



CLAUSE 4.6 VARIATION TO DEVELOPMENT STANDARD: ACTIVE STREET FRONTAGES

Waterloo Metro Quarter Over Station
Development (Southern Precinct)

Prepared for
WL DEVELOPER PTY LTD
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CLAUSE 4.6 VARIATION REQUEST - WATERLOO METRO QUARTER OVER
STATION DEVELOPMENT_SOUTHERN PRECINCT_FINAL

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1. INTRODUCTION

This Clause 4.6 Variation Request has been prepared by Urbis on behalf of WL Developer Pty Ltd (**the Applicant**) to support a detailed State Significant Development Application (**SSDA**) for the construction and operation of a mixed-use over station development (OSD) and public domain works located at the Southern Precinct of the Waterloo Metro Quarter site.

The proposed development comprises a maximum height of 25-storeys (plus roof plant) OSD with two interconnected buildings above a podium for student accommodation (Building 3) and social housing dwellings (Building 4). The construction of the metro service box is the subject of the CSSI approval and does not form part of the SSDA.

Lodgement of the detailed SSDA (SSD-10437) for which this report supports, follows the approval of a concept SSDA (SSD-9393) granted by the Minister for Planning on 10 December 2019.

The Minister for Planning and Public Spaces, or their delegate, is the consent authority for the SSDA and this application is lodged with the New South Wales Department of Planning, Industry and Environment (**NSW DPIE**) for assessment.

This request seeks to vary the strict application of clause 7.27 of the *Sydney Local Environmental Plan 2012* (**SLEP 2012**) as it relates to active street frontages, namely that the proposal must comply with the Active Street Frontages Map as it applies to the site. While the proposal has sought to maximise activation of all frontages through business and retail uses, the site's operational requirements which have been designed to be consistent with the concept approval have resulted in small portions of frontages being required for critical building services.

As stated in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 (Initial Action)* at [25], clause 4.6(3) does not require the consent authority to form its own opinion of satisfaction regarding the matters identified in clause 4.6(3)(a) and (b), but only indirectly must be satisfied that the applicant's written request has adequately addressed those matters. This request does that, and therefore the consent authority is open to be satisfied that subclause 4.6(3) has been met.

This request contains justified reasoning for the proposed variation to the active street frontages development standard, and demonstrates that:

- The objectives of the development standard will be achieved, notwithstanding that the development standard not being achieved in entirety, and in doing so, establishes that compliance with the standard is unreasonable or unnecessary (Initial Action at [17]) – Refer to **Section 7.2** of this Request.
- The proposal is consistent with the objectives of the zone in which the proposed development is proposed to be carried out, being the B4 Mixed Use Zone - Refer to **Section 7.2.4** of this Request.
- Whilst strict application of the development standard is not achieved, there are sufficient environmental planning grounds to support the proposed development – Refer to **Section 7.2.2** of this Request.

This request should be read in conjunction with the Environmental Impact Statement prepared by Urbis, and other supporting documentation submitted with the detailed SSDA.

2. SITE ANALYSIS

2.1. SITE CONTEXT AND LOCATION

The site is located within the City of Sydney Local Government Area (LGA). The site is situated approximately 3.3 kilometres south of Sydney CBD and 7.5 kilometres northeast of Sydney International Airport.

The Waterloo Metro Quarter site comprises land to the west of Cope Street, east of Botany Road, south of Raglan Street and north of Wellington Street (refer to **Figure 1**). The heritage listed Waterloo Congregational Church located at 103–105 Botany Road is within this street block but is not part of the Waterloo Metro Quarter site boundaries.

The site is a rectangular shaped allotment and an overall site area of approximately 1.287 hectares. The Southern Precinct is approximately 4,700sqm. The site is reasonably flat with a slight fall to the south.

The boundaries of the Waterloo Metro Quarter site are identified in **Figure 1**.

Figure 1 Aerial of the Site



Source: Urbis

The area surrounding the site consists of commercial premises to the north, light industrial and mixed-use development to the south, residential development to the east and predominantly commercial and light industry uses to the west. To the south west is Alexandria Park, an open space area containing formal and informal recreation areas. The eastern half of the park comprises open space containing grassed areas with walking paths and shade trees for passive recreation. The western half contains a grassed oval and other facilities used for active recreation including cricket, soccer, athletics, tennis and basketball.

The surrounding suburbs have large parks which are well maintained which connects to an existing local and district pedestrian and cycle network connecting to central Sydney to the north and green square to the south. Botany Road traffic volumes and street block configuration create a significant barrier to the east west movement, and access to transport hubs, social spaces and green amenity. There are a range of existing

building typologies across Waterloo for residential and non-residential uses, reflecting the dense grain of the area. Waterloo reflects a wide range of building heights from 1 to 30 stories across many residential and non-residential typologies. These building typologies include shops, offices, and hotels which are traditionally found in clusters at corners throughout the locality. The broader context has significant heritage items and conservation zones, as well as a strong social and cultural history. Several heritage items sit adjacent to the Waterloo Metro Quarter site as is discussed further within this EIS.

2.2. LEGAL DESCRIPTION

The site comprises the following 16 allotments and as outlined within the Site Survey submitted at **Appendix C** with the SSDA package:

- 1368 Raglan Street (Lot 4 DP 215751)
- 59 Botany Road (Lot 5 DP 215751)
- 65 Botany Road (Lot 1 DP 814205)
- 67 Botany Road (Lot 1 DP 228641)
- 124-128 Cope Street (Lot 2 DP 228641)
- 69-83 Botany Road (Lot 1, DP 1084919)
- 130-134 Cope Street (Lot 12 DP 399757)
- 136-144 Cope Street (Lots A-E DP 108312)
- 85 Botany Road (Lot 1 DP 27454)
- 87 Botany Road (Lot 2 DP 27454)
- 89-91 Botany Road (Lot 1 DP 996765)
- 93-101 Botany Road (Lot 1 DP 433969 and Lot 1 DP 738891)
- 119 Botany Road (Lot 1 DP 205942 and Lot 1 DP 436831)
- 156-160 Cope Street (Lot 31 DP 805384)
- 107-117A Botany Road (Lot 32 DP 805384 and Lot A DP 408116)
- 170-174 Cope Street (Lot 2 DP 205942)

2.3. EXISTING DEVELOPMENT

The site previously included three to five storey commercial, light industrial and shop top housing buildings. All previous structures except for an office building at the corner of Botany Road and Wellington Street have been demolished under the CSSI approval to facilitate construction of the new Sydney Metro Waterloo Station. As such the existing site is predominately vacant and being used as a construction site.

Construction of the Sydney Metro is currently underway on site (below ground level) in accordance with CSSI approval (CSSI 7400).

Figure 2 Photographs of existing site condition at Waterloo Metro Quarter site (dated 21 July 2020)



Picture 1 South western corner of site, located at the corner Wellington Street and Botany Road

Source: Urbis



Picture 2 Botany Road street frontage, looking north east

Source: Urbis



Picture 3 North western corner of site, looking north east illustrating station construction vehicular entrance

Source: Urbis



Picture 4 Botany Road street frontage, looking north east

Source: Urbis



Picture 5 North western corner of site, looking north east illustrating station construction vehicular entrance

Source: Urbis



Picture 6 Raglan Street frontage, looking east

Source: Urbis



Picture 7 Cope Street frontage, looking north

Source: Urbis



Picture 8 South eastern corner of site, located at corner of Cope Street and Wellington Street

Source: Urbis

2.4. SURROUNDING DEVELOPMENT

The area surrounding the site consists of a mix of commercial, residential, and light industrial uses, civic uses and open space. An overview of surrounding development is provided below.

