

Attachment D

Clause 4.6 Variation Request – Floor to Ceiling Heights

Clause 4.6 Variation – Recommended Minimum Floor to Ceiling Heights

923-935 Bourke Street, Waterloo

Submitted to: City of Sydney Council

Submitted on behalf of: Fabcot Pty Ltd



'Gura Bulga'

Liz Belanjee Cameron

'Gura Bulga' – translates to Warm Green Country. Representing New South Wales.

By using the green and blue colours to represent NSW, this painting unites the contrasting landscapes. The use of green symbolises tranquillity and health. The colour cyan, a greenish-blue, sparks feelings of calmness and reminds us of the importance of nature, while various shades of blue hues denote emotions of new beginnings and growth. The use of emerald green in this image speaks of place as a fluid moving topography of rhythmical connection, echoed by densely layered patterning and symbolic shapes which project the hypnotic vibrations of the earth, waterways and skies.

Ethos Urban acknowledges the Traditional Custodians of Country throughout Australia and recognises their continuing connection to land, waters and culture.

We acknowledge the Gadigal people, of the Eora Nation, the Traditional Custodians of the land where this document was prepared, and all peoples and nations from lands affected.

We pay our respects to their Elders past, present and emerging.

In supporting the Uluru Statement from the heart, we walk with Aboriginal and Torres Strait Islander people in a movement of the Australian people for a better future.

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Version No.	Date of issue	Prepared by	Approved by
1.0 (FINAL)	20/05/2025	RJ / MT	DH

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1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of Fabcot Pty Ltd (Woolworths Property). It is submitted to the City of Sydney (the Council) in support of a development application (DA) for the construction of a mixed-use development at 923-935 Bourke Street, Waterloo (the Site).

Clause 4.6 of the Sydney Local Environmental Plan 2012 (Sydney LEP 2012) enables the consent authority to grant consent for development even though the development contravenes the development standard. This clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

This request relates to minor variations to the recommended minimum design criteria for ceiling heights as set out in the Apartment Design Guide (ADG) and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban dated 18 December 2024, including supporting documentation.

The ADG establishes consistent planning and design standards for residential apartments across NSW. The guideline is provided as a supplement to the design principles contained within *State Environmental Planning Policy (Housing) 2021* (Housing SEPP). Specifically, this clause 4.6 variation request relates to the recommended minimum ceiling heights specified in Part 4C of the ADG – deemed a development standard by Clause 148(2)(c) of *State Environmental Planning Policy (Housing) 2021* (Housing SEPP).

This clause 4.6 variation request demonstrates that compliance with the recommended minimum ceiling heights 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. It demonstrates that, notwithstanding the non-compliance with the recommended minimum ceiling heights standard, the proposed development:

- Achieves the applicable objectives of the ceiling height design criteria and design guidance measures.
- Has significant planning grounds to justify the variation.
- Does not give rise to any adverse environmental impacts.
- Provides a high standard of amenity for future residents and well-proportioned space perception in the apartments.
- Provides well designed and appropriately defined ceilings that creates diversity in housing provision and typology.
- Continues to satisfy the objectives of the development standard, namely to provide a ceiling height which achieves sufficient natural ventilation and daylight access.
- Will promote the orderly and efficient use of land, in accordance with the objects of the Environmental Planning and Assessment Act 1979 (the Act).
- Will ensure a development that is suitable for the site and is in the public interest.

In light of the above, the consent authority can be satisfied that there is sufficient justification for the variation to the development standard, as proposed in accordance with the flexibility allowed under clause 4.6 of the Sydney LEP.

1.1 Background

DA/2024/1208 was lodged with Council in December 2024. It seeks development consent for the demolition of all on-site structures and the construction and use of a mixed-use development accommodating a subterranean supermarket with retail, commercial and residential land uses above ground, together with substratum subdivision.

The proposed development follows the successful completion of a Design Alternatives Competition (design competition) between 11 March and 1 May 2024, with the winning scheme awarded to Bates Smart.

2.0 Development Standard to be Varied

2.1 Is the Planning Control in question a Development Standard

Council staff have provided an interpretation that the ceiling height design criteria of the ADG is a development standard due to clause 148(2)(c) of the Housing SEPP. This clause states the following:

148 Non-discretionary development standards for residential apartment development—the Act, s 4.15

(1) *The object of this section is to identify development standards for particular matters relating to residential apartment development that, if complied with, prevent the consent authority from requiring more onerous standards for the matters.*

Note—

See the Act, section 4.15(3), which does not prevent development consent being granted if a non-discretionary development standard is not complied with.

