



AMENDED CLAUSE 4.6 – HEIGHT OF BUILDINGS AND ACTIVE STREET FRONTAGES

The DA seeks consent for a mixed-use development, including commercial premises and a residential flat building component, including a mixture of studio, one, two and three bedroom dwellings

6-10 Bowral Street,
Kensington

Prepared for: PVCD Trust

REF: M210023

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Amended Clause 4.6 Variation – Clause 4.3 Height of Building



Amended Clause 4.6 Variation Statement – Building Height (Clause 4.3)

1. Height of Buildings Standard

Clause 4.3 of RLEP 2012 relates to the maximum height requirements and refers to the *Height of Buildings Map*. The relevant map identifies the subject site as having a maximum height of 21m to No. 6 Bowral Street, and 19m to Nos. 8 and 10 Bowral Street. It is noted however that the subject site is located within the Kensington and Kingsford Town Centre which permits additional height and refers to the *Alternative Building Heights Map*. The relevant map identifies that No. 6 Bowral Street is permitted an alternative maximum height of 31m, whilst Nos. 8 and 10 Bowral Street maintain the standard building height of 19m.

Building height is defined as:

building height (or **height of building**) means—

- (a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or
- (b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,

including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

The relevant maps [sheets *Height of Buildings_001* and *Alternative Height of Building_001*] indicates that the maximum building height permitted at the subject site is 19m for Nos. 8 and 10 Bowral Street and 31m for No. 10 Bowral Street, respectively.

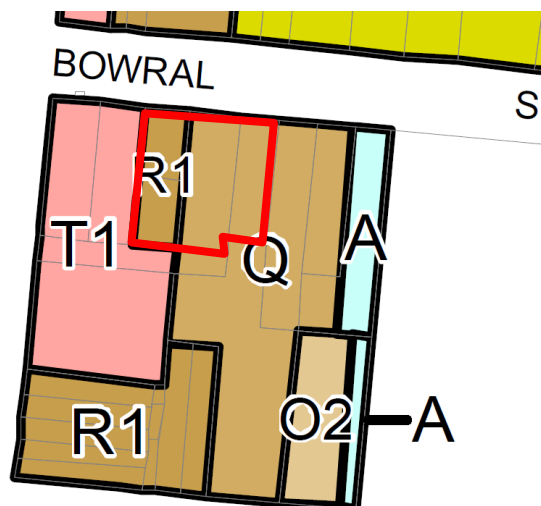


Figure 1 Extract from the Height of Buildings Map [R1=21m, Q=19m]

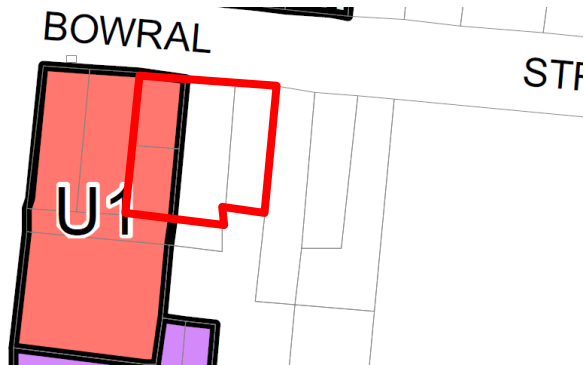


Figure 2 Extract from the Alternative Height of Buildings Map [U1=31m]

2. Proposed variation to height of buildings development standard.

The amended architectural plans indicate that the proposed development has a maximum height of 28.55m to the lift overrun where the 31m alternative building height applies and is therefore compliant, in fact 2.45m below the height limit. Where the standard building height of 19m applies, the proposal provides a maximum height of 28.73m to the lift overrun and is non-compliant. This is measured from natural ground line in accordance with the definition of height under RLEP 2012. As shown in the images below, the non-compliance with the 19m height limit can be generally described as relating to a narrow portion of the upper three levels.

In summary, the proposal, as amended, is non-compliant with the 19m building height development standard and seeks a maximum variation of 9.98m or 52.5%. It is noted that the proposal also provides the following non-compliances:

- 9.025m non-compliance to the parapet edge of the level 8 (height of 28.025m, 47.5% variation);
- 2.175m non-compliance to the swimming pool fence (height of 21.175m, 11.44% variation); and
- 1.09m variation to the swimming pool edge (height of 20.09m, 5.73% variation).





Figure 3 Height Blanket Diagram

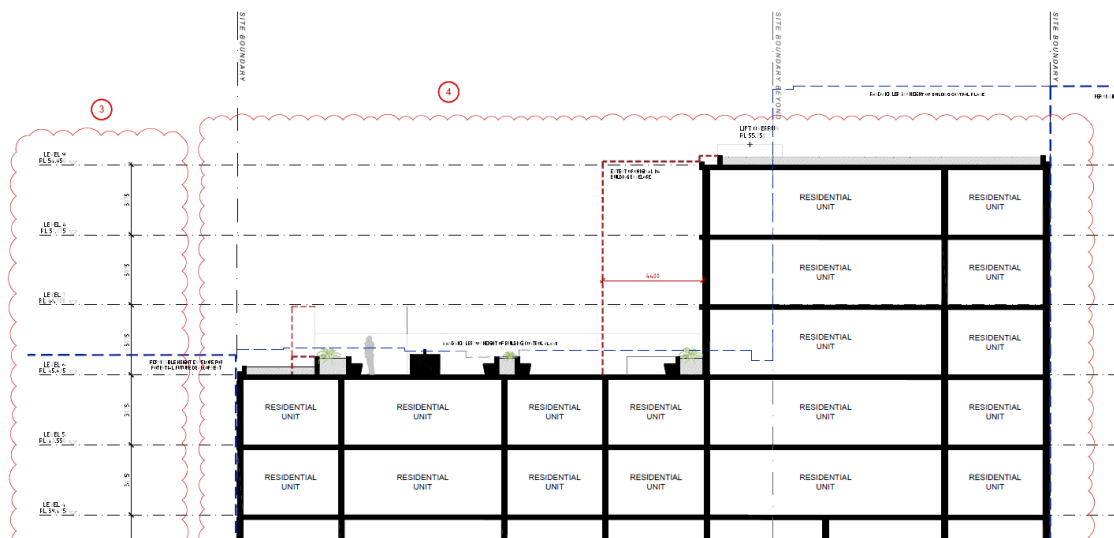


Figure 4 Sectional diagram demonstrating proposed non-compliances

3. Clause 4.6 to RLEP 2012

The objectives and provisions of clause 4.6 are as follows:

- (1) *The objectives of this clause are as follows—*
- (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.*

(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.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—

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

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

(4) Development consent must not be granted for development that contravenes a development standard unless—

(a) the consent authority is satisfied that—

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning Secretary must 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.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note— When this Plan was made, it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E3 Environmental Management or Zone E4 Environmental Living.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,

(caa) clause 5.5,

(ca) clause 6.16(3)(b).