2.4.1. Waterloo Estate

The Waterloo Estate located to the east of the site will be redeveloped over the next 15-20 years, and will seek to deliver a mix of social, affordable, and market housing.

The NSW Land and Housing Corporation has submitted a planning proposal to the City of Sydney requesting to redevelop the public and private lands in the southern part of the Waterloo Estate by changing the planning controls that currently apply to the precinct. This planning proposal is referred to as 'Waterloo South.'

Waterloo South includes land bounded by Cope, Raglan, George, Wellington, Gibson, Kellick, Pitt and McEvoy streets, and has an approximate site area of 12.32 hectares (approximately 65% of the total estate). It currently comprises 749 social housing dwellings owned by the NSW Land and Housing Corporation, 125 privately owned dwellings, and some commercial properties on the south-east corner of Cope and Wellington streets.

With up to 3,000 new dwellings proposed, the redevelopment is sought to be delivered in a staged approach and is still the subject of a finalised master planning process. Waterloo South is set to see building heights of up to 30-storeys and will benefit from the delivery of improved public transport from the new metro station and the services provided within the Waterloo Metro Quarter OSD.

2.4.2. North

To the north of the site on the northern side of Raglan Street is a mix of one and two storey commercial buildings with ground floor retail. Further to the north is Redfern train station and town centre which is characterised by a mix of residential, retail and student accommodation uses. Redfern Park is located approximately 500m north-east of the site and is a well-used recreational space with a grassy recreational park, sports fields, grandstand and children's playground.

2.4.3. East

To the east of the site is a mix of one and three storey residential flat buildings and attached dwellings that form part of the Waterloo social housing estate. Further to the east and north east are high density residential dwellings which also form part of the estate.

2.4.4. West

Beyond Botany Road to the west are two and three storey commercial and light industrial buildings, as well as a five-storey mixed use residential flat building. Council recently granted consent for an affordable housing development located at 74-88 Botany Road. The proposal includes ground floor retail fronting Botany Road.

Further to the west is the Alexandria Park Heritage Conservation Area (**HCA**). The HCA comprises a mix of late nineteenth-century houses including one to three storey terraces and cottages. The area also includes corner shop buildings, industrial and warehouse buildings. The Australian Technology Park is a business and technology centre in Eveleigh, located approximately 400m north-west of the site.

2.4.5. South

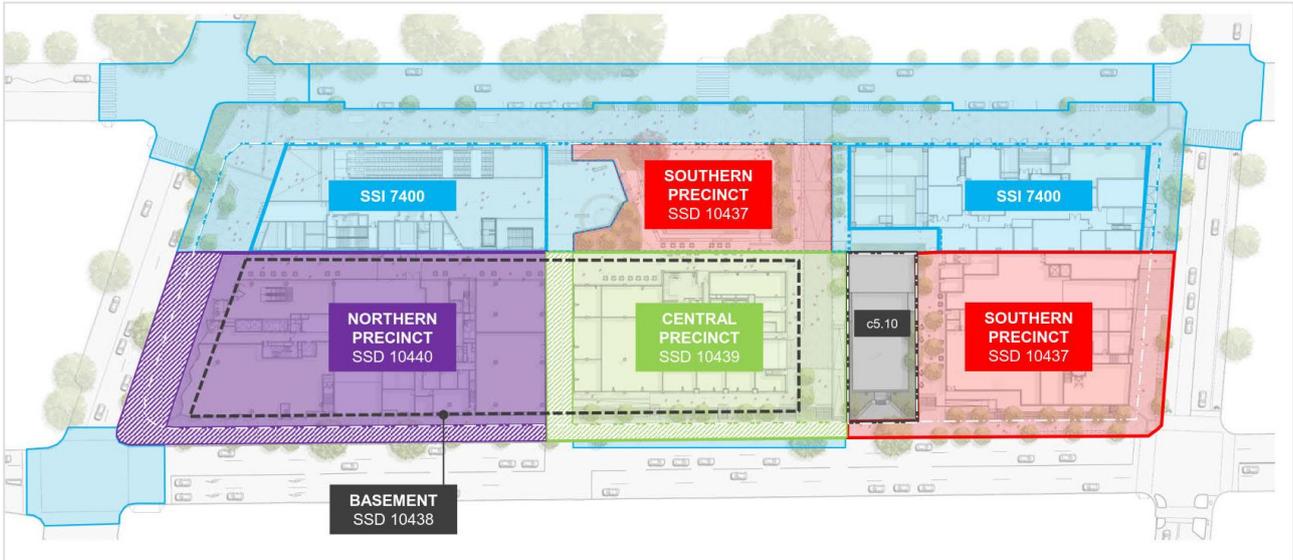
Land to the south of the site is characterised by a mix of low to mid rise industrial, commercial and residential buildings. Immediately to the south of the site on the opposite side of Wellington Street is the Cauliflower Hotel, a locally listed heritage item. Further to the south along Botany Road are a mix of residential apartments and row of terraces. Alexandria Park, a large area of public open space is located to the south-west of the site.

Green Square train station and Green Square town centre are located approximately 800m south of the site. The town centre comprises a mix of mid to high rise buildings containing retail, commercial, civic and residential uses.

2.4.6. Adjacent Waterloo Metro Quarter Precincts

The site is located within the Southern Precinct of the Waterloo Metro Quarter. Once complete, to the norther of the precinct will be the Cope Street Plaza, the metro station and Raglan Street Plaza which will be located within the same street block. The local heritage listed Waterloo Congregational Church will remain in its current location, immediately adjacent the future student accommodation building, separated by a courtyard.

Figure 3 Waterloo Metro Quarter station site precinct identification (SSDA Boundaries)



Source: WL Developer Pty Ltd

3. PROPOSED DEVELOPMENT

3.1. SYDNEY METRO

Sydney Metro is Australia's biggest public transport project (refer to **Figure 4** below). There are four core components:

Metro North West Line (formerly the 36-kilometre North West Rail Link)

Services started in May 2019 in the city's North West between Rouse Hill and Chatswood, with a metro train every four minutes in the peak. The project was delivered on time and \$1 billion under budget.

Sydney Metro City & Southwest

The Sydney Metro City & Southwest project includes a new 30km metro line extending metro rail from the end of the Metro North West Line at Chatswood, under Sydney Harbour, through new CBD stations and southwest to Bankstown. It is due to open in 2024 with the ultimate capacity to run a metro train every two minutes each way through the centre of Sydney.

Sydney Metro City & Southwest will deliver new metro stations at Barangaroo, Crows Nest, Victoria Cross, Martin Place, Pitt Street, Waterloo and new underground metro platforms at Central Station. In addition it will upgrade and convert all 11 stations between Sydenham and Bankstown to metro standards.

Sydney Metro West

Sydney Metro West is a new underground railway connecting Greater Parramatta and the Sydney CBD. This once-in-a-century infrastructure investment will transform Sydney for generations to come, doubling rail capacity between these two areas, linking new communities to rail services and supporting employment growth and housing supply between the two CBDs.

