

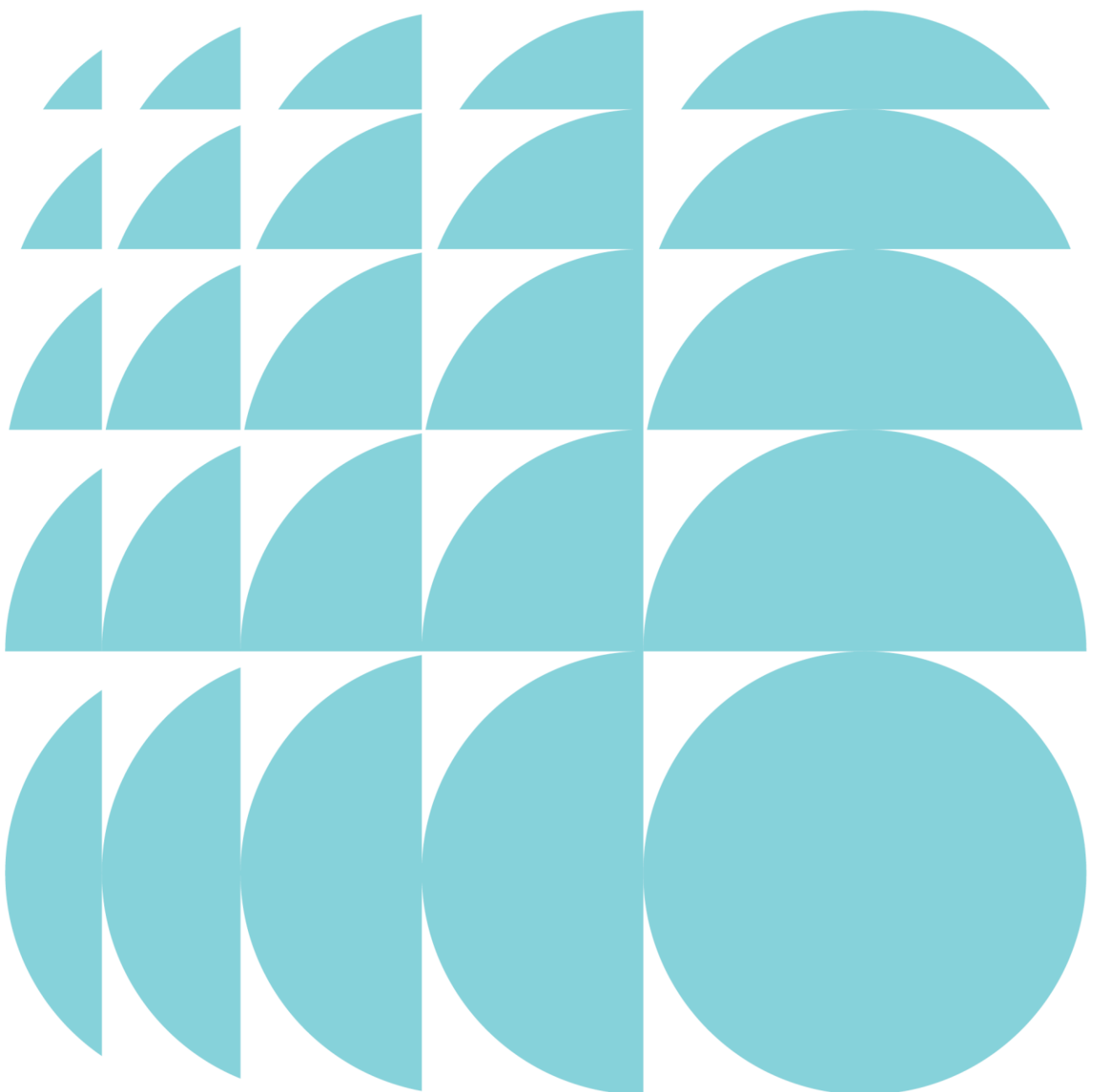
ETHOS URBAN

Clause 4.6 Variation

86-88 Walker Street, North Sydney
Hotel and Commercial Development

Submitted to North Sydney Council
On behalf of Billbergia

2 November 2018 | 218806



1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of Billbergia. It is submitted to North Sydney Council (the Council) in support of a development application (DA) for a hotel and commercial development at 86-88 Walker Street, North Sydney.