The development standards in clause 4.3 are not “expressly excluded” from the operation of Clause 4.6.

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of Subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of Subclauses 4.6(3) & (4) in order to demonstrate to the consent authority that the exception sought is consistent with the exercise of “an appropriate degree of flexibility” in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by Subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, Subclause 4.6(6).

It is hereby requested that a variation to this development standard be granted pursuant to Clause 4.6 so as to permit a maximum building height of 28.98m which equates to a numerical variation of 9.98m, noting that the maximum height relates to the lift overrun as measured from natural ground line. The results in a percentage variation of 52.5%.

4. Compliance is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a))

Of relevance to Clause 4.6(3)(a), in *Wehbe V Pittwater Council* (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

“An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The 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.”

The Judgment goes on to state that:

“The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict



compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)."

Preston CJ in the Judgment then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

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

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 16), Preston CJ makes reference to Wehbe and states:

"...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."

Clause 4.6(3)(a) requires that the written request to vary a development standard demonstrate that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case. Requiring strict compliance with the standard is unreasonable or unnecessary because:

- the development is consistent with the standard and zone objectives, even with the proposed variation (refer to Section 7 below);
- there are no additional significant adverse impacts arising from the proposed non-compliance; and
- important planning goals are achieved by the approval of the variation.

On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

5. Sufficient environmental planning grounds (Clause 4.6(3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard. Specifically, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 24) states:



*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].*

The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 whereby Justice Pain ratified the original decision of Commissioner Pearson. The following planning grounds are submitted to justify contravening the maximum building height:

1. Inability to amalgamate allotments and dual building height standard has resulted in the proposed variation

- a. The height breach is at its greatest for the lift overrun located above the nine storey portion (RL 56.00) when measured from natural ground as is located within the 19m building height standard. There is an additional non-compliance to the parapet of the level 8 and swimming pool provided for the communal open space. The proposed non-compliances are a result of the dual building height standards (being the interface between the alternative and standard building height), lot shape, amalgamation pattern and envelope as desired by the RDCP.
- b. As detailed, the maximum non-compliance is a result of the interface between the two building height development standards on the subject site and constraints imposed by the lot ownership and amalgamation patterns, which differs from that envisaged in the RDCP. That is, the height standards are prescriptive in anticipation of a certain lot amalgamation outcome, which has not been realised. Notwithstanding, the built form has been designed to satisfy the objectives and intent of the RDCP, despite providing for a variation to the building height development standard. The difference in height between the 31m alternative height control and 19m standard height and the inability to amalgamate allotments has resulted in the proposed non-compliance. The variation ensures the provision of an efficient building footprint and proportionate architectural design, at the same time as promoting the transition in building scale in an easterly direction that is supported by the controls. The narrow portion of additional height to the eastern part of the upper three storeys will be imperceptible to the casual observer.

2. The non-compliance and redistribution of height is a response to the RDCP building envelope controls

- a. The non-compliant building height is a result of the desired building envelope per the RDCP. Due to the lot ownership structure and inability to amalgamate, the shared way required under the RDCP has been proposed along the western (side) boundary. The provision of the shared way along the western boundary has redistributed the floor area on the upper levels which extends between the 31m and 19m height limit. Of relevance, the site analysis and iterative design processes have demonstrated that the proposed shared way location is the most appropriate response to the various constraints.
- b. The proposal has also sought to provide a predominant 9m setback to the rear façade which is significantly greater than what is required by the RDCP. That is, the RDCP includes the provision of a flexible 9 storey zone to the south where a reduced setback can be provided. However, the relocation of floor space on the upper levels and within the 19m height limit represents a superior outcome which will have reduced impacts to the amenity of properties to the south, whilst providing an appropriate transition of built form in an easterly direction.

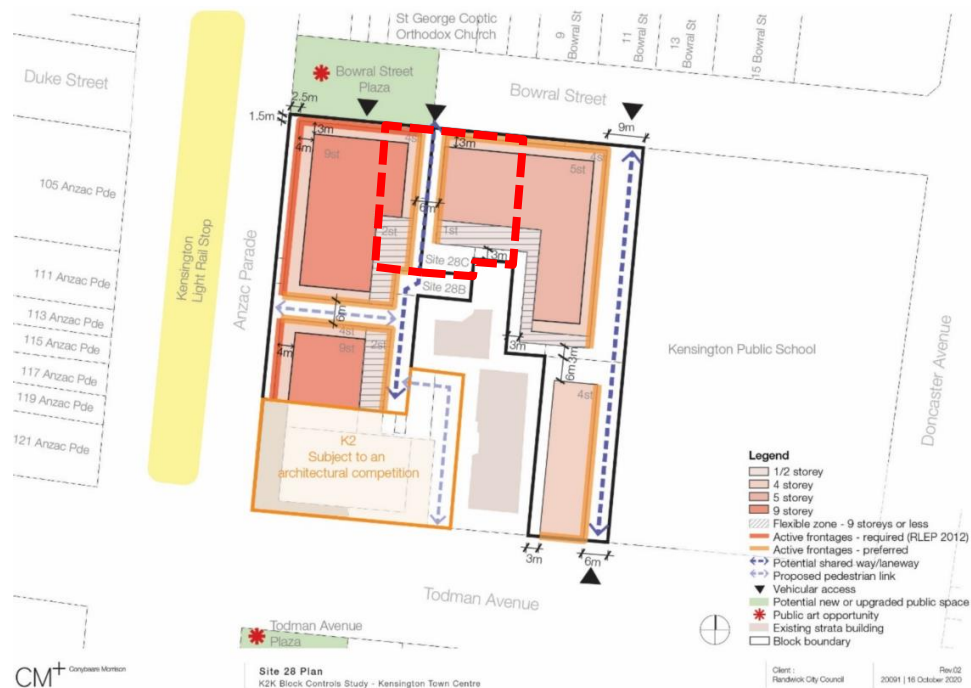


Figure 5 Building envelope controls per the DCP

- c. The proposed building envelope and distribution of floor space results in a superior urban and architectural design outcome. That is, the provision of additional floor area in alternative locations (namely, the rear setback) will not only result in a greater amenity impacts to the

adjoining properties (including overshadowing and privacy), but will also deliver an undesirable, slender tower form created by strict compliance with the LEP height standards.