The locations of seven proposed metro stations have been confirmed at Westmead, Parramatta, Sydney Olympic Park, North Strathfield, Burwood North, Five Dock and The Bays.

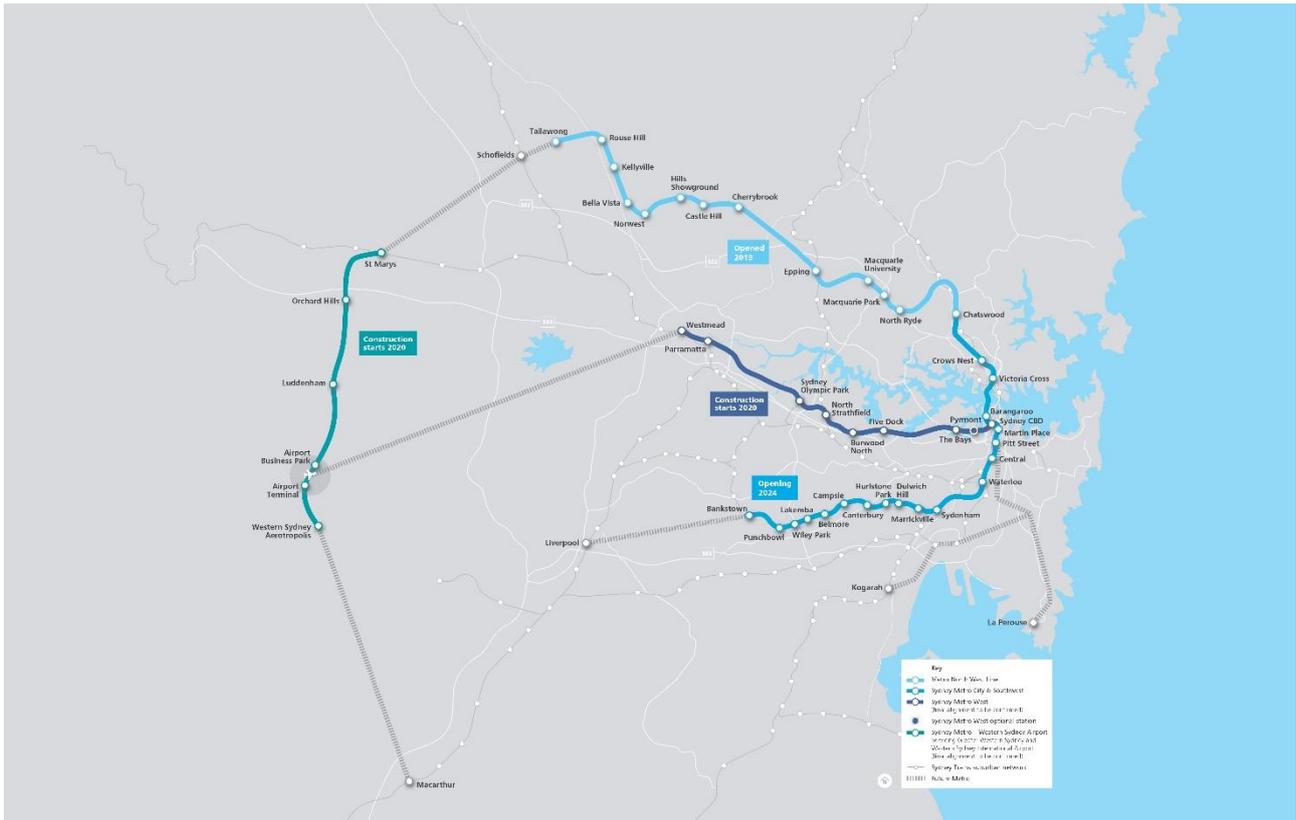
The NSW Government is assessing an optional station at Pyrmont and further planning is underway to determine the location of a new metro station in the Sydney CBD.

Sydney Metro - Western Sydney Airport

Metro rail will also service Greater Western Sydney and the new Western Sydney International (Nancy Bird Walton) Airport. The new railway line will become the transport spine for the Western Parkland City's growth for generations to come, connecting communities and travellers with the rest of Sydney's public transport system with a fast, safe and easy metro service. Six new stations will be delivered at St Marys, Orchard Hills, Luddenham, Airport Business Park, Airport Terminal and Western Sydney Aerotropolis. The Australian and NSW governments are partners in the delivery of this new railway.

On 9 January 2017, the Minister for Planning approved the Sydney Metro City & Southwest - Chatswood to Sydenham project as a Critical State Significant Infrastructure project (reference SSI 15_7400) (**CSSI approval**). The terms of the CSSI approval includes all works required to construct the Sydney Metro Pitt Street North Station, including the demolition of existing buildings and structures on the sites. The CSSI approval also includes construction of below and above ground improvements associated with the metro station structure within the 'metro box' envelope. With regards to CSSI related works, any changes to the 'metro box envelope' and public domain will be pursued in satisfaction of the CSSI conditions of approval and do not form part of the scope of this SSD DA for the OSD.

Figure 4 Sydney Metro Alignment Map



Source: Sydney Metro

3.2. CONCEPT APPROVAL (SSD 9393)

Development consent was granted on 10 December 2019 for the concept SSDA (SSD 9393) for the Waterloo Metro Quarter OSD including:

- A maximum building envelope for podium, mid-rise and tower buildings.
- A maximum gross floor area of 68,750sqm, excluding station floor space.
- Conceptual land use for non-residential and residential floor space.
- Minimum 12,000sqm of non-residential gross floor area including a minimum of 2,000sqm of community facilities.
- Minimum 5% residential gross floor area as affordable housing dwellings.
- 70 social housing dwellings.
- Basement car parking, motorcycle parking, bicycle parking, and service vehicle spaces.

The concept SSDA instrument of approval does not consent to any physical works commencing on site. Separate detailed SSDAs have been prepared concurrently for southern precinct (Buildings 3 and 4 and Cope Street Plaza), central precinct (Building 2), and the basement car park.

3.3. DESCRIPTION OF THE PROPOSAL

This detailed SSDA seeks approval for the detailed design, construction, and operation of two residential buildings within the Southern Precinct with non-residential uses in the podium, and public domain improvements including the construction of Cope Street Plaza.

Specifically, this detailed SSDA seeks development consent for the design, construction, and operation of:

- 25-storey (plus roof plant) residential building (Building 3) comprising student accommodation, to be delivered as a mixture of studio and twin rooms with approximate capacity of 474 students.

- 9-storey residential building (Building 4) above the southern station box to accommodate 70 social housing dwellings.
- Ground level retail, Makerspace, gymnasium lobby and loading facilities.
- Mezzanine level for bike storage and plant.
- Level 1 and Level 2 gymnasium and student accommodation communal facilities.
- Landscaping and private and communal open space at podium and roof top levels to support the residential accommodation.
- New public open space including the delivery of the Cope Street Plaza, including vehicle access to the site via a shared way from Cope Street, expanded footpaths on Botany and Wellington Streets and public domain upgrades.
- Signage zone locations.
- Removal of five trees.
- Utilities and service provision.
- Stratum subdivision (staged).

