

Clause 4.6 Variation Request  
Height of Buildings (Clause 4.3)  
Sydney LEP 2012

**ALTERATIONS AND ADDITIONS TO THE MINERVA THEATRE AND THE  
ADAPTIVE REUSE OF THE BUILDING FOR THE PURPOSES OF  
ENTERTAINMENT FACILITIES, FOOD & DRINK PREMISES AND TOURIST  
AND VISITOR ACCOMODATION**

28 – 30 Orwell Street, Potts Point



Prepared by Planning Lab

Issued 29 July 2021

## Introduction

This is a formal written request that has been prepared in accordance with Clause 4.6 (cl 4.6) of the *Sydney Local Environmental Plan 2012* (SLEP 2012). It supports a Development Application (DA) submitted to City of Sydney Council for the adaptive reuse of the Minerva Theatre, a State heritage listed building located at 28-30 Orwell Street, Potts Point ('the site'). The proposal constitutes a mixed use development including performance spaces, tourist and visitor accommodation and food and drink premises.

The purpose of this cl 4.6 variation request is to address a variation to Clause 4.3 Height of Buildings under the SLEP 2012. Specifically, this request seeks to vary the 22m height standard that applies to the site.

The objectives of cl 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

This request has been prepared having regard to the following considerations:

- The Department of Planning and Environment's *Guidelines to Varying Development Standards* (August 2011);
- The objectives of Clause 4.3 of the SLEP 2012, being the development standard to which a variation is sought;
- Relevant case law in the New South Wales Land and Environment Court and New South Wales Court of Appeal including *Wehbe v. Pittwater Council* [2007] NSWLEC 827.

This variation request provides an assessment of the development standard and the extent of variation proposed to the standard. The variation is then assessed in accordance with the principles set out in the *Wehbe*.

## Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the SLEP 2012 provides that development consent may be granted for development even though the development would contravene a development standard imposed by the SLEP 2012, or any other environmental planning instrument.

However, Clause 4.6(3) states that development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstance of the case, and*
- (b) *there are sufficient environmental planning grounds to justify contravening the development standard.*

In accordance with clause 4.6(3) the applicant requests that the height of building development standard be varied.

## What is the Environmental Planning Instrument (EPI) that applies to the land?

The Environmental Planning Instrument (EPI) to which this variation relates is the SLEP 2012.

## What is the zoning of the land?

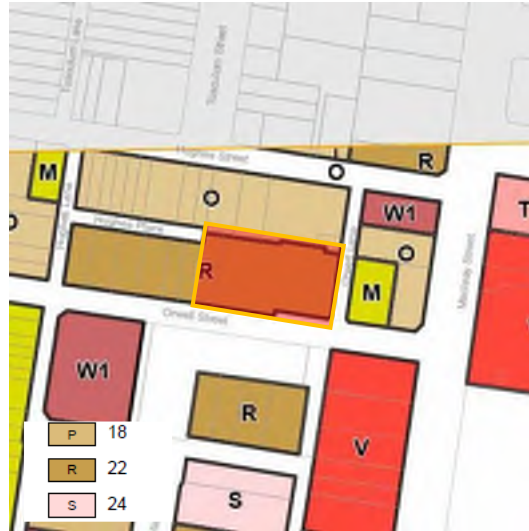
The site is zoned B4 – Mixed Use pursuant to the SLEP 2012. Refer to **Figure 1**. The proposed *‘hotel and motel accommodation’*, *‘entertainment facility’* and the complementary *‘food and drink premises’* are permissible with consent in the zone.



**Figure 1** – Land Zoning Map (Source: Sheet LZN\_022 - SLEP 2012)

## What is the development standard being varied?

Clause 4.3(2) of the SLEP 2012 provides that the maximum height for a building on any land is not to exceed the height shown for the land on the Height of Building Map. The site is within area ‘R’ on the Height of Building Map and accordingly, a Height of 22m applies as shown in **Figure 2**.



**Figure 2 - Height of Building Map (Source: Sheet HOB\_022 - SLEP 2012)**

## Is the development standard excluded from the operation of Clause 4.6 of the EPI?

Cl 4.6(2) states that development consent may be granted for development even though the development would contravene a development standard. However, this does not apply to a development standard that is expressly excluded under cl 4.6(8) of the SLEP 2012. The maximum height development standard is not identified under subclause 4.6(8) and is therefore not specifically excluded from the operation of cl 4.6 of SLEP 2012.

