CLAUSE 4.6 VARIATION REQUEST
BOTANY BAY LEP 2013
CL 4.4 FLOOR SPACE RATIO

4 – 18 DONCASTER AVE, KENSINGTON

URBIS

9 OCTOBER 2019
PREPARED FOR BLUE SKY PRIVATE REAL ESTATE

URBIS STAFF RESPONSIBLE FOR THIS REPORT WERE:

Associate Director	Ashleigh Ryan
Project Code	P00001379
Report Number	Response to Submissions

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FIGURES:

1. INTRODUCTION

This Clause 4.6 variation request has been prepared by Urbis on behalf of Bluesky Commercial Asset Management Pty Ltd, the applicant for a development application for student accommodation at 4-18 Doncaster Ave, Kensington (**the site**).

The request seeks to vary the maximum boarding room size development standard prescribed under clause 30(1)(b) of the *State Environmental Planning Policy (Affordance Rental Housing) 2009* (**ARH SEPP**) as follows:

> *(1) A consent authority must not consent to development to which this Division applies unless it is satisfied of each of the following:*
>
> *(b) no boarding room will have a gross floor area (excluding any area used for the purposes of private kitchen or bathroom facilities) of more than 25 square metres,*

Clause 4.6(2) of *Randwick Local Environmental Plan 2012* (**RLEP 2012**) states:

> *(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this **or any other environmental planning instrument**. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

Accordingly, this variation request is made pursuant to clause 4.6(2) of the RLEP 2012.

2. ASSESSMENT FRAMEWORK

2.1. CLAUSE 4.6 OF RANDWICK LOCAL ENVIRONMENTAL PLAN 2012

Clause 4.6 of RLEP 2012 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 are:

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

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a development application that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, clause 4.6 requires that the consent authority consider a written request from the applicant, which demonstrates:

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 Secretary before granting concurrence.

[Note: Concurrence is assumed pursuant to *Planning Circular No. PS 18-003 Variations to Development Standards* dated 21 February 2018].

This document forms a clause 4.6 written request to justify the contravention of the maximum boarding room area standard contained within clause 30(1)(b) of the ARH SEPP. The assessment of the proposed variation has been undertaken in accordance with the requirements of the RLEP, clause 4.6 Exceptions to development standards.

2.2. 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:

[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].

3. SITE AND LOCALITY

3.1. THE SITE

The subject site is located at 4-18 Doncaster Ave, Kensington and comprises 10 individual lots. It is within the Randwick Local Government Area, in the Royal Randwick Racecourse State Significant Development (**SSD**) site. The site is approximately 4.5km south-east of the Sydney CBD.

The site is rectangular in shape with an area of 4,275sqm. It has frontage to Doncaster Ave to the west and adjoins the light rail holding yard to the east, as illustrated in **Figure 1.**

The site is currently vacant with the exception of two semi-detached, two-storey dwellings that are locally heritage listed (I122). The lot at 18 Doncaster Avenue while presently vacant has historically been used as informal access to the Randwick Racecourse precinct.

The site is relatively flat, from its existing ground level of RL 28.64m in the north-western corner of the site close to Doncaster Ave, through to the south-east corner of the site at RL 27.92m.

The subject site currently contains four vehicle crossings from Doncaster Ave, leading to driveways for the residential dwellings on the site.

Figure 1 – Subject Site

3.2. LOCAL CONTEXT

A locality image is provided at **Figure 2** demonstrating the location of the site in relation to Randwick Racecourse, Centennial Park, and the Sydney CBD. The site is situated in close proximity to the Carlton Street light rail stop and is a relatively short walking distance to Kensington Town Centre (within 500m) and the University of New South Wales Kensington Campus (within 1.2km). The site is highly accessible via public transport and is in close proximity to bicycle paths, which with the proximity to the University, makes the site well suited to student accommodation.

Figure 2 – Locality diagram

Development in the immediate locality is characterised by residential land uses comprising a mix of single dwellings, semi-detached dwellings and three to four storey residential flat buildings. Development on the western side of Doncaster Avenue comprises primarily residential flat buildings. Further to the west of the site is the Kensington Town Centre, which is affected by the draft Kensington to Kingsford Strategy, which received conditional gateway determination in December 2017.

The architectural package provided at **Appendix A** of the **Environmental Impact Statement (EIS)** includes a sheet illustrating the relationship between the proposed building scale and massing arrangement and the existing residential flat building development on the western side of Doncaster Avenue.

The site to the east, formerly part of the Randwick Racecourse site, is now occupied by the recently developed light rail holding yard. The holding yard is a low-rise structure with substantial floor plate. The structure extends the length of the subject site (and beyond) with a large masonry wall presenting to the eastern property boundary of the subject site.