The proposed development comprises a maximum height of 25-storeys (plus roof plant) with two interconnected buildings over a podium for student accommodation (Building 3) and social housing dwellings (Building 4).

The proposal responds to the key site constraints including surrounding heritage, built form and visual and view impacts (solar access and overshadowing), to deliver an integrated OSD which exhibits design excellence and provides a range of land uses within the site.

Photomontages of the proposal are shown in Figure 5 below.

Figure 5 Photomontage of the proposed development



Picture 9 Building 3 as viewed from corner of Botany Road and Wellington Street

Source: Bates Smart



Picture 10 Building 3 as viewed from corner of Cope Street and Wellington Street.

Source: Bates Smart

3.4. LAND USE

As shown in **Figure 6** and **Figure 7** below, a combination of residential and non-residential land uses will be accommodated within the proposed OSD. The proposal seeks approval for the use of the two tower forms within the Southern Precinct for residential accommodation (specifically a 'boarding house' and 'residential flat building'). Non-residential uses are also proposed within the podium including a Makerspace and gymnasium.

The combination of residential and non-residential land uses will also assist in activating the precinct throughout the day. The proposed non-residential land uses have been located at the ground and podium levels, to create an activated interface with the ground plane and clustered around key pedestrian corridors associated with the Waterloo metro station.

3.5. BUILT FORM AND DESIGN – PODIUM

A three-storey podium (plus mezzanine) is proposed to respond to the scale and character of the existing streetscape along Botany Road and manage the interface of the proposed OSD development with the adjacent Waterloo Congregational Church.

The podium is divided into three volumes on Botany Road, representing the different land uses and breaking down the building mass. The podium is reduced to a two-storey scale alongside Church Yard and is set back to create a 6m wide space between the church and podium.

The social housing lobby is located on the eastern edge of Wellington Street towards the metro station. The lobby sits as part of a recessed two-storey brick podium with a 3.5m ground floor to floor. The podium has been broken into smaller volumes that reflect the finer grain of lots to the southern side of Wellington Street. Inactive facades have been consolidated to minimise the impact on the streetscape.

The podium does not comprise any residential uses. It provides 2,230sqm of GFA which comprises a gym, Makerspace and communal facilities associated with the student accommodation tower above.

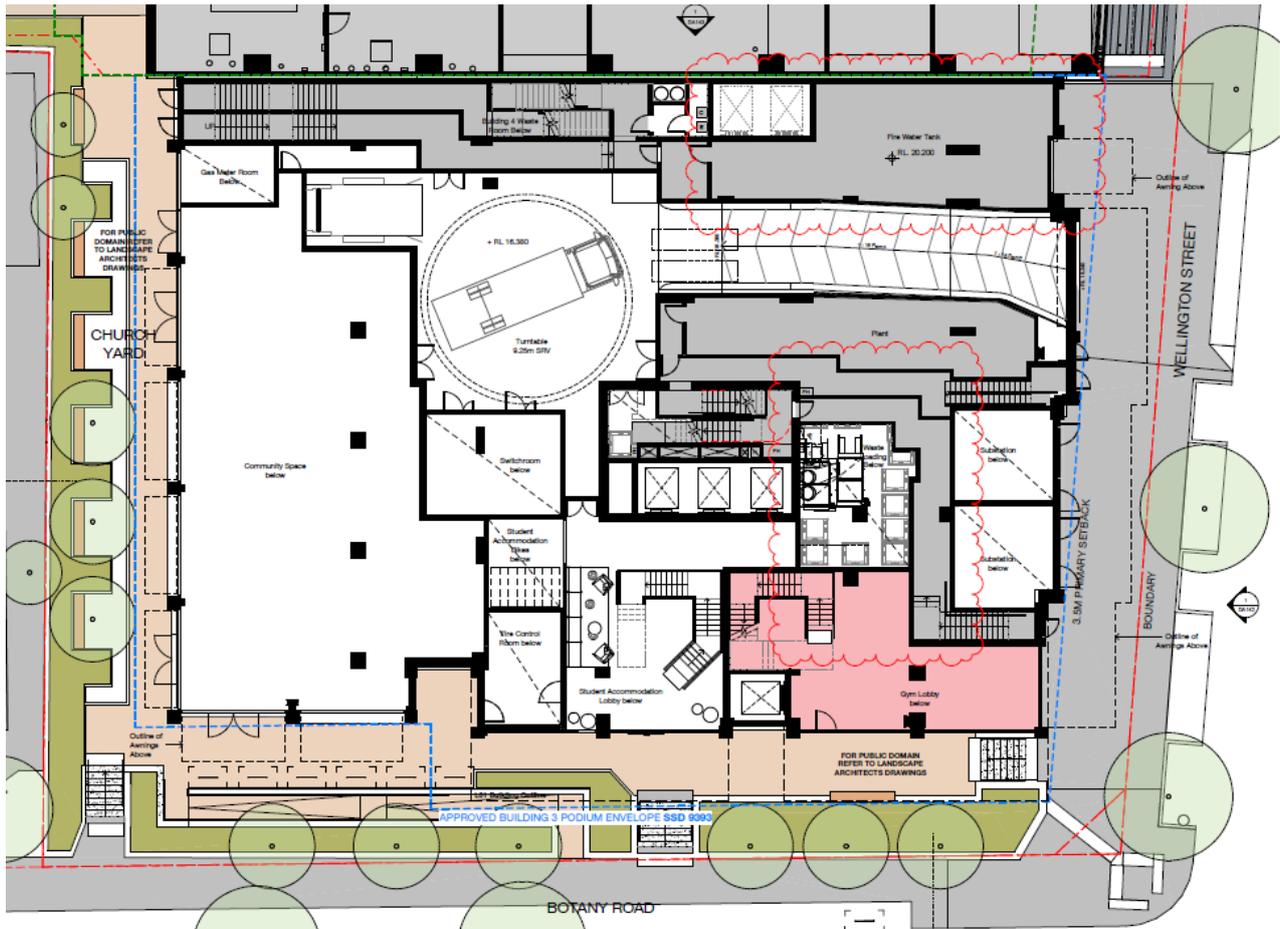
Podium level uses

The podium comprises the student accommodation lobby, social housing lobby, Makerspace, gym and communal open space associated with the student accommodation.

The entries to the Makerspace, gym and student accommodation lobby can be accessed via an elevated terrace, set back from Botany Road behind a landscaped planter. The social housing lobby is accessed via Wellington Street, connecting to lifts on the western side of the metro services box. The lobby has a split level design with a generous floor to ceiling height.

On the lower level, the lobby entry is at street level and contains bike storage and the mailboxes. The upper level is elevated above the flood planning level and contains the building lifts and a small seating area. Accessible access between the two levels is via a platform, discreetly located to one side of the lobby.

Figure 6 General arrangement plan ground floor plan Building 3



Source: Bates Smart

Figure 7 General Arrangement Plan Level 1 Building 3



Source: Bates Smart

This application seeks approval for a space on the ground floor (adjacent Church Yard and Botany Road) to be used for community uses, with the intention for it to be used as a Makerspace. As this use may include a range of uses to be defined and evolve over time, it is proposed as a 'commercial premises' land use, which to maximise flexibility and respond to community needs and interests. The space is approximately 300sqm and will have its own amenities. It has been designed to be accessed from Botany Road as well as the new Church Yard which will support activation of this new public space. Fit out and use of the makerspace will be subject to a separate future approval process.