- d. As such, the amended proposal is designed with a cohesive built form in which the extent of non-compliance only occupies a maximum width of 3m (or 8% of the site frontage) within the recessed uppermost levels. This ensures that when viewed from the streetscape, despite being technically non-compliant, the development is of a suitable bulk and scale, delivering the desired transition within the streetscape. In fact, it is considered that the minimal width of the non-compliance to the upper levels will be generally imperceptible as viewed by the casual observer. Of relevance, the neighbouring properties to the east are permitted a 19m building height which will reinforce the transition of bulk and scale from Anzac Parade to Doncaster Avenue, along Bowral Street. From an urban design perspective, the extent of non-compliance delivers cohesive single lot development, whilst maintaining the desired character per the DCP.



Figure 6 Section indicating 3m wide area of non-compliance (blue), in comparison to the remaining built form (green)

3. Redistribution of height to provide for shared laneway



- a. As describe, the provision of the shared way along the western boundary has redistributed the floor area on the upper levels which extends between the 31m and 19m height limit. The inability



to amalgamate with the neighbouring properties and subsequent design iterations have resulted in the provision of the shared way along the western boundary, which differs from the location as desired by the DCP. To ensure the provision of a shared way, the proposal has relocated floor area and resulted in the non-compliance. Despite the various site constraints, the proposal will deliver a high-quality shared way which will satisfy 1.3 Objects of Act (EP&A Act 1979), specifically, (a), (c) and (g). That is, the redistribution of floor area to deliver the shared way is considered to provide a direct benefit to the general public through improving the public domain and delivering a development with good design and amenity. Further to this, the provision of a shared way has required the redistribution of floor area resulting in non-compliance allows for orderly and economic use of the land. As such, the redistribution of building height and floor area to allow for the shared way will provide a direct benefit to the general public and should be considered in this variation.

4. The non-compliance is entirely consistent with the character of the locality

- a. The maximum extent of non-compliance is setback 4.5m to 4.9m from Bowral Street and 9m to the rear. These setbacks, which are consistent with (or greater than) the RDCP, ensure that the variation will not result in any adverse visual impact when viewed from the public domain or neighbouring properties and will be compatible with the desired character of the locality. Due to the minor width of the variations (as described above), the setbacks will ensure that the streetscape impact is minimised. Similarly, as the proposal provides a nil setback to the western (side) boundary, which is consistent with the RDCP requirements, the height non-compliance will merge seamlessly with the properties to the west upon their redevelopment.
- b. To the east, the non-compliant elements are setback 20.45m from the boundary shared with the neighbouring property. The considerable separation distance, limited width of the non-compliance and recessed envelope ensures that an appropriate transition of built form is provided along Bowral Street, as desired by the RDCP. Furthermore, the proposal provides a compliant 19m built form within the eastern portion of the site (excluding the swimming pool), as to ensure that the desired relationship to Nos. 12 and 16 Bowral Street will be retained. As such, the proposed setbacks and overall architectural design ensures that the non-compliance will be entirely compatible with the character of the locality.
- c. When considering the proposed height in comparison to the properties to the north and south, the non-compliance will merge, or be absorbed, into the anticipated bulk and scale of the locality. That is, on the northern side of Bowral Street the 31m height limit (as is permitted by the alternative building height) extends to the eastern boundary of Nos. 1-3 Bowral Street (St George Coptic Orthodox Church). Given it is unlikely that the adjacent church will be redeveloped, the non-compliant height opposes a structure that is uncharacteristic of the streetscape and will ensure that the impact created by the proposal will be less apparent by virtue of the differing typologies.



Similarly and when considering the properties to the rear, it is noted that a 54m height limit is permitted. The properties to the rear are subject to an approval for an 18 storey mixed use development at Nos. 172-180 Anzac Parade and 116R Todman Avenue. Where the properties to the rear are not captured as part of the abovementioned approval, the proposed separation and height of the approved development will limit any visual or physical impact.

5. The non-compliances achieve a high level of design excellence, based on site analysis

- a. The amended proposal delivers a high quality urban and architectural design which clearly exhibits design excellence, despite non-compliance. That is, the proposal has undergone in-depth site analysis, numerous iterations and refinement to reach the amended outcome. The arrangement of floor space and subsequent building height non-compliance have been informed by the desired DCP envelope, lot pattern and ownership structure. As such, the distribution of floor area is considered the most appropriate response to the streetscape, whilst protecting the amenity of neighbouring properties. Importantly, the additional height results in a proportionate urban and architectural form which cannot be achieved through strict compliance with the LEP standard.
- b. The maximum extent of non-compliance is appropriately integrated into the overall building form. The non-compliance will not be visually jarring as the built form is situated within a well-articulated mass extending seamlessly between the varying building heights. That is, the difference in height between the alternative and standard controls will be maintained, although shifted slightly to the east as a result of the previously mentioned constraints. Importantly, the non-compliant elements form part of a recessed built form and includes framing, balcony articulation, fenestration and contemporary materiality to ensure that design excellence is achieved.

6. The non-compliances pertaining to the swimming pool are minor and result in a better outcome for the development

- a. The non-compliances to the swimming pool will significantly improve the amenity of future occupants without having any adverse impact to the streetscape or neighbouring properties. That is, the swimming pool is raised above the finished floor level of the roof top terrace to enable the provision of a sufficient depth for the use of future occupants. In order to minimise the impact of this feature, it has been setback from the outer edge of the built form and site boundaries. This ensures that the swimming pool and associated balustrades will not be visually obtrusive or jarring from the public domain or neighbouring properties, as the compliant built form will obscure sightlines from natural ground. Given the subordinate nature of these elements, they are not anticipated to result in any visual impact. With regards to amenity, the setback of the swimming pool limits any potential privacy, solar access or view impacts and is considered acceptable.

7. Orderly and economic use of land

- a. The social benefits of providing housing stock within a highly sought-after location should be given weight in the consideration of the variation request. The distribution of floor space is predicated on the allotment shape, principles of the DCP and lot ownership pattern. This has resulted in a building envelope which extends from the 31m alternative building height into the 19m building height and therefore necessitates a form and scale that breaches the height limit. It would be a loss to the community (and contrary to the public interest) to deny the variation and require the removal of residential accommodation within a well located and well-designed development.
- b. Insistence on compliance with the height control would also result in the removal of the communal swimming pool, which is a disproportionate response to the relatively minor impacts created by this element. The non-compliance to the swimming pool will provide a distinctive benefit to the amenity of future occupants and is adequately setback from the public domain to limit any visual or physical impact. Furthermore, the swimming pool is also designed to ensure the amenity of neighbouring properties is protected.