(2) The following are non-discretionary development standards—

(a) *the car parking for the building must be equal to, or greater than, the recommended minimum amount of car parking specified in Part 3J of the Apartment Design Guide,*

(b) *the internal area for each apartment must be equal to, or greater than, the recommended minimum internal area for the apartment type specified in Part 4D of the Apartment Design Guide,*

(c) the ceiling heights for the building must be equal to, or greater than, the recommended minimum ceiling heights specified in Part 4C of the Apartment Design Guide.

While the design criteria of the ADG are not generally interpreted as ‘development standards’, Council has interpreted the recommended minimum ceiling height design criteria to be a development standard, as the ceiling height design criteria are referenced in clause 148(2)(c) of the Housing SEPP (refer above **bold**) as a standard that cannot be used for refusal if the criteria are satisfied.

As Council staff have previously interpreted the word ‘standard’ to mean ‘development standard’, a clause 4.6 variation request is required if the minimum recommended design criteria for ceiling heights, amongst other criteria, are not achieved. While we do not share this interpretation, this clause 4.6 variation request is made to facilitate the determination of the proposed DA in line with the held views of Council.

2.2 Development Standard – Ceiling Height

This clause 4.6 variation request seeks to justify contravention of the ceiling height development standard set out in the ADG. Objective 4C-1 of the ADG states:

Objective 4C-1
Ceiling height achieves sufficient natural ventilation and daylight access

Design criteria
1. *Measured from finished floor level to finished ceiling level, minimum ceiling heights are:*

Minimum ceiling height for apartment and mixed use buildings	
Habitable rooms	2.7m
Non-habitable	2.4m
For 2 storey apartments	2.7m for main living area floor 2.4m for second floor, where its area does not exceed 50% of the apartment area
Attic spaces	1.8m at edge of room with a 30 degree minimum ceiling slope

Minimum ceiling height for apartment and mixed use buildings	
If located in mixed used areas	3.3m for ground and first floor to promote future flexibility of use

These minimums do not preclude higher ceilings if desired

Design guidance

Ceiling height can accommodate use of ceiling fans for cooling and heat distribution

Objective 4C-2

Ceiling height increases the sense of space in apartments and provides for well proportioned rooms

Design guidance

A number of the following design solutions can be used:

- The hierarchy of rooms in an apartment is defined using changes in ceiling heights and alternatives such as raked or curved ceilings, or double height spaces.
- Well proportioned rooms are provided, for example, smaller rooms feel larger and more spacious with higher ceilings.
- Ceiling heights are maximised in habitable rooms by ensuring that bulkheads do not intrude. The stacking of service rooms from floor to floor and coordination of bulkhead location above non-habitable areas, such as robes or storage, can assist.

Objective 4C-3

Ceiling heights contribute to the flexibility of building use over the life of the building

Design guidance

Ceiling heights of lower level apartments in centres should be greater than the minimum required by the design criteria allowing flexibility and conversion to non-residential uses (see figure 4C.1)

2.3 Extent of the Variation Proposed

The proposal seeks a variation to the recommended minimum ceiling heights specified in Part 4C of the Apartment Design Guide – deemed a development standard by Clause 148(2)(c) of the Housing SEPP. The extent of the variation is discussed below.

2.3.1 Young Street residential terraces – mezzanine floor ceiling height

The ADG recommends (Part 4C) a ceiling height of 2.7 metres for habitable rooms to ensure sufficient natural ventilation and daylight access. The proposed development provides upper level terrace ceiling heights of 2.4 metres, representing a 0.3 metre variation from this standard.