To the south of the subject site are a series of single storey brick dwellings, the nearest of which is situated a nominal distance from the southern property boundary of the subject site. This interface is sensitive in the sense that it is situated on the southern side of the property and is inherently vulnerable to overshadowing.

A contextual analysis is provided at **Appendix A** of the **EIS** illustrating proximity to University facilities, the Kensington Town Centre and existing and developing public transport routes.

A detailed description of the subject site is provided in the **EIS** prepared by Urbis, accompanying the SSD Development Application.

3.3. PLANNING CONTEXT

The proposal is for student accommodation which is best characterised as a *boarding house* development under the RLEP. The site is zoned R3 Medium Density Residential. Boarding house development is permissible with consent. The proposal is permitted with consent. The proposed development complies with the 12m height limit for the site. The site contains a local heritage item (I122) known as “2 storey terraced pair” at 10-12 Doncaster Ave and is within the Racecourse heritage conservation area (C13).

State Environmental Planning Policy (State and Regional Development) 2011 (**SRD SEPP**) identifies development that is SSD. The proposal is declared to be SSD as it is proposed to be carried out on land identified as being within the Royal Randwick Racecourse Site and will have a capital investment value of more than $10 million.

It is noted that part of the site falls outside the Royal Randwick Racecourse Site, being Lots 52A and 52B in DP 400051, however pursuant to clause 8(2) of the SRD SEPP, the whole development is declared to be SSD as development proposed across these allotments is inherently related to the SSD.

Figure 3 illustrates the site boundary in relation to the Royal Randwick Racecourse SSD area boundary.

Figure 3 – Royal Randwick Racecourse SSD site area

The **ARH SEPP** aims to provide a consistent planning regime for the provision of affordable rental housing and to facilitate the effective delivery of new affordable rental housing by providing incentives by way of expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards.

The provisions of the ARH SEPP apply to boarding house developments. Part 2 Division 3 of the ARH SEPP sets out mandatory standards for boarding houses, and standards that cannot be used to refuse development consent if achieved.

The proposed development illustrated at **Appendix A** of the **Response to Submissions Report** has been designed to satisfy the mandatory standards for boarding houses established in clause 30 of the ARH SEPP. This includes provision of community living rooms, maximum floor space for boarding rooms (for standard rooms), provision for a boarding house manager, and minimum parking spaces for bicycles and motorcycles.

However, due to the adaptive reuse of the heritage item on the site, two boarding house rooms exceed 25sqm GFA. Further separation of these boarding rooms to accommodate two separate lodgings however is not supported by the heritage consultant, to maintain the historic room proportion and original ceiling details.

4. THE PROPOSED DEVELOPMENT

4.1. DEVELOPMENT OVERVIEW

This clause 4.6 variation request relates to a proposed boarding house (student accommodation) development delivered under the provisions of RLEP and ARH SEPP.

The development is described as follows:

- Demolition of existing structures on site, with the exception of the locally heritage listed semi-detached pair of dwellings at 10 and 12 Doncaster Avenue which are proposed to be retained and repurposed.
- Construction of a three-storey student accommodation (defined as a boarding house) development comprising:
  - A gross floor area (**GFA**) of 5,860sqm which equates to a floor space ratio of 1.37:1.
  - A total of 259 beds, including a combination of rooms with private facilities and 'clusters' that rely on communal facilities.
  - Several communal rooms distributed over the three levels of the development with an aggregate area of 338sqm.
  - 434sqm of communal outdoor landscape areas.
- A single level of basement parking including waste and loading areas, 56 car parking spaces, 55 motorcycle spaces and 178 bicycle spaces.

A photomontage of the proposed development is provided below at Figure 4 and west elevation along the Doncaster Ave frontage at **Figure 5.**

The Architectural Plans detailing the proposal as prepared by Hayball Architects are attached at **Appendix A** of the **Response to Submissions Addendum Report**.

Figure 4 – Proposed Development

Figure 5 – West Elevation, Doncaster Ave

Note: Building elements fronting Doncaster Avenue highlighted in purple above.

4.2. ADAPTIVE REUSE OF HERITAGE ITEM

The retention and conservation of the existing heritage item at 10-12 Doncaster Avenue for use as boarding rooms and communal areas forms part of the development application.