8. Limited environmental impacts



- a. It is considered that there is an absence of any significant material impacts attributed to the breach on the amenity or the environmental values of surrounding properties, the amenity of future building occupants and on the character of the locality. Specifically:
 - i. The extent of the additional height creates no significant adverse overshadowing impacts to adjoining properties when compared to a compliant building envelope. That is, although the additional height results in a minor degree of overshadowing, it will retain adequate solar access to neighbouring properties. As shown in the comparative sun-eye diagrams prepared by *PBD Architects*, the ground floor apartment of No. 122 Todman Avenue (as it opposes the boundary shared with the subject site) will not receive two hours of solar access during mid-winter as a result of the proposed development. Two hours of solar access to this dwelling would be similarly unachievable if a fully compliant RDCP envelope was proposed. It is also reasonably anticipated that the lowest level of this ageing walk-up residential flat building would be impacted by any future development given the permitted increase of density. Further to this and as discussed in this Variation, a fully compliant RDCP envelope cannot be achieved given the lot ownership and amalgamation pattern, thus contributing to the proposed non-compliance and the resultant impacts. As such, the increase to overshadowing caused by the non-compliant elements would be insignificant;
 - ii. The height breach does not result in any adverse additional privacy impacts. The extent of privacy impacts caused by the height breach will have no greater impact on the privacy of adjoining properties when compared to a compliant built form. The non-compliant elements are setback considerably from respective boundaries, are orientated to the public domain

and will not result in any further overlooking. As such, the loss of privacy caused by the non-compliant elements would be insignificant; and

- iii. The height breach will not result in any significant view loss as the subject site does not contain any significant views across or from the public domain. The maximum height non-compliance is limited and is consistent with the building height of the surrounding locality. As such, the extent of view loss caused by the non-compliant element would be insignificant.

9. The proposal meets aims and objectives of key planning documents

- a. The proposed development meets the objectives of the development standard and meets the objectives of the B2 Local Centre zone (as further detailed in Section 7 below);
- b. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:
 - i. The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilised site (1.3(c));
 - ii. To promote the delivery and maintenance of affordable housing (1.3(d));
 - iii. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).
- c. The variation to the height of buildings development standard will give better effect to the aims of *State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development* (SEPP 65). In particular:
 - i. The proposed variation will provide more sustainable housing in social and environmental terms and better achieve urban planning policies (clause 2(3)(a)(i));
 - ii. to achieve better built form and aesthetics of buildings and of the streetscapes and the public spaces they define (clause 2(3)(b));
 - iii. to contribute to the provision of a variety of dwelling types to meet population growth (clause 2(3)(f));
 - iv. Approval of the proposed variation will support a variety of housing types by providing a well-located and compact development that will be a better choice for families (clause 2(3)(g)).



The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development, particularly the dual alternative building heights, lot ownership pattern, amalgamation and desired building envelope. Insistence on compliance with the height will result in the removal of a number of residential apartments and communal open space elements which is a disproportionate outcome given the limited impacts of the proposal. Specifically, the additional height does not significantly impact the amenity of the neighbouring properties (when compared to a compliant development) and has been designed to address Bowral Street and ensure the non-compliance is not visual jarring from the public domain or neighbouring properties.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

86. *The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*
87. *The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

As outlined above, it is considered that in many respects, the proposal, as amended, will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

6. The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), (Clause 4.6(4)(a)(i))

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a)

in Section 4 above (and furthermore in terms of meeting the objectives of the development standard, this is addressed in Section 7 below). Clause 4.6(3)(b) is addressed in Section 5 above.

The second opinion of satisfaction, in clause 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 clause 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in Section 7 below.

7. The proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out (Clause 4.6(4)(a)(ii))

Clause 4.3 - Height of Buildings Objectives

The objectives and relevant provisions of clause 4.3 of RLEP 2012 are as follows, inter alia:

- (a) to ensure that the size and scale of development is compatible with the desired future character of the locality,*
- (b) to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item,*
- (c) to ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views.*



In order to address the requirements of Subclause 4.6(4)(a)(ii), the objectives of Clause 4.3 are addressed in turn below.

Objective (a): “to ensure that the size and scale of development is compatible with the desired future character of the locality”

It is noted that objective (a) refers to being “compatible” with adjoining development. It is considered that “compatible” does not promote “sameness” in built form but rather requires that development fits comfortably with its urban context. Of relevance to this assessment are the comments of Roseth SC in *Project Venture Developments Pty Ltd v Pittwater Council* [2005] NSWLEC 191:

“22 There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.”

Council does not have any specific desired future character objectives under RLEP 2012. Desired future character is subjective and must be set by the existing, recently approved and proposed buildings within the neighbourhood. The subject site is zoned B2 Local Centre within a locality which is anticipated to undergo a significant increase in density. That is, the existing size and scale of development in the immediate locality is not definitive. Directly to the east and west, the neighbouring properties are underdeveloped and do not represent the desired future character of the locality as anticipated by the relevant development standards and controls. Similarly and to the south, these buildings are also underdeveloped relative to the standards. Importantly, although the church structure to the north and education facility further to the east are considered part of the local character, they do not represent the envisaged increase of density.



Regardless, these buildings have been considered as part of the character of the locality given the architectural variety they provide to the streetscape.

The proposal is best described as a mixed use development which is permissible in the zone and is consistent with the desired future character of the locality. Importantly and when considering nearby approvals, the following is noted:

- The allotments to the west at Nos. 4 Bowral Street and 160 Anzac Parade are subject to development consent for an eight storey mixed use development (under DA/938/2016). However, it is noted that this was approved prior to the gazettal of the recent LEP and DCP amendments and is therefore permitted a greater building height;
- Further to the south-west is Nos. 172-180 Anzac Parade and 116R Todman Avenue which is subject to an approval for the construction of an 18 storey mixed use development under DA/414/2020 per the current planning controls; and
- A number of other large mixed use developments have been approved in the locality, including Nos. 111-125 Anzac Parade and Nos. 182-190 Anzac Parade to the south-west and Nos. 18-26 Ascot Street to the north.

As evidenced by these recent approvals, the character within the locality is undergoing transformation, better reflecting Council's desired character and density. Accordingly, the proposed height encroachment does not result in a building which is incompatible with the desired character and typology of developments throughout the locality. The non-compliant elements are provided within a high-quality built form which is well articulated and is consistent with the objectives and principles of the LEP and DCP. The design has integrated various elements to reduce bulk and scale at the point of greatest variation, including considerable setbacks, framing, parapet edges, balcony articulation and glazing, within a recessed floorplate. The built form, which is consistent with the intent of Blocks 28B and 28C per the Kensington and Kingsford DCP, is considered to respond to the existing and desired future character of the locality.



Furthermore, it is noted that the proposal provides a building envelope which is reflective of the objectives of the RDCP and character of the locality, in that the development will provide a stepped built form with shared laneway appropriately addressing the streetscape. This ensures that despite non-compliance, the proposal is consistent with the desired building pattern in the locality. The burden on insisting on strict compliance would result in the removal of high quality, residential apartments which would be an unreasonable and unnecessary outcome given the scale of the proposal is compatible with the character of the locality. Additionally, the proposal does not result in any adverse impacts to the amenity of the neighbouring properties as is discussed in objective (c).