Clause 4.6 of the North Sydney Local Environmental Plan 2013 (NSLEP) enables North Sydney Council and the Northern District Planning Panel to grant consent for development even though the development contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

This clause 4.6 variation request relates to the development standard for building height under clause 4.3 of the NSLEP and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban dated November 2018.

This clause 4.6 variation request demonstrates that compliance with the maximum height development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the standard.

This clause 4.6 variation request demonstrates that, notwithstanding the non-compliance with the maximum height development standard, the proposed development:

- It satisfies the tests in clauses 5.6 and 6.3(3) of NSLEP which provide for buildings to exceed the maximum height limit;
- Will have an appropriate impact, in terms of its scale, form and massing;
- Will not impact on any significant view lines and vistas from the public domain; and
- Will enhance the streetscape in relation to scale, materials and external treatments.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the NSLEP.

2.0 Development Standard to be Varied

This clause 4.6 variation request seeks to justify contravention of the development standard set out in clause 4.3 of the NSLEP. Clause 4.3 provides that the maximum height control for the Site is RL227. The height of the proposed building to the top of the facade is RL 227, however contains an architectural roof feature that reaches a height of RL232.6, which equates to variation of 5.6m.

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court and the NSW Court of Appeal in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827; and
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.

The relevant matters contained in clause 4.6 of the NSLEP, with respect to the maximum building height development standard, are each addressed below, including with regard to these decisions.

3.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the NSLEP is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request.

The five methods outlined in *Wehbe* include:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
- 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 (**Fourth Method**).
- The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Method**).

Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary is the **First Method**. It is noted that in addition to the objectives, NSLEP also provides specific criteria within Clauses 5.6 and 6.3(3) that provide a framework for Council to grant consent to development that exceeds the maximum height control.

3.1.1 The underlying objectives or purposes of the development standard are achieved notwithstanding non-compliance with the standard

The objectives of the development standard contained in clause 4.3 of the NSLEP are summarised in **Table 1**. Further objectives in respect of building height in the North Sydney Centre are contained in clause 6.3(1) of the NSLEP. These are also considered in **Table 1**.

Table 1 Assessment of the Objectives of the Height Development Standard

Objective	Proposal
Clause 4.3 (1)	
(a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,	<ul style="list-style-type: none"> • Height controls in the North Sydney centre are set via reduced levels, rather than height in metres, to best respond to variation in natural landforms. The

Objective	Proposal
	proposed exceedance of the height control does not impact this reflection of natural landforms.
(b) to promote the retention and, if appropriate, sharing of existing views,	<ul style="list-style-type: none"> The proposal does not impact on any significant view lines and vistas from the public domain;
(c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,	<ul style="list-style-type: none"> As demonstrated in the overshadowing analysis submitted with the Statement of Environmental Effects the proposed development will maintain an acceptable level of solar access to existing dwellings, public reserves and streets.
(d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,	<ul style="list-style-type: none"> N/A. The proposed development is not in close proximity to any residential development.
(e) to ensure compatibility between development, particularly at zone boundaries,	<ul style="list-style-type: none"> The proposed development is within the centre of the North Sydney Centre and not at the zone boundary.
(f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.	<ul style="list-style-type: none"> The proposal is consistent with the scale of development expected in the context of the North Sydney CBD.
Clause 6.3(1)	
(a) repealed	<ul style="list-style-type: none"> N/A
(b) to promote a height and massing that has no adverse impact on land in Zone RE1 Public Recreation or land identified as "Special Area" on the North Sydney Centre Map or on the land known as the Don Bank Museum at 6 Napier Street, North Sydney,	<ul style="list-style-type: none"> As demonstrated in the overshadowing study the proposal will not have any impact on any land in Zone RE1 Public Recreation or land identified as "Special Area" on the North Sydney Centre Map.
(c) to minimise overshadowing of, and loss of solar access to, land in Zone R2 Low Density Residential, Zone R3 Medium Density Residential, Zone R4 High Density Residential, Zone RE1 Public Recreation or land that is located outside the North Sydney Centre.	<ul style="list-style-type: none"> The additional height above RL 227 does not result in any additional shadow on the residential or open space areas outside of the centre.
(d) to promote scale and massing that provides for pedestrian comfort in relation to protection from the weather, solar access, human scale and visual dominance,	<ul style="list-style-type: none"> The proposed building has a lower scale podium form which provides a massing that is complementary to the retained heritage item and also that provides for pedestrian comfort.
(e) to encourage the consolidation of sites for the provision of high grade commercial space.	<ul style="list-style-type: none"> The proposal consolidates two smaller sites to allow for larger floorplates that are suitable for the proposed commercial and hotel uses.

