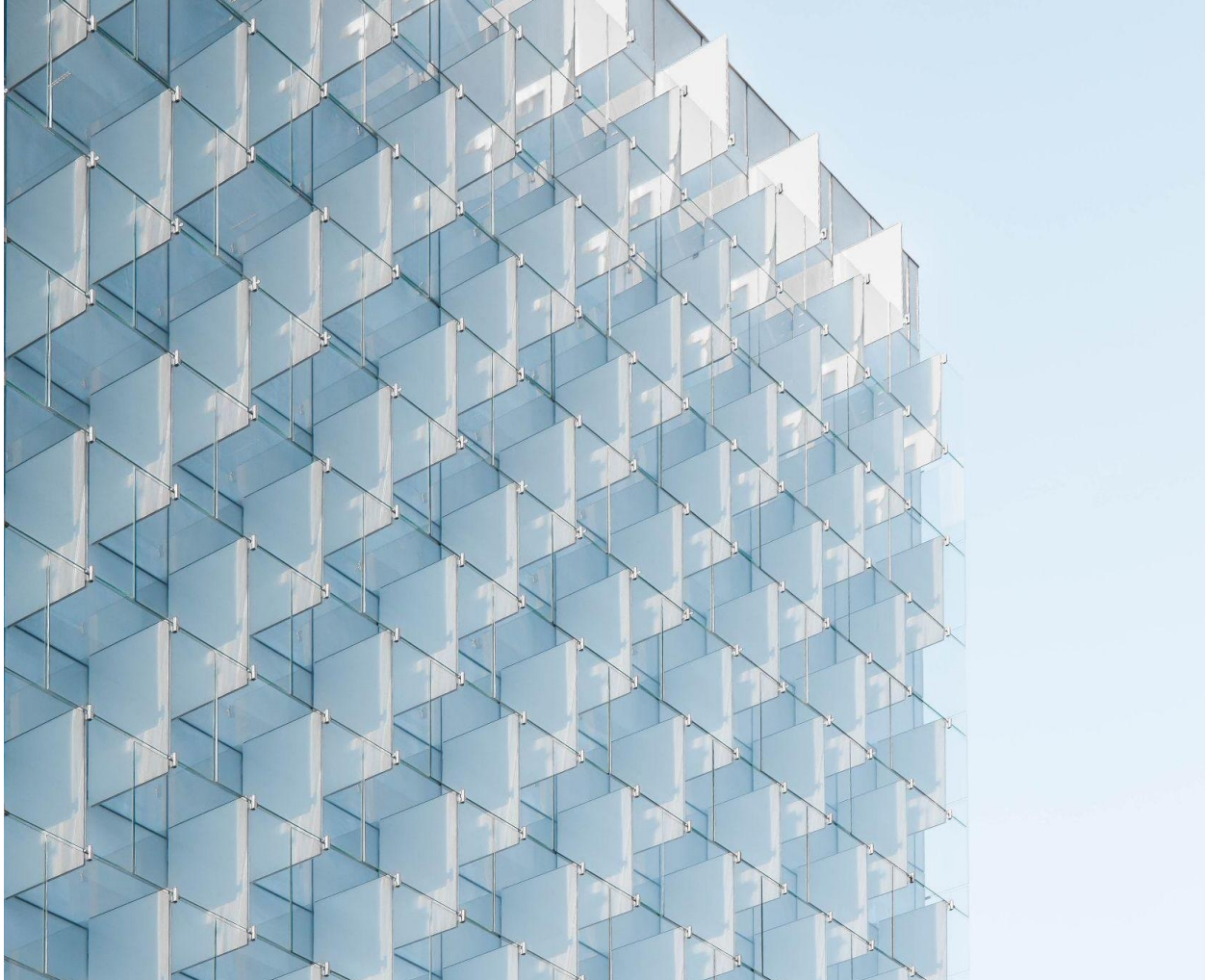


WILLOWTREE PLANNING



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CLAUSE 22 VARIATION REQUEST MAXIMUM FLOOR SPACE RATIO

ALTERATIONS AND ADDITIONS TO THE EXISTING BUILDING FOR THE REMOVAL OF AN INTERTENANCY STAIRCASE

5 Murray Rose Avenue, Sydney Olympic Park, NSW 2127
Lot 5 DP1185060

—
Prepared by Willowtree Planning Pty Ltd
on behalf of Growthpoint Properties Australia

Clause 22 Variation – Floor Space Ratio

Alterations and Additions to the Existing Building for the Removal of an Intertenancy Staircase
5 Murray Rose Avenue, Sydney Olympic Park, NSW 2127

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PART A PRELIMINARY

1.1 INTRODUCTION

This Clause 22 Variation Request (Variation Request) has been prepared in support of a Development Application (DA) for the alterations and additions to the existing building for the removal of an intertenancy staircase at 5 Murray Rose Avenue, Sydney Olympic Park (Subject Site).