The proposal is therefore consistent with objective (a), despite the height breach.

Objective (b): “to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item”

The subject site is not located within a heritage conservation area and is not adjacent to a heritage or contributory item. However, the site is within proximity to a number of heritage items including *Crewell Victorian Terrace House* (I124) at No. 58 Doncaster Avenue, *Detached Cottage Group* (I125) at Nos. 69-82 Doncaster Avenue, *Kensington Public School Buildings* (I126) at Nos. 77-79E Doncaster Avenue and *Victorian Mansion* (I127) at Nos. 86-92 Doncaster Avenue.

With regards to the nearby heritage items, *Kensington Public School Buildings* bears the greatest relationship to the subject site. However, and when considering the proposed non-compliance, this heritage item is separated by three properties which are permitted a maximum height of 19m (Nos. 12 to 16 Bowral Street), in addition to the compliant portion of the proposed development. Given the physical and visual separation between the heritage item and non-compliant elements, this will not be visually obtrusive or jarring as it is designed within a recessive and simplified architectural character. Furthermore, the width of the variation is limited to 3m and the proposal maintains the anticipated step in building height as desired by both the LEP and DCP.



Following this, the contemporary built form is integrated with framed elements, balcony articulation, fenestration and high quality materials, as to limit impact. Importantly, the part of the building which bears the greatest relationship to the *Kensington Public School Buildings* is the podium form, which is compliant with the 19m standard. Accordingly, as the proposal will deliver a built form which is anticipated on the subject site, the extent of non-compliance will have no adverse impact to the heritage character of this item.

With regards to the remaining heritage items (as listed above), these are located on the eastern side of Doncaster Avenue. The non-compliant built form will have no impact to these items by virtue of the considerable separation. The proposal is therefore consistent with objective (b).

Objective (c): “to ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views”



In terms of visual bulk, the scale of the proposed development has largely been addressed in response to objective (a). For the reasons discussed in relation to objective (a), including setbacks, design and materiality, the proposed development represents a scale which is compatible with the existing and desired future character of the locality. Furthermore, when viewed from the public domain and neighbouring properties, the design and siting of the non-compliance provides considerable visual and physical separation thus mitigating any potential sense of enclosure or visual impact. The contemporary design, including modulation, balcony articulation and fenestration, in conjunction with the modern materials and neutral colour scheme, ensures that the proposal is not visually jarring from the streetscape.

In terms of privacy, the height breach does not result in any adverse additional privacy impacts. The areas of non-compliance are concentrated to Bowral Street and are setback considerably from the rear boundary. When considering the openings to the south, these are generally compliant with the ADG separation requirements which therefore mitigates potential overlooking. On the upper most level, where a variation to the separation requirements is sought, the openings overlook a space not anticipated to be redeveloped per the DCP, thus limiting any adverse overlooking.

To the west, the proposal is provided with a blank façade and nil setback, whilst to the east, the non-compliant elements are setback considerably from the neighbouring properties. When considering the swimming pool, the proposed setbacks also limit overlooking to the neighbouring property. As such, the parts of the building which do not comply with the height development standard do not result in any further privacy impact beyond a compliant built form given the above-mentioned design measures.

With regards to overshadowing, the proposed height breach will not result in any adverse overshadowing as opposed to an entirely compliant built form. The shadow diagrams submitted confirm that the proposal will not result in any significant additional overshadowing to the surrounding properties beyond what is permitted by the increase of density envisaged by the RLEP and RDCP. That is, despite the site orientation and anticipated density, the proposal will retain appropriate solar access to the neighbouring properties during mid-winter. Specifically, the proposal will retain 2 hours of solar access during mid-winter to 2 of 3 apartments located within the walk-up residential flat building at No. 122 Todman Avenue. Whilst the ground floor apartment of this neighbouring building will not receive the required amount of solar access, this would not be achieved with a RLEP and RDCP compliant envelope and is therefore considered acceptable. As such, the additional overshadowing impact as a result of the height breach when compared to a compliant development are insignificant.

In terms of view loss, the proposed variation will not result in any significant loss of views or outlook compared to a building with a compliant height. Importantly, there are no significant views currently enjoyed across the subject site from the public domain or neighbouring properties and the applicable planning controls effectively anticipate a continuous 31m and 19m high built form along Bowral Street. As the existing buildings are under-developed relative to the height control, the expectation to retain views through the permissible building envelope is considered unreasonable. It follows that there is a reasonable expectation that the views would be lost with any redevelopment of the site and therefore loss of views must be considered against the back drop of the permissible planning controls.



Accordingly, any potential loss of views created by the non-compliance is considered to be reasonable within the Local Centre zone.

Therefore objective (c) is achieved.

Clause 6.17 - Community infrastructure height of buildings and floor space at Kensington and Kingsford town centres

The objectives and relevant provisions of clause 6.17 of RLEP 2012 are as follows, inter alia:

- (a) to allow greater building heights and densities at Kensington and Kingsford town centres where community infrastructure is also provided,*
- (b) to ensure that those greater building heights and densities reflect the desired character of the localities in which they are allowed and minimise adverse impacts on the amenity of those localities,*
- (c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure.*

As the proposal complies with the alternative building height standard applies, these objectives are satisfied.

Objectives of the Zone

Clause 4.6(4)(a)(ii) requires that the consent authority be satisfied that the development is in the public interest because it is consistent with relevant zone objectives. The objectives of Zone B2 Local Centre are as follows:

- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*

The proposal, as amended, will provide a mixed use development which includes a commercial premises and variety of residential accommodation which will support the existing and future commercial and community uses in the area. Furthermore, the commercial premises and residential apartments will also allow for residents to work and live in the Kensington locality.

- To encourage employment opportunities in accessible locations.*

As identified above, the proposal will increase commercial opportunities in an accessible location. It is noted that the variation to maximum building height will not impact any employment opportunities on site or within the local centre.



- To maximise public transport patronage and encourage walking and cycling.*

The subject site is located within walking distance to numerous bus stops located along Anzac Parade and Kensington Light Rail Stop, which will resultantly improve public transport patronage, walking and cycling. The non-compliance with the building height will have no impact on the development satisfying this objective.

- To enable residential development that is well-integrated with, and supports the primary business function of, the zone.*

The proposal provides a well-designed and integrated mixed use building consistent with the desired future character of the locality. The variation to the standard will have no impact to the delivery of the residential accommodation and will continue to support the businesses in the locality.

- To facilitate a high standard of urban design and pedestrian amenity that contributes to achieving a sense of place for the local community.*



The proposal will provide an articulated design which will address the public domain and supports a high-quality pedestrianised streetscape. The non-compliance to maximum building height will not impact the pedestrianised scale and forms part of the recessed upper levels.