As part of the Response to Submissions and in particular the comments of the NSW Government Architect's office, dated 11 June 2019, the layout of the heritage item was revised such that the ground floor front rooms are used for communal open space rather than private bedrooms to activate the streetscape. This has resulted in the first-floor front rooms, which exceed 25sqm in area, to be used as boarding rooms. Given the size of these rooms they are proposed to be used by two residents as indicated within the Architectural Plans. On a per person basis, the proposal does not exceed the maximum boarding room area. However, to include a partition wall (to be compliant with the ARH SEPP standard) would detract from the spatial integrity of the space or requiring the removal of significant fabric.

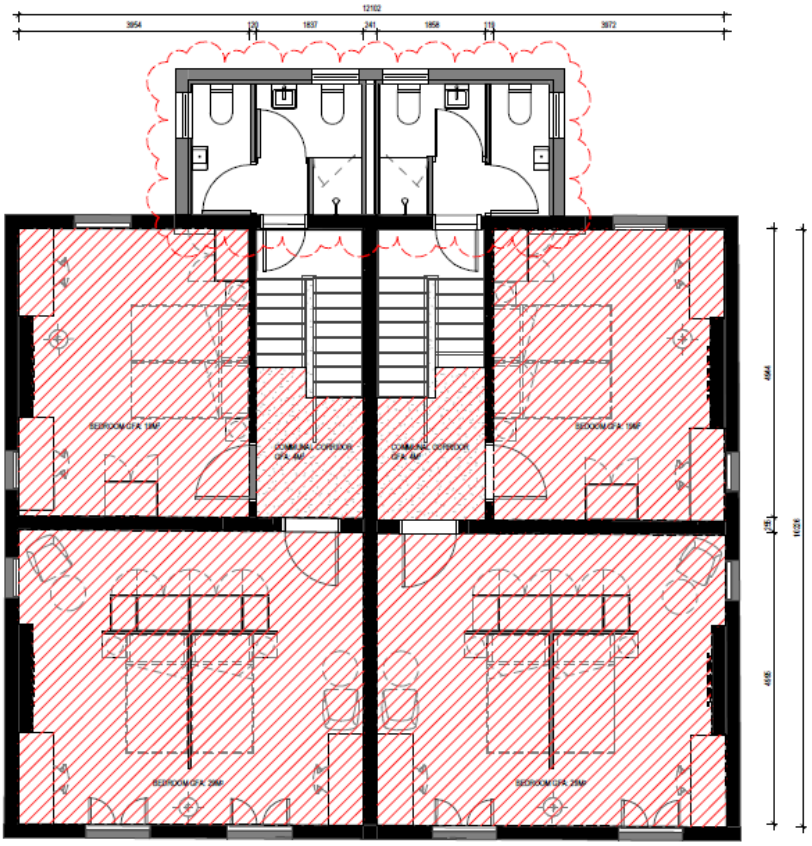
Conservation of the heritage item on the site has driven the design of the proposal. Adaptive reuse and conservation of the heritage items is supported by technical heritage advice which confirms the heritage significance of the building is retained.

5. EXTENT OF CONTRAVENTION

5.1. VARIATION TO MAXIMUM BOARDING ROOM SIZE

Once 'Tudio' Type H unit is proposed to be a maximum 35sqm in area (excluding kitchen and bathroom facilities); and two bedrooms within the converted heritage item are proposed to have a maximum 29sqm in area as illustrated below. The tudio is proposed to be unusually large to provide a logical building massing from a corridor on the ground floor of the building.

Figure 6 – Three boarding rooms that exceed the maximum 25sqm GFA area



QTY: 1

QTY: 1

This request seeks an exemption from the strict application of Clause 30(1)(b) of AHR SEPP for the three rooms illustrated above. The variation affects 1.2% of boarding rooms proposed within the development.

6. CLAUSE 4.6 VARIATION REQUEST: FLOOR SPACE RATIO

The following sections of the report provide an assessment of the request to vary the development standard relating to the standards for boarding houses in accordance with clause 30(1)(b) of the AHR SEPP.

6.1. CLAUSE 30(1)(B) OF ARH SEPP

The request seeks to vary the maximum boarding room size development standard prescribed under clause 30(1)(b) of the ARH SEPP as follows:

> *(1) A consent authority must not consent to development to which this Division applies unless it is satisfied of each of the following:*
>
> *(b) no boarding room will have a gross floor area (excluding any area used for the purposes of private kitchen or bathroom facilities) of more than 25 square metres,*

6.2. KEY QUESTIONS

Is the Planning Control a Development Standard?

The maximum boarding room size control prescribed under clause 30(1)(b) of the ARH SEPP is a development standard capable of being varied under clause 4.6 of RLEP.

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

The development standard is not excluded from the operation of clause 4.6 as it is not listed within clause 4.6(6) or clause 4.6(8) of RLEP.

What is the Underlying Object or Purpose of the Standard?