The Subject Site is zoned B4 Mixed Use, pursuant to the *State Environmental Planning Policy (Precinct-Central River City) 2021* (Central River City SEPP) and is located within the City of Paramatta Local Government Area (LGA). The proposed development is permissible with consent within the B4 zone and is considered contextually appropriate. The proposal is generally consistent with the objectives and provisions of the Central River City SEPP, with the exception of Clause 19 – Floor Space Ratio, for which this Variation Request is sought.

This Variation Request has been prepared in accordance with the aims and objectives contained within Clause 20 and the relevant development standards prescribed under the Central River City SEPP. It considers various planning controls, strategic planning objectives and existing characteristics of the Subject Site and concludes that the proposed non-compliance is the best means of achieving the objects of encouraging orderly and economic use and development under the *Environmental Planning and Assessment Act 1979* (EP&A Act).

1.2 RATIONALE OF VARIATION FROM DEVELOPMENT STANDARDS

This Variation Request has been submitted to assess the proposed non-compliance with Clause 19 – Floor Space Ratio of the Central River City SEPP and has been prepared in accordance with the requirements of Clause 22 of the Central River City SEPP which includes the following objectives:

- (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.

Under the provisions of Clause 19 of the Central River City SEPP, the Subject Site is subject to a maximum floor space ratio of **3:1**. The proposed floor space ratio of **3.22:1** would exceed the maximum floor space ratio.

In its existing state, the development on the Subject Site comprises a FSR of 3.20:1 which exceeds the maximum floor space ratio. The proposed development seeks to remove the intertenancy staircase from levels Level 01 to Level 04, resulting in an increase in gross floor area (GFA) of 98m².

The existing staircases no longer serve any purpose within the building and are limiting the operational efficiency and availability of employment generating floor space. The proposed non-compliance is limited to internal alterations only and will have no adverse impacts on the adjoining properties or public domain.

This Variation Request has been prepared in accordance with the aims and objectives contained within Clause 22 and the relevant development standards prescribed by Central River City SEPP.



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1.3 DEVELOPMENT STANDARD VARIATION

Under the provisions of Clause 19 of the Central River City SEPP, the Subject Site is subject to a maximum floor space ratio of **3:1**. The proposal will result in a floor space ratio of **3.22:1**. **Table 1** below provides a summary of the variation.

TABLE 1: CLAUSE 19 OF THE CENTRAL RIVER CITY SEPP VARIATION SUMMARY						
Central River City SEPP	Development Standard	Maximum Space Proposed	Floor Ratio	Proposed Compliance	Development	Non-
Clause 19 – Floor Space Ratio	3:1	3.22:1		The proposal seeks consent for a maximum floor space ratio of 3.22:1 which is a 7.3% variation from the development standard.		

In its existing state, the development on the Subject Site comprises a FSR of 3.20:1 which exceeds the maximum floor space ratio. Notwithstanding the above, curtailing the floor space ratio of the proposal to the current approved floor space ratio would prevent the proposal from maximising operational efficiencies, thus preventing the Subject Site from achieving its development potential. The proposed additional floor space is limited to those areas where the redundant intertenancy stairs are contained between Levels 01 and Level 04. The proposed additional GFA is limited to 98m² which in itself represents a 0.8% variation to the maximum permitted floor space.

In its current form, the proposal therefore represents the most efficient use of the Subject Site which responds to the existing site conditions, compared to a development which is entirely compliant with the maximum floor space ratio.



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PART B THRESHOLDS THAT MUST BE MET

2.1 INTERPRETING CLAUSE 20

Clause 22 of the Central River City SEPP facilitates exceptions to strict compliance with development standards in certain circumstances. Clause 22(4) states (our emphasis added):

Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

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

*Note— The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be **accompanied by a document setting out the grounds** on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b)*

Accordingly, a successful Clause 22 variation must satisfy the below:

First Limb – Cl 22(4)

Clause 22(4) provides that the consent authority must be satisfied that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the following:

- a. that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Cl 22(4)(a)); and
- b. that there are sufficient environmental planning grounds to justify contravening the development standard (Cl 22(4)(b)). To this end the environmental planning grounds advanced in the written request must justify the contravention, not simply promote the benefits of carrying out the development as a whole: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15] (it is noted for the purposes of this assessment that Clause 22 of the Central River City SEPP is generally consistent in wording and application with Clause 4.6 of the Standard Instrument and other relevant Environmental Planning Instruments and as referenced below).