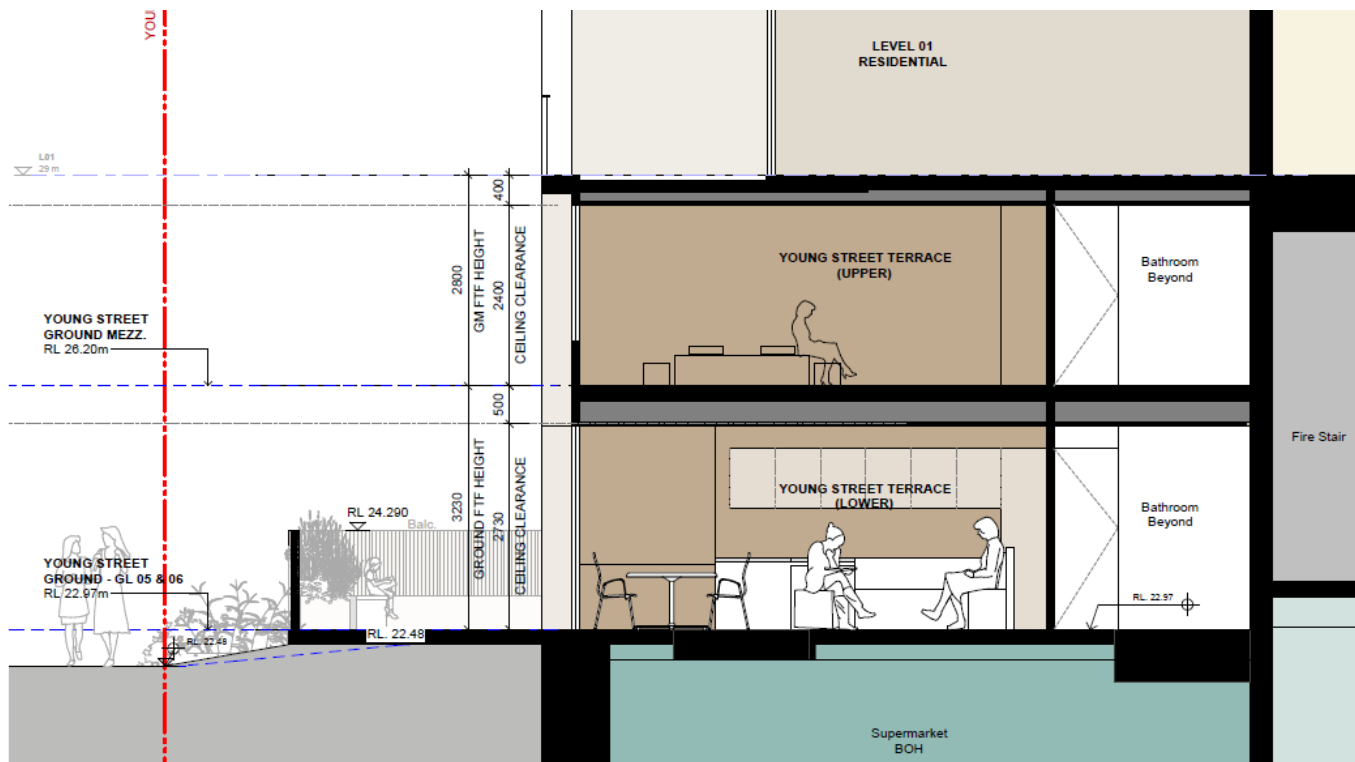


Figure 1 Section extract demonstrating terrace ceiling heights

Source: Bates Smart

This variation is due primarily to both terrace levels being integrated into the podium of the building fronting Young Street and achieving the podium height datum from an urban design perspective. Further, the alignment of the height of the terraces with the loading dock provides for a consistent, structurally and spatially efficient design response. This consistent Level 1 structural transfer slab optimises the design and accessibility of the residential and communal spaces.

The upper level of these terraces is limited for use as bedrooms and bathrooms, with open plan living areas provided with additional height at the ground level. The provision of these terraces within this location activates the landscaped Young Street frontage and was commended for both the additional residential dwelling typology and integrated design response as part of the design excellence competition. The proposal offers an additional housing typology, utilising space efficiently to enhance housing supply and diversification within the development.

2.3.2 Young Street residential terraces – ability for future adaptation

Additionally, the ADG recommends (Part 4C) a minimum ceiling height of 3.3 metres in mixed-use areas for ground and first-floor levels to facilitate future flexibility of use. The proposed development provides a minimum ceiling height of 2.7 metres fronting Young Street at the ground level and 2.4m fronting Young Street at the mezzanine level.

This variation is justified similarly by the efficient use of space for residential purposes, providing practical flexibility without compromising the future adaptability potential, amenity or spatial quality of the development. The design of the residential space does not preclude any potential future conversion.

2.3.3 Other first floor residential

As per the above, the ADG recommends (Part 4C) a minimum ceiling height of 3.3 metres in mixed-use areas for ground and first-floor levels to facilitate future flexibility of use. The proposed development provides a minimum ceiling height of 2.7 metres on the first floor across the development, equating to a variation of 0.6m.

This variation is justified by the double height ground floor already set aside for retail and commercial uses (refer to **Figure 2**). In effect, this activated condition on the ground floor means that future conversion of residential space would not need to occur as provision has already been made for non-residential uses with a generous floor

to ceiling height. In the event that expansion was desirable, the 2.7m ceiling height would not compromise the future adaptability potential, amenity or spatial quality of the development. The design of the residential space does not preclude any potential future conversion.