3.1.2 Height Variation Permitted by Clause 5.6 Architectural Roof Features

In addition to meeting the underlying objectives of Clause 4.3, clause 5.6 of NSLEP allows for an architectural roof feature that exceeds, or causes a building to exceed, the height limits set by clause 4.3. In order to grant consent pursuant to clause 5.6 the consent authority must be satisfied that the proposal is consistent with the matters set out in **Table 2**.

Table 2 Consistency with clause 5.6

Objective	Proposal
(a) the architectural roof feature:	
(i) comprises a decorative element on the uppermost portion of a building, and	<ul style="list-style-type: none"> The roof feature is a finely detailed glazed box that will be a decorative element on the uppermost portion of the building.

Objective	Proposal
(ii) is not an advertising structure, and	<ul style="list-style-type: none"> The roof feature is not an advertising structure
(iii) does not include floor space area and is not reasonably capable of modification to include floor space area, and	<ul style="list-style-type: none"> The roof feature does not include any floor space area and is reasonably capable of modification to include floor space area.
(iv) will cause minimal overshadowing, and	<ul style="list-style-type: none"> The roof feature will cause minimal overshadowing.
(b) any building identification signage or equipment for servicing the building (such as plant, lift motor rooms, fire stairs and the like) contained in or supported by the roof feature is fully integrated into the design of the roof feature.	<ul style="list-style-type: none"> The lift motor room and plant within the roof feature are fully integrated into its design.

3.1.3 Height Variation Permitted by Clause 6.3(3)

In addition to meeting the underlying objectives of Clause 4.3, Clause 6.3(3) of the NSLEP also allows for a building to exceed the maximum height of buildings shown for the land on the height of buildings map if the consent authority is satisfied that *“any increase in overshadowing between 9 am and 3 pm from the March equinox to the September equinox (inclusive) will not result in any private open space, or window to a habitable room, located outside the North Sydney Centre receiving:*

- (a) if it received 2 hours or more of direct sunlight immediately before the commencement of North Sydney Local Environmental Plan 2013 (Amendment No 23)—less than 2 hours of direct sunlight, or*
- (b) if it received less than 2 hours of direct sunlight immediately before the commencement of North Sydney Local Environmental Plan 2013 (Amendment No 23)—less direct sunlight than it did immediately before that commencement.”*

As demonstrated in the shadow analysis submitted with the DA, the proposed roof feature only generates a negligible amount of additional shadow on the residential areas located outside of the North Sydney CBD and will not cause any dwelling to receive less than 2 hours of direct sunlight.

3.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

The following site-specific environmental grounds further justify the proposed variation to the maximum height control:

- The proposed development will not generate any unacceptable adverse environmental impacts to adjoining or nearby landowners;
- The proposal fulfils the objectives of the relevant objectives of the two building height controls applying to the site (as demonstrated in Section 3.1.1);
- The breach in building height enables the provision of additional commercial floorspace consistent with the objective of Council's North Sydney CBD Capacity and Land Use Strategy and North Sydney CBD Planning Proposal;
- The breach of building height relates only to a building services zone, and is not in relation to any usable floor area; and
- The proposed variation will not result in a development which is out of character with that envisioned for the North Sydney CBD.