- *To minimise the impact of development and protect the amenity of residents in the zone and in the adjoining and nearby residential zones.*

The proposed variation will have no impact to the amenity of surrounding properties as discussed in this Variation. That is, the additional building height will not impact the solar gain, privacy or views of the adjoining properties and is considered acceptable.

- *To facilitate a safe public domain.*

The proposal will significantly improve safety of the public domain through the provision of a commercial premises and residential accommodation orientated to Bowral Street. The height non-compliance will have no impact on facilitating a safe public domain.

The proposed development, including those parts of the building that breach the height of buildings development standard, is not antipathetic to the objectives for the zone and for that reason the proposed variation is acceptable.

8. The concurrence of the Secretary has been obtained (Clause 4.6(4)(b))

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, attached to the Planning Circular PS 20-002 issued on 5 May 2020, 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.

9. Whether contravention of the development standard raises any matter of significance for State or Regional environmental planning (Clause 4.6(5)(a))

Contravention of the maximum height development standard proposed by this application does not raise any matter of significance for State or regional environmental planning.

10. The public benefit of maintaining the development standard (Clause 4.6(5)(b))

As detailed in this amended submission there are no unreasonable impacts that will result from the proposed variation to the maximum building height. As such there is no public benefit in maintaining strict compliance with the development standard. Whilst the proposed building height exceeds the maximum permitted on the site by 9.98m (52.5%), the proposed development 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.

11. Conclusion

Having regard to all of the above, it is considered that compliance with the alternative maximum height development standard is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives. The proposal, as amended, has also demonstrated sufficient environmental planning grounds to support the breach.

Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation supported.

Amended Clause 4.6 Variation –
Clause 6.20 Active street frontages at Kensington and
Kingsford town centres



Amended Clause 4.6 Variation Statement – Active street frontages at Kensington and Kingsford town centres (Clause 6.20)

1. Active Street Frontages standard

Clause 6.20 of *Randwick Local Environmental Plan 2012* (RLEP 2012) relates to the provision of *Active street frontages at Kensington and Kingsford town centres* and refer to the Active Street Frontages Map. Clause 6.20(3) and (4) of RLEP 2012 requires that:

(3) Development consent must not be granted to the erection of a building on land to which this clause applies unless the consent authority is satisfied that all premises on the ground floor of the building facing the street are to be used for the purposes of commercial premises after the erection of the building.

(4) Development consent must not be granted to a change of use of premises on the ground floor of a building on land to which this clause applies unless the new use is for the purposes of commercial premises.

As such, Clause 6.20(3) applies to the subject site, specifically, a corner of the allotment identified as No. 6 Bowral Street, as reproduced in **Figure 7** below.



Figure 7 Active Street Frontages Map (Site edged in Blue)

It is noted that the RLEP 2012 does not provide a definition for active street frontage, however Clause 6.20(3) envisages that the part of the building identified as an active street frontage is to be provided as a commercial premises. The proposal provides part of the shared way within the area that is affected by the identification on the “active frontages map”. The shared way provides vehicular access to the basement carpark, waste and loading areas which are associated with the commercial uses at ground level, as well as the residential uses above. Accordingly, it is considered that the proposal is compliant with the standard in that the area that is affected by the provision is ancillary to the

commercial premise uses at ground level. Notwithstanding, should the Court take a different view, in the interests of abundant caution and to remove any jurisdictional hurdle, this Clause 4.6 Statement is provided.

2. Proposed variation to the active street frontages development standard

As demonstrated in **Figure 8** below, the subject site provides a share way to the north-eastern corner of the allotment (affected by the active street frontages map) within No. 6 Bowral Street. If the share way were deemed to not be associated with commercial premises for the purposes of the clause, which the applicant says is not accurate, the extent of variation sought is 100%. The proposal will provide commercial premises to the east of the shared laneway.

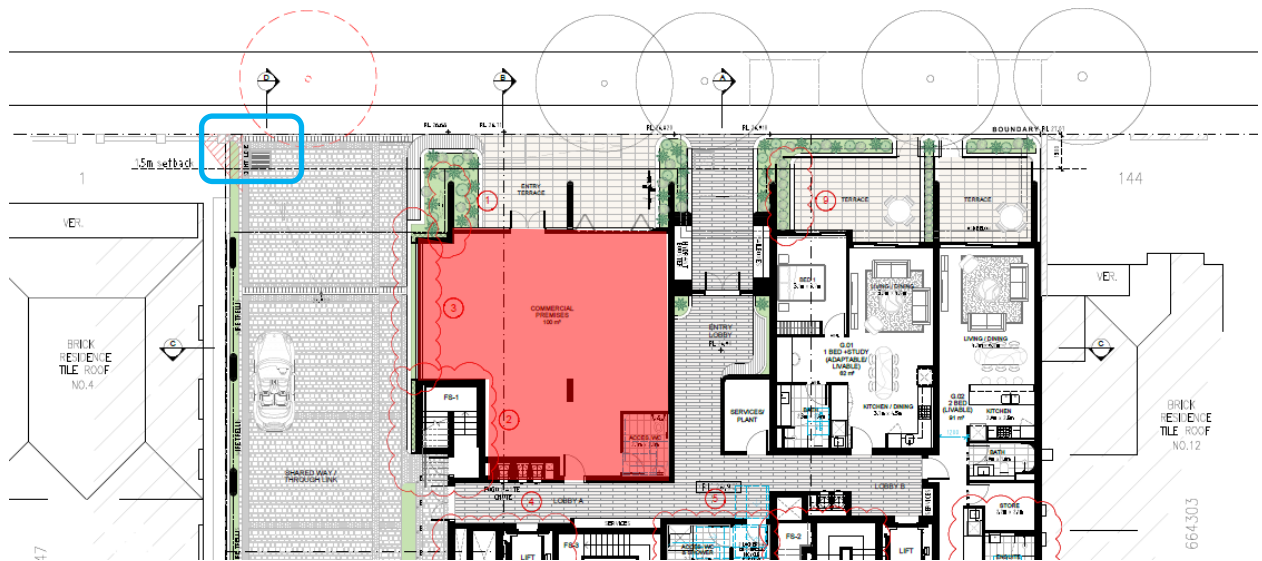


Figure 8 Ground floor plan with approximate portion of the site expected to be active street frontage circled in blue and commercial premises highlighted in red

3. Clause 4.6 to RLEP 2012

The objectives and provisions of clause 4.6 are as follows:

(1) *The objectives of this clause are as follows—*

- (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.*

(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.*

(3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—*



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

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

(4) Development consent must not be granted for development that contravenes a development standard unless—

(a) the consent authority is satisfied that—

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning Secretary must 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.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note— When this Plan was made, it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E3 Environmental Management or Zone E4 Environmental Living.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

(a) a development standard for complying development,



(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,

(caa) clause 5.5,

(ca) clause 6.16(3)(b).