Additionally, the western façade will be occupied by the Gym Lobby entrance point, connecting pedestrians to the Level 1 gymnasium. The gym is located on Level 1 and 2 with the entry lobby located at the south-western corner of the site. Fit out of the gym will be subject to a future planning approval.

As shown in the artist impression in Figure 8, the entirety of the western façade facing Botany Road is activated via a number of commercial uses.

Figure 8 Artist Impression western façade Building 3



Source: Bates Smart

As mentioned above, the Gym Lobby is located at the south-western corner of the site, partially occupying the southern façade at ground level. The remainder of the southern façade is primarily taken up by two components. The first, is façade screening behind which two substations are located. Secondly, the social housing lobby, accessed of Wellington Street connects to the social housing lifts outside the metro box on the eastern edge of the site. The lobby façade reads as a two storey volume that is set back slightly to give the entry greater definition. The lobby has a split level design with a generous floor to ceiling height. On the lower level, the lobby entry is at street level and contains bike spaces and the mailboxes. The upper level is elevated above the flood planning level and contains the building lifts and a small seating area for residents. Accessible access between the two levels is via a platform lift, discreetly located to one side of the lobby.

Figure 9 Artist Impression, corner of western and southern façade Building 3



Source: Bates Smart

Figure 10 Portion of non-activated façade of Building 3 from Wellington Street



Source: Bates Smart

4. PLANNING FRAMEWORK

Clause 7.27 – Active street frontages of the SLEP 2012 seeks to promote uses that attract pedestrian traffic along certain ground floor street frontages, adding to the vibrancy and attractiveness of place. Clause 7.27 reads as follows:

- (1) The objective of this clause is to promote uses that attract pedestrian traffic along certain ground floor street frontages.*
- (2) This clause applies to land identified as “Active street frontage” on the Active Street Frontages Map.*
- (3) Development consent must not be granted to the erection of a building, or a change of use of a building, on land to which this clause applies unless the consent authority is satisfied that, after its erection or change of use—*
 - (a) all premises on the ground floor of the building that face the street will be used for the purposes of business premises or retail premises, and*
 - (b) those premises will have active street frontages.*
- (4) For the purposes of subclause (3), an active street frontage is not required for any part of a building to be used for any of the following—*
 - (a) entrances and lobbies (including as part of mixed use development),*
 - (b) access for fire services,*
 - (c) vehicular access*

4.1. COMPLIANCE WITH CLAUSE 7.27 OF THE SYDNEY LEP 2012

Compliance with clause 7.27 of the SLEP 2012 requires all premises on the ground floor of a building with street frontage to be used for business premises or retail premises.

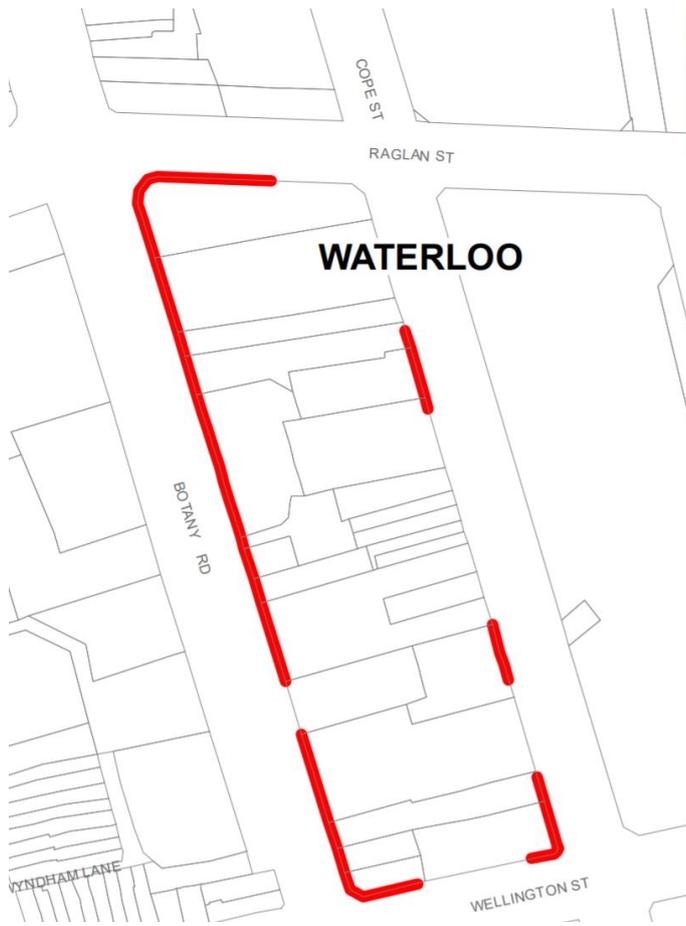
As noted in Clause 7.27(4), an active street frontage is not required for any part of a building to be used for entrances and lobbies (including as part of mixed use development), access for fire services or vehicular access.

Accordingly, this request relates to the components of the ground floor required for active frontages which are not excluded by the provisions of clause 7.27(4), namely those areas used for services.

As discussed in Section 5 below, portions of the site are required to form active frontages and be utilised for business premises or retail premises. Importantly, Figure 11 shows the entire Botany Road frontage of the Waterloo Metro Quarter (other than the Waterloo Congregation Church frontage) is required to be activated. Additionally, the portions of both Cope Street, Raglan Street and Wellington Street are required to be activated.

As described in clause 7.27 of the SLEP 2012, and as illustrated in the Active Street Frontages Map (AFS_010) shown in **Figure 11** below, the site is subject to a requirement to provide active frontages along certain frontages.

Figure 11 Section from Active Street Frontages Map (AFS_010)



Source: SLEP 2012

5. VARIATION OF ACTIVE STREET FRONTAGES STANDARD

5.1. DEFINITION OF ACTIVE STREET FRONTAGE

While a specific definition for active street frontages is not provided, clause 7.27 of the SLEP 2012 does outline the following requirements:

- *All premises on the ground floor of the building that face the street will be used for the purposes of business premises or retail premises.*
- *Those premises will have active street frontages.*