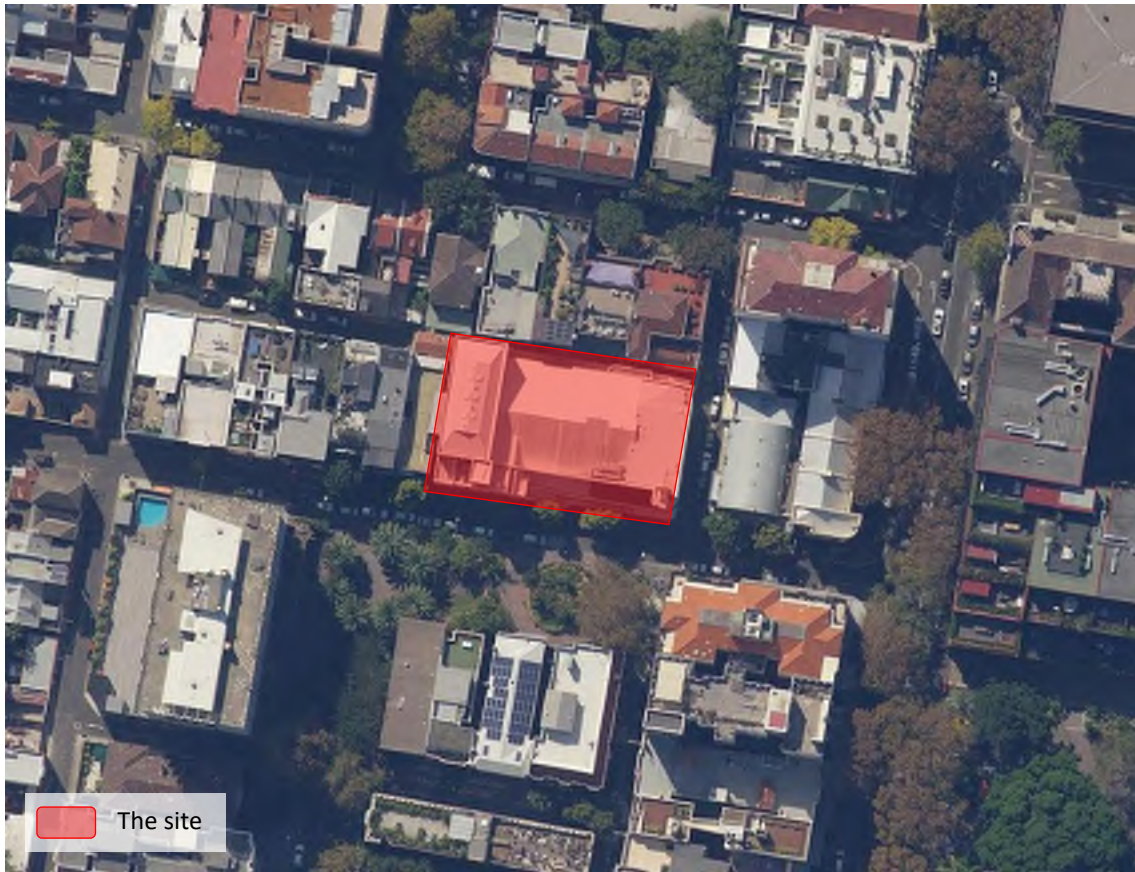
## The site and its context

The site is located at 28-30 Orwell Street, Potts Point within the City of Sydney Local Government Area. The site is located east of central Sydney within the urban centre of Potts. The site is legally described as Lots 1,2,3 and 4 in DP 456456, and Lot 10 in DP 10682 and is privately owned by CE Minerva Pty Ltd. It is rectangular and has an area of 1,267m<sup>2</sup>. It has a primary frontage to Orwell Street of approximately 46m and a secondary frontage of 27m to Orwell Lane.

Within the immediate surrounds of the site, the built form is generally made up of commercial and residential buildings with ground floor retail/commercial uses. The surrounding buildings range in height from 2-3 storeys to 8 storeys (to the south and west) and as shown at the Gowrie Gate directly to the west.

The subject site houses the 'Metro Theatre', an Art Deco style building which consists of 5 storeys over a basement level bounded on two sides by road, and on the other two sides by residential blocks

An aerial photo of the site is shown in **Figure 3**.