The development standards in Clause 6.20 are not “expressly excluded” from the operation of Clause 4.6.

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of Subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of Subclauses 4.6(3) & (4) in order to demonstrate to the consent authority that the exception sought is consistent with the exercise of “an appropriate degree of flexibility” in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by Subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, Subclause 4.6(6).

It is hereby requested that a variation to the Clause 6.20 development standard be granted pursuant to Clause 4.6 so which equates to a percentage variation of 100%. As described, the proposal provides a commercial premises to east of the shared way.

4. Compliance is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a))

Of relevance to Clause 4.6(3)(a), in *Wehbe V Pittwater Council (2007) NSW LEC 827* Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

“ An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The 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.”

The judgement goes on to state that:

“ The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 and 2 for the purposes of this Clause 4.6 variation [our underline]):

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

3. *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
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;*
5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 16), Preston CJ makes reference to Wehbe and states:

"...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."

Clause 4.6(3)(a) requires that the written request to vary a development standard demonstrate that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case. Requiring strict compliance with the standard is unreasonable or unnecessary because:

- the development is consistent with the standard and zone objectives, even with the proposed variation (refer to Section 7 below);
- there are no additional significant adverse impacts arising from the proposed non-compliance; and
- important planning goals are achieved by the approval of the variation.

On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

5. Sufficient environmental planning grounds (Clause 4.6(3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard. Specifically, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 24) states:

*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].*

The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* and *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248* whereby Justice Pain ratified the original decision of Commissioner Pearson. The following planning grounds are submitted to justify contravening the active street frontage standard:

1. The non-compliance is technical in nature and the proposal satisfies the intent of Clause 6.20

- a. The amended development provides a commercial premises to the east of the shared way which is a direct result of the site conditions, lot ownership structure, amalgamation pattern and building envelope as envisaged by the RDCP. Further the share way itself is associated with commercial premises on the site and is considered to only be permissible on this basis. Whilst the proposal does not provide a commercial tenancy fronting the part of the site affected by the map, commercial premises are provided to the east and will satisfy the intent and objectives of the control. Further, the share way itself is associated with commercial (and residential) premises and has the sole intent of generating activity for the site, likely more frequent and significant movement than would be generated by a shopfront to this part of the site. The provision of a commercial premises to the east of the share way will activate both the street frontage and share way, albeit in a slightly modified location. As such, whilst the corner of the site identified by Clause 6.20 is not strictly fronted by a shopfront associated with commercial premises, the commercial premises that are provided to the east will continue to activate the corner of the site as desired by the RLEP. As described in further detail below, the shared way will also contribute to activation of the streetscape.

2. The non-compliance is a result of the site conditions and envisaged envelope of the RDCP

- a. The proposed variation is a result of the existing site conditions, lot ownership pattern and building envelope envisaged by the DCP. That is, the inability to amalgamate with the neighbouring properties to the east and west of the subject site has resulted in a variation to the building envelope controls, specifically, the provision of a shared-way along the western (side) boundary. This has ultimately resulted in the non-compliance as it pertains to the active frontage of No. 6 Bowral Street. Achieving strict compliance is not practicable when considering the desired site arrangement per the relevant controls. As such, and in order to offset this variation, the amended proposal provides a commercial premises to the east of the shared way to ensure the intent of Clause 6.20 is satisfied.
- b. The proposed commercial premises extend the active frontage to the east, in order to account for the relocated shared way. This is considered an appropriate design outcome which will provide a balance between delivering a shared way and providing an active commercial frontage. Beyond the proposed commercial premises, the eastern side of Bowral Street is characterised by non-active frontages. In this context, articulation of the street frontage via the shared-way and commercial premises is deemed to be appropriate given this will achieve the objective of Clause 6.20. Specifically, the proposal will provide a high level of articulation and encourage pedestrian movement along Bowral Street and the shared way.

- c. As discussed, the proposal is compatible with the existing and desired future character of the locality and provides consistency in built form as is anticipated by the building envelope controls. Of relevance, the site is located at a juncture of a number of properties with various owners and therefore the desired envelope per the DCP envelope has been amended due to inability to amalgamate. This has resulted in a relocation of the share way to satisfy the intent of the block controls and ensure that the proposal will not impact pedestrian movement whilst delivering a high quality development.

3. The variation will permit a suitable streetscape outcome and will achieve design excellence

- a. Despite technical non-compliance, the relocated commercial premises and shared way will provide a high level of activation along the streetscape and ultimately achieve design excellence. The design has activated the frontage and provides visual interest as viewed from the public domain. Specifically, the proposal provides a clearly delineated share way, with a commercial premises to the east, which will appropriately activate the façade as required by the clause. Both the share way and commercial premises utilise framing, glazing, landscaping and lighting to encourage access and movement along the streetscape. This is integrated with the overall built form and includes high quality materials which are representative of the desired character of the locality.
- b. The proposal provides physical and visual signals for residents and the general public regarding movement through the shared-way and will ultimately deliver an active frontage as desired within the corner of No. 6 Bowral Street. Whilst the proposal will provide a commercial premises to the east, the shared way is considered to provide an alternative form of streetscape activation.
- c. Upon redevelopment of the properties to the west, these are anticipated to provide an active frontage to Bowral Street given they will not be burdened by the provision of a shared-way. The provision of commercial frontages to these lots will therefore appropriately relate to the shared way and commercial premises proposed on the subject site. This will ensure that the overall vision of Bowral Street is achieved, despite the minor technical variation.

4. Orderly and economic use of land

- a. Insistence on strict compliance with the standard would result in an inferior site planning and design outcome which would require the shared way to be relocated centrally through the site and ultimately undermine the feasibility of the proposal. It follows that the proposed development, whilst relocating the active street frontage, will satisfy the intent of the LEP and DCP to deliver a distinct benefit to the character of the locality and streetscape.
- b. The social benefits of providing a shared-way and commercial premises, albeit in a slightly different location, should be given weight in the consideration of the variation request. It would be a loss to the community (and contrary to the public interest) to deny the variation and require

significant redesign to achieve strict compliance, given the numerous site limitations and restrictions.

5. Limited environmental impacts

- a. It is considered that there is an absence of any significant material impacts attributed to the non-compliance on the amenity or the environmental values of surrounding properties, the amenity of future building users and on the character of the locality. Specifically:
 - i. The extent of non-compliance has no adverse additional overshadowing impacts to adjoining properties. That is, the proposed design approach and relocation of the commercial premises does not impact the solar gain of the properties to the east, west and south. As such, additional overshadowing caused by the non-compliant elements would be insignificant; and
 - ii. The variation does not result in any adverse privacy impacts. The proposed design includes the provision of a non-habitable shared-way and relocated commercial premises which will not impact the privacy of adjoining or nearby residential accommodation and is insignificant; and
 - iii. The breach does not result in any view loss which is not reasonably anticipated within the planning controls and site context. As such, it is anticipated the extent of view loss is insignificant or nil.