The AHR SEPP does not include specific objectives for the maximum boarding room size development standard. Notwithstanding this, the objective is presumably linked to ensuring that boarding house controls are not used to develop pseudo residential flat buildings with private apartments, and to ensure affordability of units by restricting maximum size.

It is important to note the intent of the AHR SEPP is to facilitate the increased supply and diversity of affordable rental and social housing in New South Wales. Whilst by default the proposed student housing development is considered a boarding house and therefore subject to the provisions under the AHR SEPP, the profile of student residents anticipated to be living at the site is very different to the profile of residents anticipated to live in general affordable housing developments. As such shared living and 'tudios' are anticipated to be acceptable. Furthermore, it is noted that the underlying objective or purpose of the standard is not adversely affected by proposed variation that affects only 1.2% of boarding rooms.

6.3. CONSIDERATION

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

Complying with the development standard is unreasonable in the circumstances of the case, as compliance would not result in a better planning outcome, and would be contrary to heritage advice and the logical ground floor layout.

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are listed within the 'five-part test' outlined in *Wehbe v Pittwater [2007] NSWLEC 827.* These tests are outlined in **Section 2.2** of this request (paragraphs [17]-[21].

An applicant does not need to establish all of the tests or 'ways'. **It may be sufficient to establish only one way,** although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

The development is justified against one 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 proposed variation affects only 1.2% of boarding rooms. Two of the three rooms affected are oversized to the following factors:

- Request from the NSW Government Architect's office to position the communal facilities within the ground floor front room of the heritage item, consistent with the more traditional layout of the terraces houses; and
- The restriction in the ability to introduction new partition walls and new structures within the heritage item on the site without adversely impacting the spatial layout of the room or original building fabric.

One room within the new development is proposed to exceed 25sqm in GFA due to the unique layout of the floorplate and the 'tudio' being positioned at the end of a corridor. Arguably this room could be reduced in size by extending the width of the corridor – however this would result in an unnecessary reduction in amenity for the residents of this room.

The implied objectives of the development standard are not undermined by the proposed variations as follows:

- The rooms that are proposed to exceed the maximum area are to be used by two residents in a room-share arrangement, thus ensuring the affordability of the room per resident is retained;
- The size of the rooms per person are consistent with the minimum standards provided within the ARH SEPP;
- The rooms that are proposed to exceed the maximum area are to be strictly used as part of a boarding house and not a residential flat building, which can be conditioned in any approval offered; and
- The rooms that are proposed to exceed the maximum area are within the footprint of an overall student accommodation development and are not in a position to be separately subdivided or used separately in the future.

As such, the objectives of the development standard are achieved notwithstanding the non-compliance with the standard for 1.1% of boarding rooms within the development.

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

Not relied 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 relied 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 relied 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 relied upon.

6.3.2. 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:

- The development is consistent with the Objects of the *Environmental Planning and Assessment Act 1979* by promoting the orderly and economic use and development of the land by maximising opportunities to provide housing diversity and affordable dwelling types for students within proximity of public transport, active transport infrastructure, and tertiary education.
- It is considered a better outcome for the site to repurpose the heritage building by incorporating it into the student accommodation development rather than it being excluded from the site area where heritage conservation may not be independently delivered.
- In order to comply with the development standard, additional partition walls and additional doors would need to be installed within the heritage item. This addition would have the potential implication of adversely affecting the spatial layout of the original bedrooms within the heritage item and adversely impacting original building fabric.
- The proposed redesign has been as a result of advice from the NSW Government Architect's office to improve the activation of the streetscape and ground level of the development. The proposed variation achieves this outcome.
- The proposed development is suitable in the context of the heritage conservation area within which it is located.
- Potential impacts upon the amenity of the surrounding area will be minor or can be mitigated to an acceptable level.

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

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

The proposed development is consistent with the objectives of the development standard as outlined within **Section 6.3.1** of this Request.

The proposal is also consistent with the land use objective that applies to the site under RLEP as demonstrated within **Table 2** below. The site is located within the R3 Medium Density Residential zone.

Table 1 – Assessment of Compliance with Land Use Zone Objectives

Objective	Compliance
To provide for the housing needs of the community within a medium density residential environment	The proposal will provide for student accommodation within a medium density residential environment, specifically, the proposal includes a three-storey development that is consistent with the height and scale of a number of residential flat buildings within close proximity of the site, and that are characteristic of new development within the locality. The proposal provides for the needs of the community, specifically by delivering purpose-built student accommodation within an area of high demand for affordable accommodation for students and young people. Affordable rooms are not undermined by the inclusion of three (1.1%) boarding rooms that exceed 25sqm in area, as they are to be used by two independent residents.