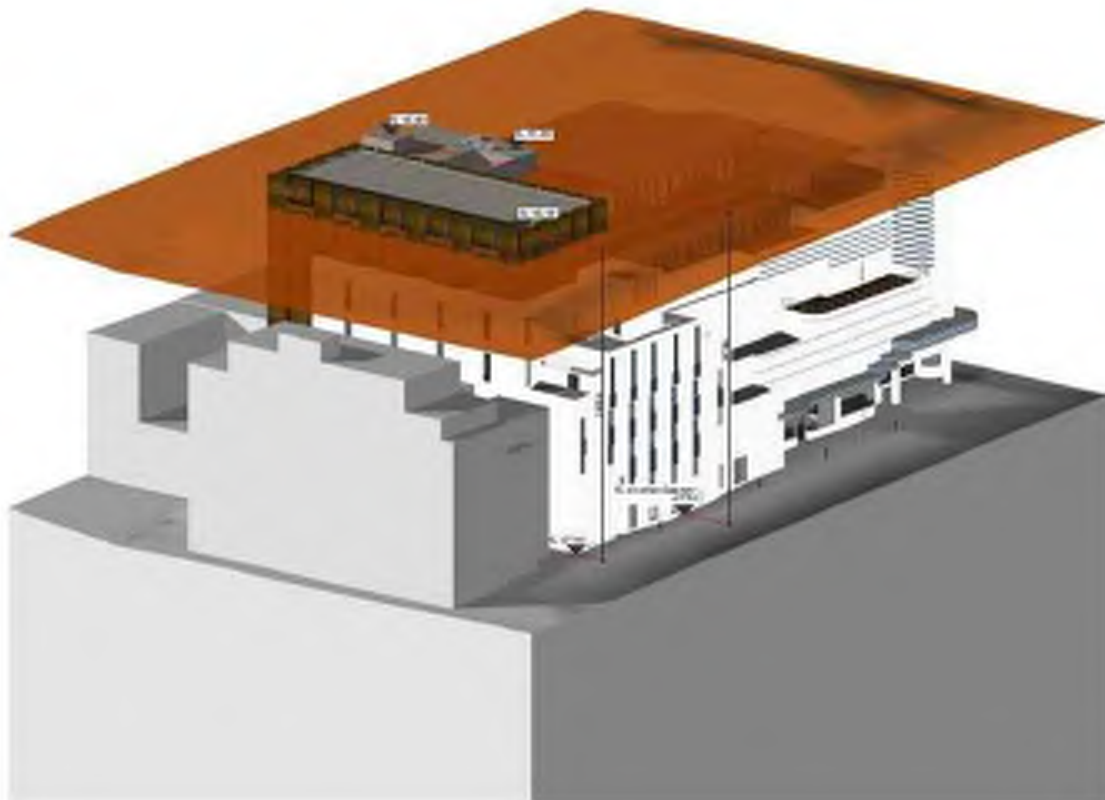
*Figure 3: Aerial photograph of the site and surround (Source: Six Maps 2021)*

## Extent of Variation to the Development Standard

The vast majority of the proposed building envelope is below or in line with the 22m height limit. However, the maximum building height, as measured from the '*existing*' ground level', is 24.92m at the parapet of the proposed vertical addition above the flytower of the theatre as indicated in the architectural drawings prepared by Tonkin Zulaikha Greer Architects. Therefore, the proposed development breaches the height standard by a maximum of 2.92m (13.27%).

The exceedance, being the portion of the building above the 22m height limit, is attributed to the proposed two storey hotel addition to the flytower (RL +62.10 or 24.92m) along the western boundary and the adjacent vertical circulation element (RL +61.39 or 24.76m) proposed to provide lift and fire egress throughout the building. The extent of the height breach is shown in **Figures 4** below.





**Figure 4:** 22m Height Plan Overlay - Axonometric View (Source: Tonkin Zulaikha Greer Architects)

### Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was the satisfaction of the first test of the five-set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In *Wehbe v Pittwater Council* [2007] 156 LGERA 446 [42] – [51] (“*Wehbe*”) and repeated in *Initial Action* [17]-[21] the Chief Judge identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established.

Although *Wehbe* concerned a SEPP 1 objection, it remains relevant to requests under clause 4.6 as confirmed by Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, notwithstanding that if the first and most commonly applied way is used, it must also be considered in 4.6(4)(a)(ii).

The 5 ways in *Wehbe* are that:

1. the objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;

3. the objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
4. the development standard has been virtually abandoned or destroyed by the Council's actions in granting consents departing from the standard and hence the standard is unreasonable; or,
5. the zoning of the land is unreasonable or inappropriate.

The five ways are not exhaustive, and it may be sufficient to establish only one.

For completeness, this request addresses the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

Compliance with the Height of Buildings development standard is unreasonable or unnecessary in the circumstances of this case because, as explained in **Table 1** (below), the objectives of the development standard are achieved, notwithstanding non-compliance with the standard.