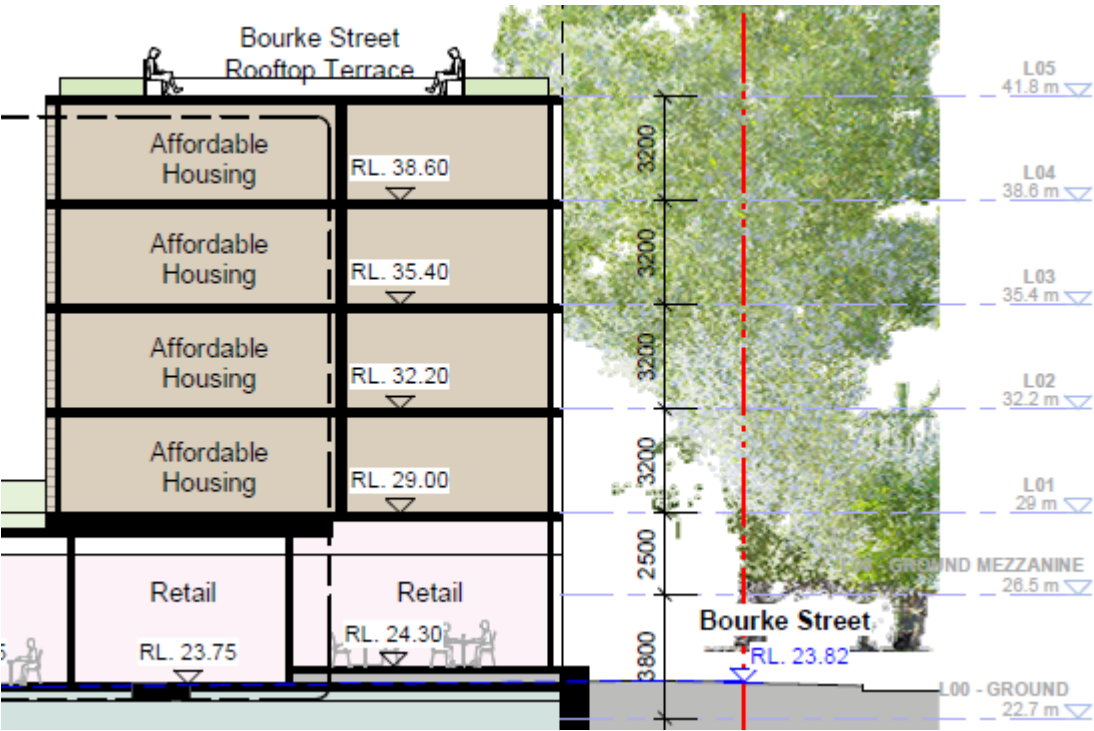


Figure 2 Section extract demonstrating standard floor-to-floor with double height retail ground floor

Source: Bates Smart

3.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Sydney LEP provides that:

4.6 Exceptions to development standards

- (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:
- (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and
 - (b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

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.
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.
3. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (*Initial Action*).
4. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (*Al Maha*).
5. *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511.
6. *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386.
7. *Moskovich v Waverley Council* [2016] NSWLEC 1015.
8. *Baron Corporation Pty Ltd v The Council of the City of Sydney* [2018] NSWLEC 1552 (*Baron Corporation*).

The relevant matters contained in clause 4.6 of the Sydney LEP, with respect to the recommended minimum ceiling heights development standard, are each addressed below, including with regard to these decisions.

3.1 Role of the Consent Authority

The role of the consent authority in considering this written request for a clause 4.6 variation has been recently explained by the NSW Court of Appeal in *Initial Action* and in *Al Maha* to require that the consent authority needs to be satisfied in relation to two matters:

- That the applicant's request has adequately addressed the matters in clause 4.6(3)(a) and (b)

The consent authority is required to form these two opinions first before it considers the merits of the DA, and it can only consider the merits of the DA if it forms the required satisfaction in relation to the matters. In particular, the consent authority needs to be satisfied that there are proper planning grounds to grant consent, and that the contravention of the standard is justified.

This report provides the basis for the consent authority to reach the required level of satisfaction.

This clause 4.6 variation is proposed in context of Part 4C of the ADG. Relevant matters contained in clause 4.6 of the Sydney LEP, with respect to the recommended minimum floor to ceiling height standard, are each addressed below.

3.2 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 *Whebe* 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 Sydney LEP 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.

The five methods outlined in *Whebe* include:

- The objective 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**).

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances because the objectives of Part 4C-1 of the ADG are achieved notwithstanding the non-compliance with the standard (First Method).