5.2. PROPOSED VARIATION TO ACTIVE STREET FRONTAGE STANDARD

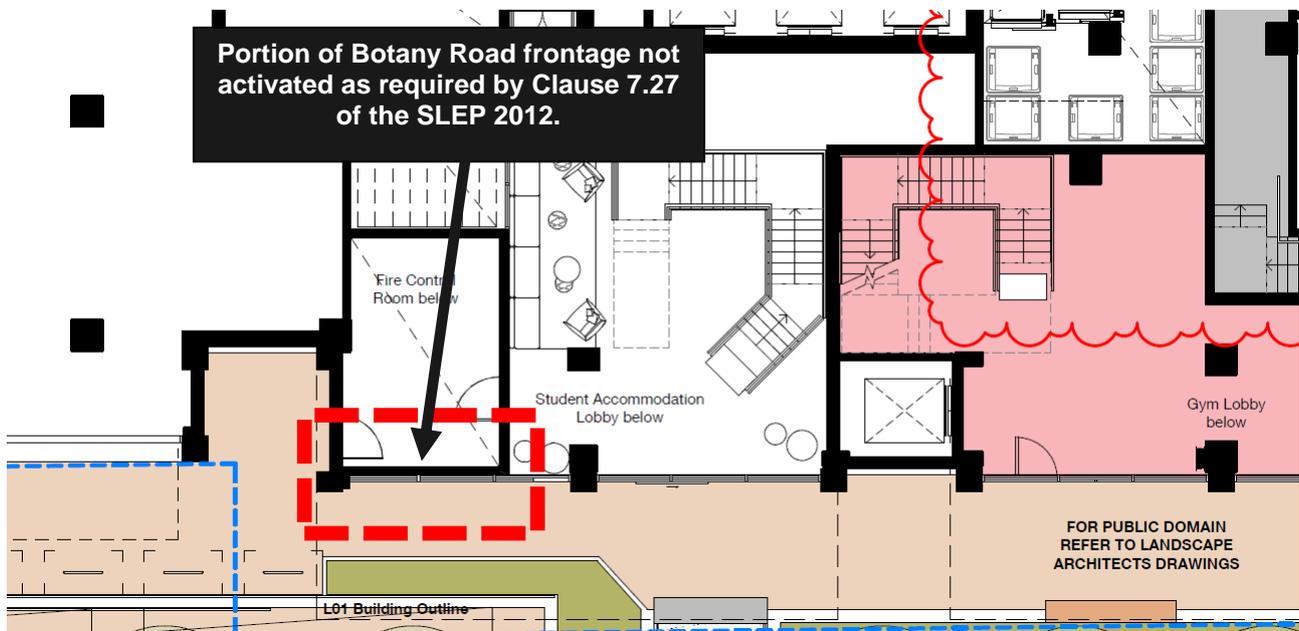
The southern precinct has three street frontages, being Botany Road to the west, Wellington Street to the south and Cope Street to the east. As shown below, **Figure 12** and

Figure 13, there are two portions of the southern precinct facades which are occupied by building services. On the Botany Road frontage, a small portion of the façade between the Markspace and the student accommodation lobby is required for a switch room entrance. Additionally, the Wellington Street frontage contains two substations, a fire control room and two stairs accessing the mezzanine level above.

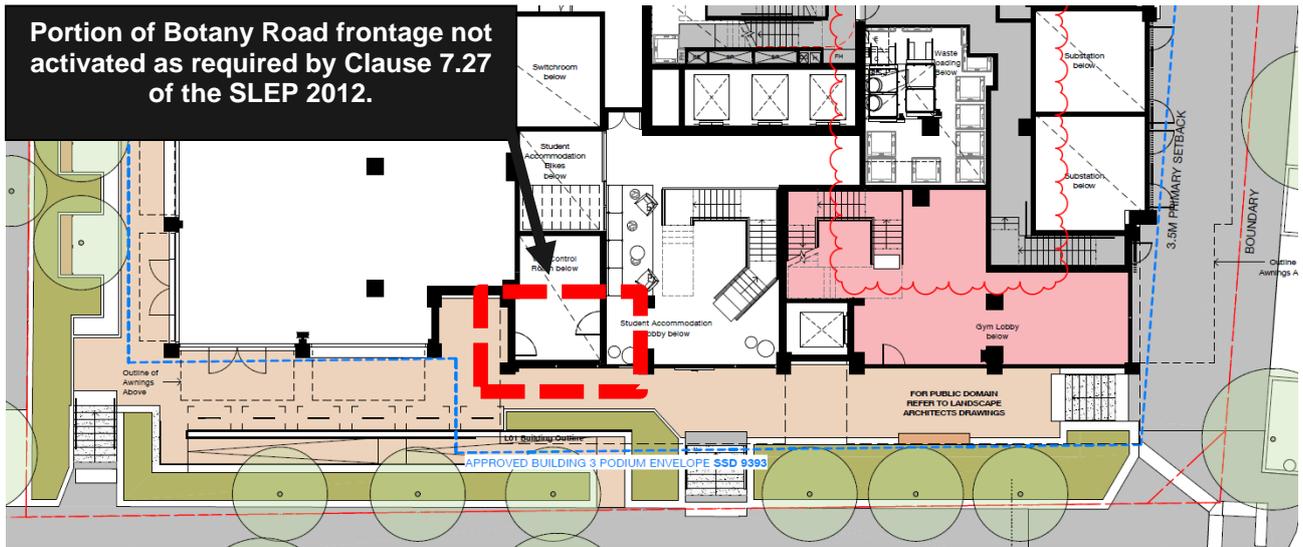
- A portion of the Wellington Road frontage is not identified as requiring active frontage, however the proposal results in additional small areas of frontage which are not activated.
- The corner of Wellington Street and Cope Street is required to provide active frontages. It is noted that the detailed SSDA does not seek consent for ground floor uses in this portion of the site, as this was approved by the CSSI approval.
- The metro services box is located on this corner and is equivalent to 6 stories of the adjacent Building 3.
- Above the metro services box is Building 4, for which this detailed SSDA seeks consent. Accordingly, a formal variation for this corner of the site is not sought under this request.

The portion of the Wellington Street façade proposed for vehicular access is required for the functionality of the southern precinct and as envisaged through the Concept SSD DA. It is noted that this portion of the site is not nominated on the Active Street Frontages Map. For abundant caution it is noted that active frontages are permitted to include vehicular access in accordance with clause 7.27(4)(c) of the SLEP 2012. Accordingly, this portion of the site's frontage is not included in this request.

Figure 12 Botany Road ground floor façade services location (close and zoomed out view)