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34], the Chief Justice held, “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

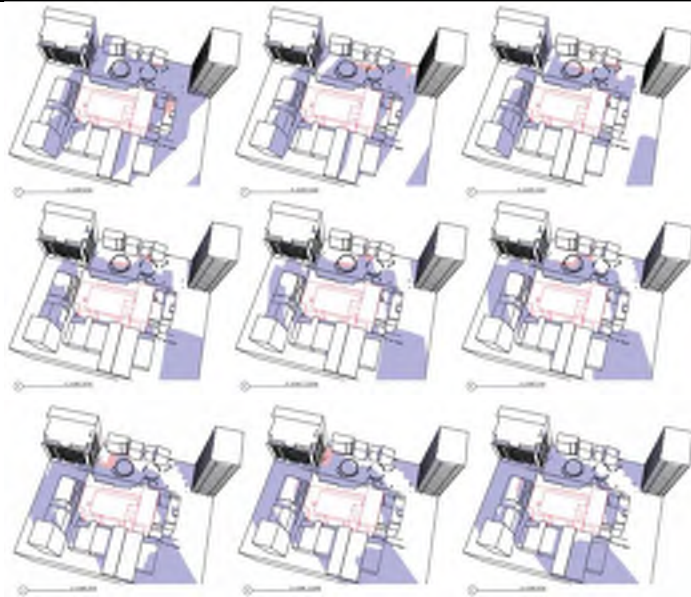
Demonstrating that there will be no adverse amenity impacts is, therefore, one way of showing consistency with the objectives of a development standard.

**Table 1: Achievement of Development Standard Objectives**

Objective	Discussion
1(a) to ensure the height of development is appropriate to the condition of the site and its context,	<p>Whilst the maximum height of the building as measured at the top of the parapet of the skytower addition is 24.92m, 2.92m above the height control, it is noteworthy that the vast majority of the structure of the proposed building complies with the 22m height limit.</p> <p>Furthermore, the non-compliant component of the building does not result in any negative visual and environmental impacts on the public domain, the local streetscape and the surrounding residential properties, as demonstrated in the below assessment:</p>

	<p><u>Visual Impacts</u></p> <p>The proposal will have a minimal visual impact on the setting of the original building. The principal façades on Orwell Street and Lane including the decorative corner tower and characteristics of the Streamline Modernist style will be retained and will continue to read as the primary element in the composition.</p> <p>The form of the proposed addition above the flytower corresponds with the original building below. As such, it will be read clearly as a secondary element. Because of the contemporary detailing and the use of a complementary palette of material and finishes, the original form of the building remains legible. Its bulk and scale are considered appropriate as they are respectful to the historic building below through setbacks and building alignments which closely follow that of the building below.</p> <p>Along the northern boundary, the new lift and fire stairs have been designed as simple forms that respond to the gradual rise of the building towards the flytower; a five-storey structure on the eastern end and eight storeys next to the flytower.</p> <p><u>Overshadowing Impacts</u></p> <p>The proposed additions have been designed to ensure that the current level of solar access to surrounding properties is maintained and little significant additional overshadowing of the public domain, such as the Springfield Gardens, is caused.</p> <p>The below Shadow Diagrams (Drawings Nos. A500 &amp; A501) (<b>Figure 5</b>) have been prepared by the project's architect, Tonkin Zulaikha Greer Architects to demonstrate compliance with clause 4.2.3.1 Solar Access of the SDCP 2012.</p>
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**Figure 5 – Shadow Diagrams 21 June | 9.00 am to 3.00 pm**  
(source: Tonkin Zulaikha Greer Architects)

#### Residential Amenity Impacts

The variation of the height standard does not result in additional overlooking of neighbouring residential properties or potential noise disruption as the breach relates to building's elements that are adequately separated from residential development.

#### Views Impacts

Refer to below response to Objective 1(c)

**Note:** The proposed building envelope has been developed in consideration of the detailed design parameters provided by the City of Sydney's Design Advisory Panel concerning an earlier re-development proposal for the site (Advise sheet: No. 53/2019). According to the Panel, a successful strategy to the provision of a vertical addition to the building should consider the following: *'A thin tower may have less of an impact– allowing the character of the architecture of the rest of the existing building to remain intact, and result in less overshadowing of Springfield Gardens. Noting that the building height limit is 22m, the Panel suggested providing some **additional height for a tower element of up to 25m**, to encourage design excellence". (Emphasis Added).*