6. The proposal meets overriding planning aims and objectives

- a. The proposed development meets the objectives of the development standard and meets the objectives of the B2 Local Centre zone (as further detailed in Section 7 below);
- b. The proposed development achieves the objects in Section 1.3 of the EP&A Act 1979, specifically:
 - i. The proposal promotes the orderly and economic use and development of land through the redevelopment of a dilapidated and underutilised site for commercial uses (1.3(c)); and
 - ii. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development, particularly given the sites location, lot ownership pattern and building envelope as envisaged by the RDCP. The mentioned site specific conditions are not anticipated by the development standard which relies a consolidated development scenario per the RDCP controls. It follows that the proposed design represents a superior outcome when considering the limitations of the site, including significant improvements to the architectural character, circulation and quality of Bowral Street and amenity of neighbouring properties. As such, the technical non-compliance with the active street frontages standard, which includes a commercial premises in an alternative location, does not

negatively impact the activation of the street and has been designed in such a way to provide a high quality, contemporary development.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

6. The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), (Clause 4.6(4)(a)(i))

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a) in Section 4 above (and furthermore in terms of meeting the objectives of the development standard, this is addressed in Section 7 below). Clause 4.6(3)(b) is addressed in Section 5 above.

The second opinion of satisfaction, in clause 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 clause 4.6(4)(a)(i) in that the

consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in Section 7 below.

7. The proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out (Clause 4.6(4)(a)(ii))

Active Street Frontage Objectives

The objective and relevant provision of Clause 6.20 of RLEP 2012 is as follows:

(1) The objective of this clause is to promote uses that attract pedestrian traffic along certain ground floor street frontages within the Kensington and Kingsford town centres.

In order to address the requirements of subclause 4.6(4)(a)(ii), the objective of Clause 6.20 is addressed in turn below.

(1) The objective of this clause is to promote uses that attract pedestrian traffic along certain ground floor street frontages within the Kensington and Kingsford town centres.

The proposed development has been designed to promote pedestrian traffic along Bowral Street and through the subject site via shared-way and relocated commercial premises. As detailed in this Variation, the subject site is constrained with regards to the provision of typical active street frontages. That is, the subject site is affected by a complex lot ownership structure and amalgamation pattern. Following this, achieving compliance with the desired built form and links as prescribed by the RDCP has resultantly relocated the shared-way along the western (side) boundary, where the active street frontage is sought. To offset the relocated shared way, the proposal includes the provision of a commercial premises to the east to satisfy the objective of clause 6.20. Furthermore, the shared way, although not a typical commercial frontage, will also promote pedestrian movement along the public domain.

The abovementioned design measures have been implemented in order to maximise pedestrian traffic along Bowral Street, through the shared-way and to the relocated commercial premises. Of relevance, the shared-way (located in place of the active frontage) is clearly defined as viewed from the public domain and is integrated into the overall built form to promote pedestrian traffic along the streetscape and through the site. This is then bolstered by the alternatively located commercial premises, which will further active the shared way and ensure the pedestrian traffic is maximised. Both the shared way and commercial premises are framed as viewed from the public domain and include landscaping, materiality and lighting to activate the frontages.

As such, the proposed design seeks to direct pedestrian circulation along the streetscape and through the shared-way thus satisfying the objective of Clause 6.20. The high quality architectural design of the development (both at a pedestrianised and wider scale) is also considered to attract pedestrian traffic along Bowral Street and the shared way, to further support the relocated commercial premises.

As such, whilst providing a technical non-compliance, the proposal is considered to maximise pedestrian traffic from the public domain and will satisfy objective (1).

Objectives of the Zone

Clause 4.6(4)(a)(ii) requires that the consent authority be satisfied that the development is in the public interest because it is consistent with relevant zone objectives. The objectives of Zone B2 are as follows:

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*

The proposal will provide a mixed-use development which will include the provision of a commercial premises and residential accommodation supporting the people who live in, work in and visit the local area.

- *To encourage employment opportunities in accessible locations.*

As identified above, the proposal will provide a commercial premises in an accessible location. It is noted that the minor variation to active street frontages will not impact the provision of a commercial premises on site or within the local centre.

- *To maximise public transport patronage and encourage walking and cycling.*

The subject site located within walking distance to numerous bus stops located along Anzac Parade and Kensington Light Rail Stop, which will resultantly improve public transport patronage, walking and cycling. The proposed development will provide a commercial premises, residential accommodation and a shared way which will maximise walking, cycling, and public transport patronage.

- *To enable residential development that is well-integrated with, and supports the primary business function of, the zone.*

The proposal provides a well design and integrated mixed use building along Bowral Street with a variety of residential accommodation. The technical variation to the standard will have no impact to the delivery of the residential accommodation and will support the businesses in the locality, the proposed commercial premises.

- *To facilitate a high standard of urban design and pedestrian amenity that contributes to achieving a sense of place for the local community.*

The proposal will provide a commercial premises and shared way which supports vehicular and pedestrian movement, as desired by the RDCP. The proposal, despite non-compliance, will provide a high quality, contemporary design which will significantly improve streetscape presence, sense of place and character of the Kensington locality and Bowral Street.

- *To minimise the impact of development and protect the amenity of residents in the zone and in the adjoining and nearby residential zones.*

The proposed variation to the active street frontage will have no impact to the amenity of surrounding properties.

- *To facilitate a safe public domain.*

The proposals will significantly improve safety of the public domain through the provision of a commercial premises and residential accommodation orientated to Bowral Street.

8. The concurrence of the Secretary has been obtained (Clause 4.6(4)(b))

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, attached to the Planning Circular PS 20-002 issued on 5 May 2020, 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.



9. Whether contravention of the development standard raises any matter of significance for State or Regional environmental planning (Clause 4.6(5)(a))

Variation of the active street frontages development standard proposed by this application does not raise any matter of significance for State or regional environmental planning.

10. The public benefit of maintaining the development standard (Clause 4.6(5)(b))

As detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the active street frontages development standard. As such there is no public benefit in maintaining strict compliance with the development standard. Whilst not strictly complying with the active street frontages standard, the proposed development provides a commercial premises to the east of the shared way and is therefore 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.

11. Conclusion

This written request has been prepared in relation to the proposed variation to the active street frontages development standard contained in Clause 6.20 of RLEP 2012.

Having regard to all of the above, it is our opinion that compliance with the active street frontages development standard is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives. The proposal has also demonstrated sufficient environmental planning grounds to support the breach. Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation supported.