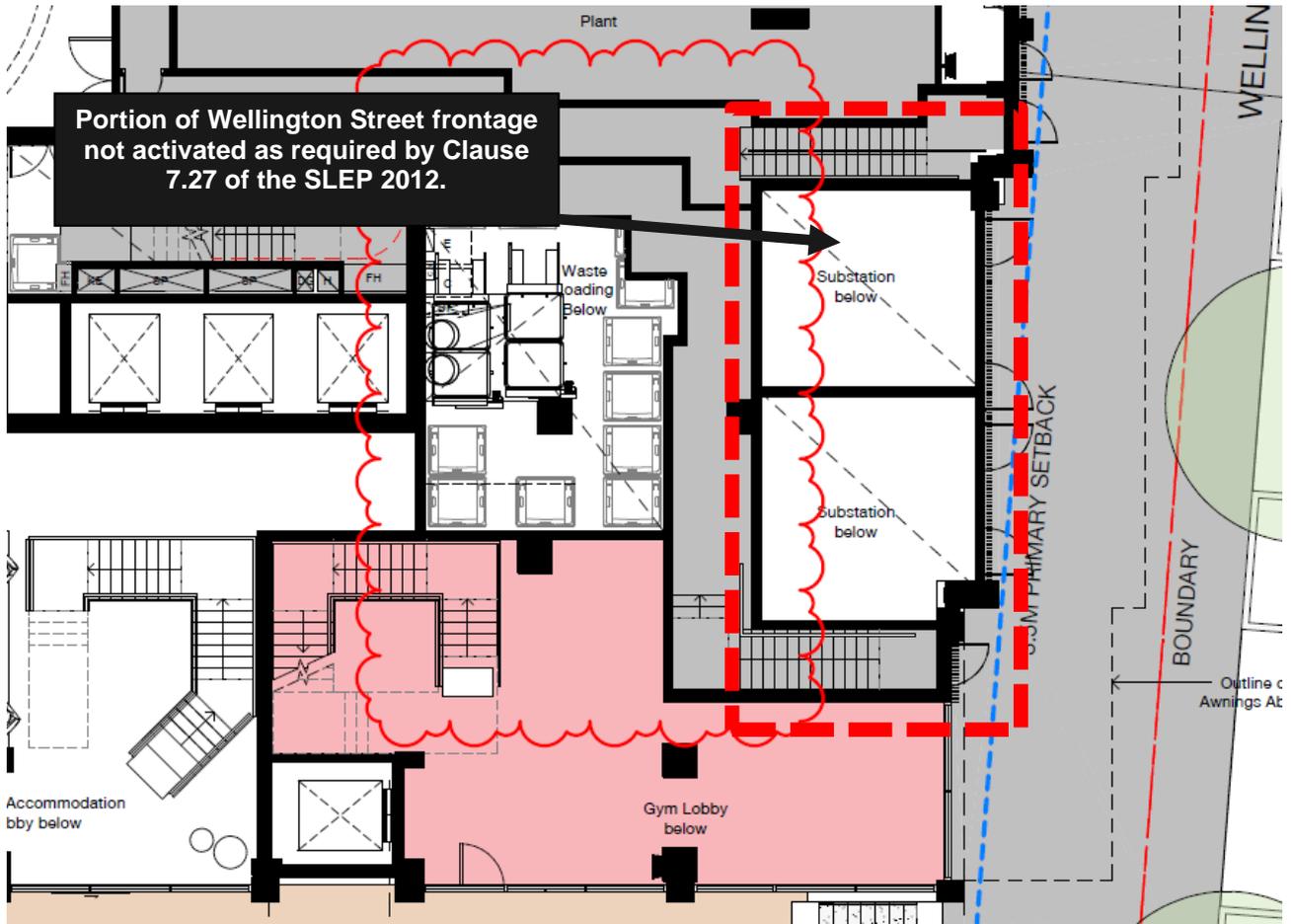


Source: Bates Smart



Source: Bates Smart

Figure 13 Wellington Street ground floor services and vehicle entry point



Source: Bates Smart

6. RELEVANT ASSESSMENT FRAMEWORK

6.1. CLAUSE 4.6 OF THE SYDNEY LOCAL ENVIRONMENTAL PLAN 2012

Clause 4.6 of SLEP 2012 includes provisions that allow for exceptions to development standards in certain circumstances. The 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.*

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a DA 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(3) requires that the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development by demonstrating:

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

Furthermore, the consent authority must be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone, and the concurrence of the Secretary has been obtained.

In deciding whether to grant concurrence, subclause (5) requires that the Secretary consider:

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*
- (c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*

This document forms a clause 4.6 written request to justify the contravention of the active street frontages development standard in clause 7.27 of SLEP 2012. 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.

6.2. NSW LAND AND ENVIRONMENT COURT: CASE LAW

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

The correct approach to preparing and dealing with a request under Clause 4.6 is neatly summarised by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, duplicated for ease of consent authority reference as follows:

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

*[14] The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of*

satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5 at [28]; *Winten Property Group Limited v North Sydney Council* (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].

[15] The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.

[16] As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe v Pittwater Council* at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.

[17] The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: *Wehbe v Pittwater Council* at [42] and [43].

[18] A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: *Wehbe v Pittwater Council* at [45].

[19] A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: *Wehbe v Pittwater Council* at [46].

[20] A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: *Wehbe v Pittwater Council* at [47].

[21] A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: *Wehbe v Pittwater Council* at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in *Wehbe v Pittwater Council* at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

[22] These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

[23] As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

[24] The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify

contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].

[25] The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant's written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). As I observed in *Randwick City Council v Micaul Holdings Pty Ltd* at [39], the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant's written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction: see *Wehbe v Pittwater Council* at [38].

[26] The second opinion of satisfaction, in cl 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in cl 4.6(4)(a)(ii).

[27] The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).

[28] The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the *Planning Circular PS 18-003* issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

[29] On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the *Court Act*. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41].

7. ASSESSMENT OF CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standards relating to the active street frontages development standard in accordance with clause 7.27 of SLEP 2012. Detailed 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 following sections of the report provides detailed responses to the key questions required to be addressed within the above documents and clause 4.6 of the SLEP 2012.

7.1. KEY QUESTIONS

Is the Planning Control a Development Standard?

The active street frontages control prescribed under clause 7.27 of the SLEP 2012 is a descriptive development standard capable of being varied under clause 4.6 of the SLEP 2012.

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

The proposed variation is not excluded from the operation of clause 4.6(2) as it does not comprise any of the matters listed within clause 4.6(6) or clause 4.6(8) of SLEP 2012.

What is the Underlying Object or Purpose of the Standard?

The objective of clause 7.27 as set out in the SLEP 2012 is:

“...to promote uses that attract pedestrian traffic along certain ground floor street frontages.”

As assessment of the proposed development against the above objective is provided in Table 1 below.

7.2. CONSIDERATION

7.2.1. Clause 4.6 (3)(a) – Is Compliance with the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case?

The common way in which an Applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary is detailed in the ‘five-part test’ outlined in the *Wehbe v Pittwater* [2007] NSWLEC 827. These tests and case law are outlined in **Section 6.2** of this report.

It is not considered necessary for an application to need to establish all of the tests or ‘ways’ a development standard is unreasonable or unnecessary. It may be sufficient to establish only one way, although if more ways are applicable, an Applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way. The development is justified against two of the *Wehbe* tests as set out below.

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

The specific objective of the active street frontages development standard as specified in clause 7.27 of the SLEP 2012 is provided in Table 1 below. An assessment of the consistency of the proposed development with the objective is also provided.

Table 1 Assessment of consistency with the objectives of the standard

Objective	Compliance
<i>The objective of this clause is to promote uses that attract</i>	As outlined in Section 0 , a small section of the Botany Road frontage is required for entrance into the switch room, and is therefore not considered activated as required by clause 7.27 of the SLEP 2012. Additionally, a portion of the Wellington Street frontage is required for

Objective	Compliance
<p><i>pedestrian traffic along certain ground floor street frontages.</i></p>	<p>servicing in the form of substations, fire control rooms and stairways to the mezzanine level above. Accordingly, these areas are not considered active street frontage and do not comply with clause 7.27 of the SLEP 2012.</p> <p>As shown in Section 5 above, only a portion of the Wellington Street frontage is required to be provided as active street frontage under clause 7.27 of the SLEP 2012. What remains, has for the better part been delivered as an active street frontage. For the portion of Wellington Street that is not activated at the ground floor, level 1 provides activation through the locating of a commercial use in the form of a gym. It is noted that while this is not provided at the ground level, locating the gym in this portion of the site still promotes pedestrian foot traffic for those accessing the facility, while providing passive surveillance opportunities and visual interest.</p> <p>The focus for pedestrian foot traffic into and around the ground floor of the southern precinct is via Church Yard, a 24m walkway located between Building 3 and the Waterloo Congregational Church. This internal space results in an urban environment with activated frontage to the marker space which is defined as a retail premises. In addition to this, there is an additional 32m of internal activation of Building 4 (northern aspect) adjacent to the Cope Street Plaza.</p> <p>When considered on balance, the entire Waterloo Metro Quarter site provides a highly activated urban streetscape, both externally to the site and through the use of internal walkways. The southern precinct provides over 215m of internal activation to ensure that pedestrian movement is encouraged.</p> <p>It is therefore concluded that the objectives of the clause are achieved in lieu of strict compliance with clause 7.27 of the SLEP 2012.</p>

In summary, achieving compliance with the standard is unreasonable and unnecessary (clause 4.6(3)(a)) as notwithstanding the non-compliance, the development is consistent with the objectives of the standard.