1(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,	As discussed above, the proposed addition is appropriately scaled and designed as a secondary component which defer to the architecture of the original building. The addition has been setback from the principal façades and adopts a contemporary materials and colour palette to minimise the visual impact on the heritage listed building and the Potts Point Heritage Conservation Area (C51).
1(c) to promote the sharing of views,	<p>There will be minimal impact on views to and from the heritage item as the proposed vertical addition above the flytower is setback from the principal elevation of the building and detailed as a discrete extension of the form below.</p> <p>The Visual Impact Assessment by Urbaine Architecture which is submitted with the Development Application demonstrates that the significant district views, particularly from the neighbouring residential developments are protected.</p>
1(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,	n/a
1(e) in respect of Green Square: <i>(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and</i> <i>(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.</i>	n/a

Compliance with the maximum height development standard is unreasonable or unnecessary in the circumstances of this case because the objective of the standard is achieved notwithstanding the non-compliance.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The underlying objective or purpose of the height standard is relevant. As demonstrated above, the proposal retains consistency with the objectives of Clause 4.3 of SLEP, despite non-compliance.

3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The underlying objectives or purpose of the standard would not be defeated or thwarted if compliance was required, however, as outlined above consistency with objectives is achieved despite non-compliance.

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;

Council has varied the height of building standard in circumstances where the objectives of the standard are achieved.

5. 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.

The proposed zoning of the land is reasonable and appropriate.

Strict compliance with the height of building development standard is unreasonable and unnecessary in the circumstances of the case in that:

- The proposal is consistent with the objectives of the 'Height of Building Standard' as detailed above.
- The vast majority of the proposed building envelope is below or in line with the 22m height limit. As such, the scale of the building remains consistent with the desired character of the locality notwithstanding the proposed minor variation.
- The proposal retains, conserves and adapts the building, respecting its aesthetic significance. The existing streetscape is varied, with a range of scales and architectural styles. The proposed additions have been designed to minimise visual impacts on the streetscape and the local Heritage Conservation Area.

- The proposed variation to the Height of Buildings control does not give rise to an impact on the amenity of the locality.

As the proposal is consistent with the objectives of the height of buildings standard, compliance with the development standard is considered to be unreasonable and unnecessary in the circumstances of the case.

### Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?

The proposed massing and design of the flytower addition is the result of a considered analysis of the qualities of the base theatre building and the surrounding context and the desire to deliver a positive design outcome with a high level of architectural merit. The modifications to the original flytower of the building have been carefully designed to ensure that its external volume retains its primacy within the streetscape and the vertical extension reads as secondary complementary form.

In this particular circumstance, there are sufficient environmental planning grounds to warrant the proposed variation to the height of buildings standard.

### Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

### Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is 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 in which the development is proposed to be carried out.

## Objective of the Development Standard

The consistency of the proposed development with the specific objectives of the height of buildings development standard is addressed above.

## Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the B4 - Mixed Use. The objectives of the zone are:

- *To provide a mixture of compatible land uses.*
- *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.*
- *To ensure uses support the viability of centres.*

The subject proposal meets the objectives for the zone in that:

- The proposed development includes 'hotel and motel accommodation', 'entertainment facility' and complementary 'food and drink premises' which are permissible with consent within a B4 – Mixed Use Zone.
- The proposal will see the subject site continue to connect with its rich history through its reinstated function as a performance venue, while also bringing new visitors via the proposed hotel and food and beverage spaces.
- The mix of uses will enhance the distinctive, mixed character of the Potts Point locality.
- The development will have a positive economic impact on the Potts Point area with the potential to attract visitors to the area and to provide employment opportunities.
- The site has excellent access to public transport being located in close proximity to the Kings Cross Railway Station to the south, which provides excellent access to the Eastern Suburbs & Illawarra Line. The nearest bus stop is located on Macleay Street which provides frequent public bus services to the CBD and eastern suburbs.

For the reasons given the proposal is consistent with the objectives of the B4 zone.

## Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

- (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.*

Given its location within the heart of Potts Point, the proposed adaptive reuse of the building as the 'Minerva Theatre' strikes a balance between achieving good conservation outcomes and finding an appropriate use that is commercially viable and sustainable for the future. The proposal demonstrates a high-quality outcome for a building which has sat vacant for five years and now has

the opportunity to again serve the cultural needs of the local community by providing entertainment venues capable of hosting a diverse range of live performances.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the floor space ratio development standard will achieve a better outcome in this instance in accordance with objective 1(b).

## Conclusion

Strict compliance with the height of buildings development standard contained within clause 4.3 of the Sydney Local Environmental Plan 2012 has been found to be unreasonable and unnecessary in the circumstances of the case. Further, there are sufficient environmental planning grounds to justify the proposed variation. In this regard, it is reasonable and appropriate to vary the height of buildings development standard to the extent proposed.