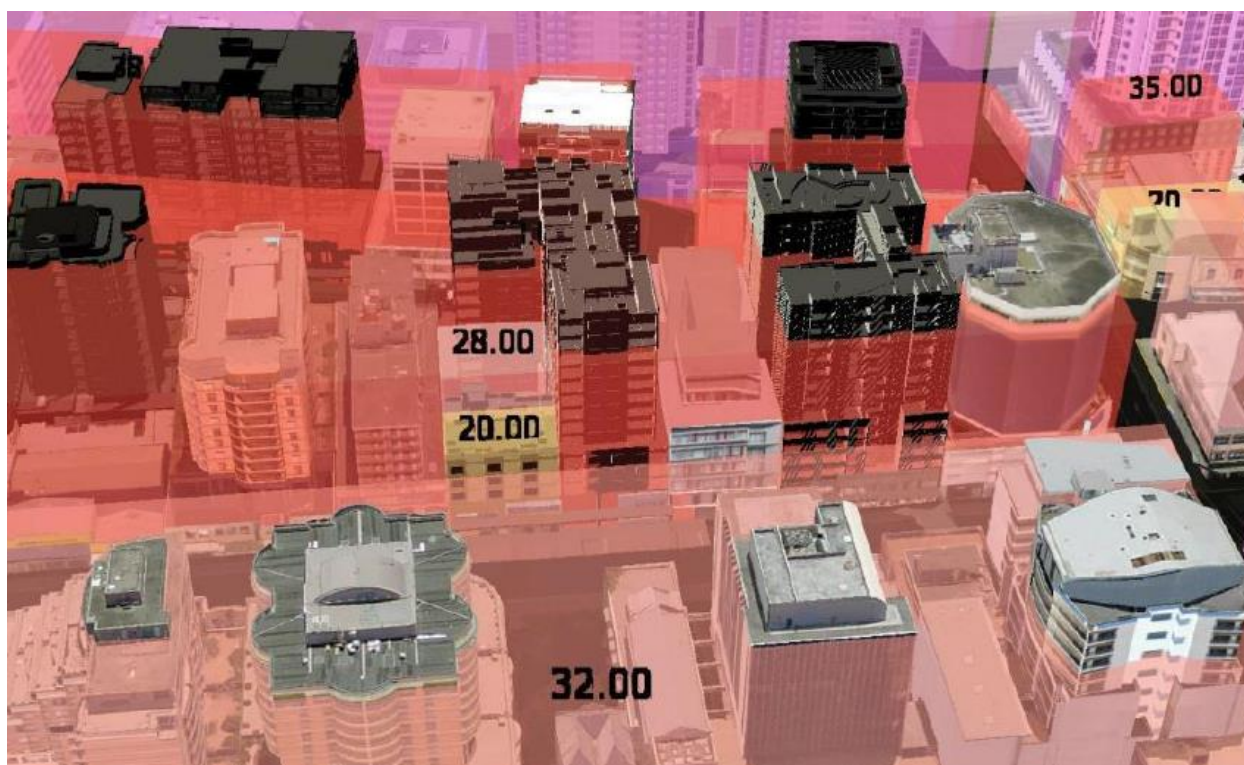


Picture 1 - 59-75 Grafton Street, Bondi Junction – DA482/2017 – approved 2 May 2019

Source: Cottee Parker JPRA

- **Figure 5** below (shown above the red height plane) is from a recent Council Assessment Report for 87-99 Oxford Street and 16-22 Spring Street, Bondi Junction which identified at least six (6) recent building height variations to the south of the site – a number of which related to plant and roof space, but also habitable spaces.

Figure 5 – Recent approved height variations in Bondi Junction



Source: Waverley Council

This demonstrates that Council have accepted variations where they relate to lift overruns, plant equipment and ancillary features and where there is no additional impact as a result of these breaches.

- The proposed areas of the height standard that are contravened do not provide any unreasonable impacts on neighbouring properties, beyond that of a compliant building height.

#### 4.3. **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 consistency of the development with the objectives of the development standard is demonstrated above. The proposal is also consistent with the B4 (Mixed Use) zone objectives that apply to the site under WLEP 2012 – as outlined within Table 2:

Table 2 – Assessment of consistency with Zone Objectives

Objective	Comment
<i>To provide a mixture of compatible land uses.</i>	The land use proposed is permitted with consent and provides mix of commercial and residential land uses.
<i>To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.</i>	The development integrates residential and retail land uses in an accessible location which can maximise public transport patronage and encourage walking and cycling.

Objective	Comment
<i>To encourage commercial uses within existing heritage buildings and within other existing buildings surrounding the land zoned B3 Commercial Core</i>	Not applicable

#### **4.4. CLAUSE 4.6(5)(A) – WOULD NON-COMPLIANCE RAISE ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL PLANNING?**

The proposed non-compliance with the maximum height of building 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.

#### **4.5. CLAUSE 4.6(5)(B) – IS THERE A PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD?**

Overall it is considered that the strict maintenance of the standard in this instance is not in the public interest as the current proposal will result in the delivery of a high-quality mixed-use development in the Bondi Junction Precinct which achieves the strategic objectives of Council.

#### **4.6. CLAUSE 4.6(5)(C) – ARE THERE ANY OTHER MATTERS REQUIRED TO BE TAKEN INTO CONSIDERATION BY THE SECRETARY BEFORE GRANTING CONCURRENCE?**

The Planning Circular PS 18-003, issued on 21 February 2018 (**Planning Circular**), outlines that all consent authorities may assume the Secretary's concurrence under clause 4.6 of the *Standard Instrument (Local Environmental Plans) Order 2006* (with some exceptions). The WLEP is a standard instrument LEP and accordingly, the relevant consent authority may assume the Secretary's concurrence in relation to clause 4.6 (5). This assumed concurrence notice takes effect immediately and applies to pending development applications.

We note that under the Planning Circular this assumed concurrence is subject to some conditions - where the development contravenes a numerical standard by greater than 10%, the Secretary's concurrence may not be assumed by a delegate of council. This restriction however does not apply to decisions made by a local or regional planning panel, as they are not legally delegates. The proposed development will be assessed by a regional planning panel, and as such the 10% limit does not apply.

## 5. CONCLUSION

The proposed development negligibly exceeds the 60m height standard under WLEP 2012.

Compliance with the development standard is unreasonable and unnecessary in the circumstances of the case for the following reasons:

- The proposal achieves the objectives of the building height standard notwithstanding the non-compliance with the height standard.
- There are sufficient environmental planning grounds to justify the non-compliance.
- The proposal is in the public interest as it is consistent with the objectives of the development standard and the objectives for development within the B4 Mixed Use zone.

Based on the reasons outlined above, it is concluded that the request is well founded and that the particular circumstances of the case warrant flexibility in the application of the maximum height of building development standard.

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