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

Not replied upon.

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

Not replied upon.

Test 4: The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.

Not replied upon.

Test 5: The zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that

zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary.

Not replied upon.

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

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

- While the proposal seeks minor variations to the requirements of clause 7.27 of the SLEP 2012, activation of the ground floor is considered in keeping with the desired future character of the site and surrounding area. This is due to widespread activated uses attracting pedestrian foot traffic, connecting the precinct with the broader surrounds.
- In addition to the high level of streetscape activation proposed, the precinct incorporates approximately 215m of internal activation, ensuring that pedestrian movement is not only encouraged around the site, but throughout the site as well. Internal activation is critical in ensuring precinct wide activation at a human scale, rather than focusing activation only on the primary road frontages.
- The proposal is consistent with the objective of the development standard (clause 7.27) as demonstrated above. Additionally, the proposal remains consistent with the objectives of the B4 Mixed Use Zone, as the proposal will provide a genuine mix of uses across the Waterloo Metro Quarter site creating an integrated precinct. The proposal will provide compatible retail premises on the ground floor of the northern building to support upper levels of commercial and the wider precinct mix.
- The proposed variation to the active street frontages development standard will not prohibit the objective of the standard, being to attract pedestrian traffic along the ground floor street frontages.
- Strict compliance with the development standard under clause 7.27 of the SLEP 2012 would result in the illogical and inefficient locating of critical building service infrastructure. Additionally, if servicing was to be provided below ground in the basement, this may require excavation under the Waterloo Congregational Church which does not form part of the site, without any discernible benefit to the overall site's operation.

In conclusion, there are sufficient environmental planning grounds to justify contravening the development standard.

7.2.3. Clause 4.6 (4)(a)(i) - Has the Written Request adequately Addressed the Matters in Sub-Clause (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).

Each of the sub-clause (3) matters are comprehensively addressed in this written request, including detailed consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. The written request also provides sufficient environmental planning grounds, including matters specific to the proposal and the site, to justify the proposed variation to the development standard.

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

The proposal is also consistent with the land use objectives that applies to the site under the SLEP 2012 as demonstrated in Table 2 below. The site is located within the B4 Mixed Use Zone.

Table 2 Consistency of proposal with objectives of the B4 Mixed Use Zone

Objectives	Compliance
<i>To provide a mixture of compatible land uses.</i>	The proposal provides land uses envisaged and anticipated within the B4 Mixed Use zone. Land uses which will support one another are proposed, such as retail premises on lower levels supporting upper levels of commercial and residential 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>	<p>The proposal will provide a genuine mix of uses across the Waterloo Metro Quarter site which will integrate and benefit off each other. The overall mixture of uses sought will enable greater activation throughout the day and night to enliven the precinct and create a sense of place.</p> <p>The proposal still ensures the maximum amount of activation occurs on ground floor levels to support the use of public transport patronage on the site.</p>
<i>To ensure uses support the viability of centres.</i>	<p>The proposal forms part of a large development in a key centre within Sydney. It will ensure the viability and long-term growth of the area, supporting the Innovation Corridor which is vital to the ongoing economic success and global completeness.</p> <p>The variation to the development standard does not prescribe the proposal's ability to support the Innovation Corridor, part of the City Fringe which has been identified as needing to contribute at least 53,800 additional jobs by 2036.</p>

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

The proposed non-compliance with the active street frontages development standard will not raise any matter of significance for State or regional environmental planning.

7.2.6. Clause 4.6(5)(b) – Is There a Public Benefit of Maintaining the Planning Control Standard?

The proposed development achieves the objectives of the active street frontage development standard and the land use zoning objectives. The proposal activation throughout the proposal has sought to be maximised in the context of the existing site constraints, and the operational and function requirements of the development. Additionally, the internal activation of over 215m balances portions of the street frontages which have not been activated by retail and business premises. As such, there is no public benefit in maintaining the development standard given the substantial activation throughout the development.

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

There are no known additional matters that need to be considered within the assessment of the clause 4.6 Request and prior to granting concurrence, should it be required.

8. CONCLUSION

This variation is made pursuant to clause 4.6 of the SLEP 2012, in support of a detailed SSDA seeking approval for the construction and operation of a mixed use OSD and public domain works located at the Southern Precinct of the overall Waterloo Metro Quarter site. The proposal results in an orderly and economic use of the site that leverages from significant NSW Government investment in public transport, specifically Sydney Metro. Additionally, the proposal supports the objectives for development within the Eastern City District as outlined within the District Plan.

This variation request is made pursuant to clause 4.6 of the SLEP 2012. For a request to meet the requirements of clause 4.6(3) of SLEP 2014, it must adequately demonstrate:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

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

- The objectives of the development standard, specifically to attract pedestrian traffic along certain ground floor street frontages, is still achieved for the site despite not strictly adhering to the standard. This detailed DA seeks consent for ground floor uses on only two of the three street frontages of the southern precinct. Streetscape activation is generally provided as required under clause 7.27 of the SLEP 2012, with only minor variations sought. Where the variations are sought, level 1 uses will provide activation and passive surveillance opportunities ensuring the streetscape is still attractive to pedestrian foot traffic.
- Substantial additional internal activation ensures precinct wide activation, and accounts for any external frontage activation shortfalls. Internal activation is highly desirable from a pedestrian scale, away from the amenity impacts of surrounding streets.
- There are sufficient environmental planning grounds to support the proposed development, in that on balance, a significant amount of external and internal building frontages is activated and will result in encouraging pedestrian foot traffic.

In view of the above, we submit that the proposal is in the public interest and that the proposed clause 4.6 variation request to vary the application of the active street frontages development standard prescribed by clause 7.27 of SLEP 2012 be supported.

DISCLAIMER

This report is dated 15 February 2021 and incorporates information and events up to that date only and excludes any information arising, or event occurring, after that date which may affect the validity of Urbis Pty Ltd (**Urbis**) opinion in this report. Urbis prepared this report on the instructions, and for the benefit only, of WL DEVELOPER PTY LTD (**Instructing Party**) for the purpose of Clause 4.6 Variation Request (**Purpose**) and not for any other purpose or use. To the extent permitted by applicable law, Urbis expressly disclaims all liability, whether direct or indirect, to the Instructing Party which relies or purports to rely on this report for any purpose other than the Purpose, and to any other person which relies or purports to rely on this report for any purpose whatsoever (including the Purpose).

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All surveys, forecasts, projections and recommendations contained in or associated with this report are made in good faith and on the basis of information supplied to Urbis at the date of this report, and upon which Urbis relied. Achievement of the projections and budgets set out in this report will depend, among other things, on the actions of others over which Urbis has no control.

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

APPENDIX