Objective	Compliance
	The site is particularly suitable for student accommodation as it is situated in close proximity to the Carlton Street light rail stops and is a relatively short walking distance to Kensington Town Centre (within 500m) and the University of New South Wales Kensington Campus (within 1.2km). The site is highly accessible via public transport and is in close proximity to bicycle paths, which with the proximity to the University, makes the site well suited to student accommodation.
To provide a variety of housing types within a medium density residential environment	The proposed development provides three storey student accommodation within an area characterised by private dwellings of a mixture of sizes and scales, from single storey detached dwellings to four storey residential flat buildings. Student accommodation is considered to provide variety to the housing types within the locality in that the purpose-built student accommodation will deliver communal living for students rather than relying on traditional market rental accommodation. Variety of housing types is also delivered within the development, including studio accommodation, twin rooms, and 'cluster style' accommodation that will suit different student needs and price points. This includes the two apartments that exceed 25sqm in area.
To enable other land uses that provide facilities or services to meet the day to day needs of residents	N/A
To recognise the desirable elements of the existing streetscape and built form or, in precincts undergoing transition, that contribute to the desired future character of the area	While the existing built form on the site consists of a heritage item and previously low scale housing, recent population growth and increases in planning controls in the locality (Kensington to Kingsford corridor especially) in response to the additional investment in public transport in proximity to the area, is transforming Kensington for additional residential populations. The proposal recognises the desirable elements of the eastern side of Doncaster Avenue and the heritage conservation area, including the scale of the retained heritage item and the natural materiality of the conservation area. By adaptively reusing the heritage item and minimising new building elements within the item, this heritage significant is retained. Articulation and variety in material and colours are incorporated into the façade of the proposed development to contribute to the desired future character of the area, while taking inspiration for building elements from the past. Significant new landscaping is proposed along the Doncaster Avenue streetscape, including within the communal open space, which will reduce the perception of the scale of the development from the public domain. The façade of the proposed development is designed with vertical elements to reflect the existing streetscape/built form elements provided by the single storey Victorian dwellings south of the site.

Objective	Compliance
To protect the amenity of residents	The site is well positioned with only one direct residential neighbouring property. As a result of the amended development design, additional setback is proposed to the southern neighbour. The development is therefore positioned away from a conglomerate of sensitive land uses. The amenity of residents will be protected through mitigation of overshadowing impacts on the adjoining building to the south by including only a single storey of development in the south-east corner. Privacy screens have been provided to rooms at the southern end of the student accommodation so that the adjoining building to the south is not impacted by overlooking. Visual impact of the proposal from the neighbouring property has been addressed through the reduction in scale at the south-east corner, increasing the amount of sun access compared to a compliant residential flat building scheme, and through significant boundary screen planting as illustrated within the Landscape Plans included at **Attachment F** of the Response to Submissions Report. The proposed development will provide a high level of amenity for future residents of the development and will not adversely impact upon other aspects of amenity for neighbouring residents.
To encourage housing affordability	The proposal addresses housing affordability through the provision of a variety of student accommodation room types that suit various price points and by alleviating rental pressures on the private housing market from student demand. This is not adversely affected by the introduction of three boarding rooms that exceed 25sqm in area.

The proposal is considered to be in the public interest as the development is consistent with the objectives of the development standard, and the land use objectives of the zone.

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

The proposed non-compliance with the maximum boarding room size within a local heritage item will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case given the location of a heritage item on the site, and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

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

There would be no public benefit in maintaining the development standard in this case, as:

- Heritage values of the retained heritage items have been maintained;
- Adequate setbacks are provided to the retained heritage items, and to the site boundaries;
- Adequate setbacks are provided to the adjacent residential property on the southern site boundary;
- Maintaining the standard would not deliver affordable and varied purpose-built student accommodation, and as such there would continue to be additional strain on the private rental housing market in the locality.

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

The Planning Circular PS 18-003, issued on 21 February 2018 (**Planning Circular**), outlines that consent authorities for SSD may assume the Secretary's concurrence where development standards will be contravened.

Nevertheless, 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.

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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.

BRISBANE
Level 7, 123 Albert Street
Brisbane QLD 4000
Australia
T +61 7 3007 3800

MELBOURNE
Level 12, 120 Collins Street
Melbourne VIC 3000
Australia
T +61 3 8663 4888

PERTH
Level 14, The Quadrant
1 William Street
Perth WA 6000
Australia
T +61 8 9346 0500

SYDNEY
Level 23, Darling Park Tower 2
201 Sussex Street
Sydney NSW 2000
Australia
T +61 2 8233 9900

URBIS.COM.AU