3.3 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

3.3.1 Consistency with objectives of the development standard

The proposed development is consistent with the objectives of the maximum building height development standard, for the reasons discussed in section 3.1.1 of this report.

3.3.2 Consistency with objectives of the zone

The proposed development is consistent with the objectives of the B3 Commercial Core Zone, as demonstrated in Table 2.

Table 3 Assessment of the Objectives of the B3 Commercial Core Zone

Objective	Proposal
B3 Commercial Core Zone	
To provide a wide range of retail, business, office, entertainment, community and other suitable land uses that serve the needs of the local and wider community.	<ul style="list-style-type: none"> The proposal includes a mix of hotel and commercial uses which will serve the needs of the local and wider community.
To encourage appropriate employment opportunities in accessible locations	<ul style="list-style-type: none"> The site is within walking distance of North Sydney Train Station and the approved Victoria Cross Metro Station. Numerous bus services are also within walking distance of the site.
To maximise public transport patronage and encourage walking and cycling.	<ul style="list-style-type: none"> The proposed development does not provide any onsite parking. Employees and visitors will therefore need to arrive at the site by more sustainable means such as public transport, walking or cycling.
To prohibit further residential development in the core of the North Sydney Centre.	<ul style="list-style-type: none"> No residential development is proposed.
To minimise the adverse effects of development on residents and occupiers of existing and new development.	<ul style="list-style-type: none"> The proposed development will not generate any unacceptable environmental impacts on any residents or occupiers of existing or new development.

3.3.3 Overall public interest

The proposed development is in the public interest in that it provides a significant uplift in commercial and hotel floorspace in the North Sydney CBD, whilst simultaneously protecting and enhancing the cultural and heritage significance of the heritage item known as the 'Firehouse Hotel' at 86 Walker Street. The scheme further provides a through site link to enhance Council's exhibited Laneways Strategy for the North Sydney CBD.

3.4 Other Matters for Consideration

Under clause 4.6(5), in deciding whether to grant concurrence, the Director-General must consider the following matters:

- (5) *In deciding whether to grant concurrence, the Secretary must consider:*
- whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - the public benefit of maintaining the development standard, and*
 - any other matters required to be taken into consideration by the Secretary before granting concurrence.*

These matters are addressed in detail below.

3.4.1 Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation of the maximum height development standard does not raise any matter of significance for State or regional planning. We do note, however, that the proposal is consistent with the most recent metropolitan plan for Sydney, the *Greater Sydney Region Plan* in that it:

- will reinforce the North Sydney CBD as a strong commercial core delivering significant employment opportunities;

- provides new tourism infrastructure which supports the existing commercial development within the North Sydney CBD and also Sydney CBD;
- allows for the use of the Site to continue to provide local employment opportunities;
- is well located to public transport connections; and
- retains and protects a heritage asset.

3.4.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard

There is no public benefit in maintaining the development standard in terms of State and regional planning objectives. As noted in the preceding sections, the additional height proposed generally reflects the height of development envisaged in the North Sydney CBD, and the proposed variation does not give rise to any adverse environmental impacts.

3.4.3 Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Director-General before granting concurrence.

There are no other relevant matters requiring consideration.

4.0 Conclusion

The assessment above demonstrates that compliance with the maximum building height development standard contained in clause 4.3 of the NSLEP is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. Specifically, the proposed development meets the tests of clause 5.6 and 6.3(3) which provide for the consent authority to approve development which exceeds the maximum height control. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst also allows for a better outcome in planning terms.

This clause 4.6 variation demonstrates that, notwithstanding the non-compliance with the maximum height development standard, the proposed development:

- Is consistent with clauses 5.6 and 6.3(3) of NSLEP which allow for a variation to the maximum height control under certain circumstances;
- Will have an appropriate impact, in terms of its scale, form and massing;
- Will not impact on any significant view lines and vistas from the public domain; and
- Will enhance the streetscape in relation to scale, materials and external treatments.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the NSLEP.