3.2.1 The underlying objectives or purposes of the development standard

The objective of the development standard contained in Part 4C of the ADG is as follows:

- 4C-1 Ceiling height achieves sufficient natural ventilation and daylight access.
- 4C-2 Ceiling height increases the sense of space in apartments and provides for well-proportioned rooms.
- 4C-3 Ceiling heights contribute to the flexibility of building use over the life of the building.

An assessment of the areas of non-compliance against the objectives of the ceiling heights provisions is provided in **Table 1** below.

Table 1 Consistency with the Part 4C-1 objective of the ADG

Objective	Development response
Ceiling height achieves sufficient natural ventilation and daylight access	Objective 4C-1 of the ADG aims to ensure that apartments achieve sufficient natural ventilation and access to daylight. While the ceiling height design criteria specified by the ADG is not numerically met in the upper level of the terraces facing Young Street, the majority of apartments within the development still feature ceiling heights of 2.7 metres. The non-compliance on the other first floor apartments relates only to flexibility and are not compromised regarding natural ventilation and daylight access. Importantly, the terraces that do not meet the minimum floor-to-ceiling height do not restrict the penetration of natural light and airflow into the apartments. All of the terraces the subject of this variation request still meet the ADG provisions for access to sunlight under Objective 4A-1 and natural cross ventilation under Objective 4B-1. Additionally, apartment depths have been limited to enhance ventilation and airflow, with kitchens positioned near large sliding door windows to maximise natural ventilation.
Objective 4C-2 Ceiling height increases the sense of space in	Objective 4C-2 of the ADG further aims to ensure that proposed ceiling heights enhance the sense of space in apartments and provide well-proportioned rooms. The areas of proposed non-compliance remain consistent with the design guidance for this objective. The open-plan

Objective	Development response
apartments and provides for well proportioned rooms.	arrangement of habitable living spaces optimises spatial perception and outlook, and the terraces impacted by this non-compliance are located at street level, incorporating sliding doors leading to open outdoor courtyards. Generally, these terraces have been designed with an open-plan layout to facilitate flexible movement. The non-compliance on the other first floor apartments relates only to flexibility and are not compromised regarding sense of space in apartments.
Objective 4C-3 Ceiling heights contribute to the flexibility of building use over the life of the building.	Objective 4C-3 of the ADG seeks outcomes where ceiling heights contribute to the flexibility of building use throughout its lifespan within mixed-use areas. The minor non-compliances identified on the ground level, mezzanine and first floor offer slight variations from the standard. These variations still enable flexibility for potential alternative uses at these levels without compromising amenity or spatial requirements.

3.3 Clause 4.6(3)(b): There are sufficient environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the Sydney LEP requires the departure from the development standard to be justified by demonstrating:

That there are sufficient environmental planning grounds to justify contravening the development standard.

There are several environmental planning grounds that justify the proposed variations to the development standard, including:

- All kitchens within the terraces are located adjacent to an open-plan living and dining layout at the ground floor with minimum 2.7m ceilings, benefiting from adjacent daylight, ventilation, and outlook.
- All first floor units are consistent with the standard minimum 2.7m ceilings outside of mixed-use areas, and present across all other floors in the buildings.
- Terrace depths are limited to maximize ventilation and airflow, with kitchens positioned near large sliding door windows to maximise natural ventilation.
- All apartments, both terrace-style and first floor units, meet the ADG's recommended minimum internal areas, with minimum room dimensions generally achieved and furniture placements demonstrating functional use of spaces.
- The non-compliances at the ground level, mezzanine and first floor are minor and therefore do not significantly inhibit flexibility in the uses at these levels.
- The likelihood of a non-residential conversion of the terraces is considered unlikely given extensive retail and commercial floorspace is provided elsewhere in the proposed development, in more prominent, desirable and publicly active streetscape locations for such uses. The conversion of first floor apartments is considered unlikely still considering the double height ceilings already provided for in the extensive retail provision across the site. Further, the structure of the development in terms of the stratum subdivision of residential and non-residential components would render any conversion unviable.

Noting the points above, there are sufficient environmental planning grounds to justify a variation to the development standard.

4.0 Conclusion

The assessment above demonstrates that compliance with the recommended ceiling height development standard contained in the ADG is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. 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 minor variation of the ceiling height design criteria in a portion of the apartments, the proposed development:

- Achieves the applicable objectives of the ceiling height design criteria and design guidance measures.
- Has significant planning grounds to justify the variation.
- Does not give rise to any adverse environmental impacts.
- Will promote the orderly and efficient use of land, in accordance with the objects of the Environmental Planning and Assessment Act 1979 (the Act).
- Will ensure a development that is suitable for the site and is in the public interest.

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