In the decision of *Rebel MH v North Sydney Council* [2019] NSWCA 130 (**Rebel**) Payne JA held (our emphasis added):

*“Although it was unnecessary finally to decide the correct construction of cl 4.6(4) in *Al Maha*, I agree with the construction advanced in that case by Basten JA, with whom Leeming JA agreed, at [21]-[24]. **Properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).** Clause 4.6(3) requires the consent authority to have “considered” the written request and identifies the necessary evaluative elements to be satisfied. To comply with subcl (3), the request*



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must demonstrate that compliance with the development standard is “unreasonable or unnecessary” and that “there are sufficient environmental planning grounds to justify” the contravention. It would give no work to subcl 4.6(4) simply to require the consent authority to be satisfied that an argument addressing the matters required to be addressed under subcl (3) has been advanced.”

Accordingly, a consent authority must be satisfied:

- a) that the Clause 22 variation application addresses the matters in Clause 22(4); and
- b) of those matters itself which means that there is greater scope for a consent authority to refuse a Clause 22 variation.

These matters are addressed in **Sections 4.3** and **4.4** of this Variation Request.

This written request has been prepared under Clause 22 of the Central River City SEPP to request a variation to the floor space ratio development standard at Clause 19 of the Central River City SEPP.



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PART C STANDARDS BEING OBJECTED TO

3.1 OVERVIEW

The Subject Site is zoned B4 Mixed Use and is subject to the underling objectives of the varied standard as well as the B4 zone under the Central River City SEPP.

3.2 CLAUSE 20 FLOOR SPACE RATIO OBJECTIVES UNDER THE CENTRAL RIVER CITY SEPP

Clause 20 of the Central River City SEPP identifies the following objectives relating to floor space ratio:

- (a) to define floor space ratio,
- (b) to set out rules for the calculation of the site area of development for the purpose of applying permitted floor space ratios.

Pursuant to Clause 22, the proposal seeks exception to the maximum floor space ratio under the Central River City SEPP.

3.3 PROPOSED VARIATION TO DEVELOPMENT STANDARDS

The DA seeks approval for the alterations and additions to the existing building for the removal of an intertenancy staircase at 5 Murray Rose Avenue, Sydney Olympic Park. The Subject Site is subject to a maximum floor space ratio of 3:1. The development proposes a maximum floor space ratio of **3.22:1**. The proposal would **exceed the floor space ratio applicable to the Subject Site by a maximum of 0.22:1, which represents a 7.3% variation**. The area of non-compliance is limited to those areas where the redundant intertenancy stairs are contained between Levels 01 and Level 04. The proposed additional GFA is limited to 98m² which in itself represents a 0.8% variation to the maximum permitted floor space.

In its existing state, the development on the Subject Site comprises a FSR of 3.20:1 which exceeds the maximum floor space ratio. Notwithstanding the above, curtailing the floor space ratio of the proposal to the current approved floor space ratio would prevent the proposal from maximising operational efficiencies, thus prevent the Subject Site from achieving its development potential.

The development in its proposed built form and scale will provide additional employment generating floor space which maximises the operational efficiencies of the existing development. The proposed non-compliance will not have an adverse impact on the area and seeks only to accommodate additional internal GFA in place of redundant staircases.

In its existing state, the development on the Subject Site comprises a FSR of 3.20:1 which exceeds the maximum floor space ratio. Notwithstanding the above, curtailing the floor space ratio of the proposal to the current approved floor space ratio would prevent the proposal from maximising operational efficiencies, thus preventing the Subject Site from achieving its development potential.

In its current form, the proposal therefore represents the most efficient use of the Subject Site which responds to the existing site conditions, compared to a development which is entirely compliant with the



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maximum floor space ratio. The Subject Site is zoned B4 under the provisions of the Central City River SEPP, whereby commercial office buildings are permissible with consent.

This Variation Request has been prepared in accordance with the objectives of Clause 20 and the B4 zone objectives of the Central River City SEPP.



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PART D PROPOSED VARIATION TO STANDARDS IN CLAUSE 19 OF THE CENTRAL RIVER CITY SEPP

Pursuant to Clause 22 of the Central River City SEPP, exception is sought from the floor space ratio standard applicable to the Subject Site pursuant to Clause 19 of the Central River City SEPP.

4.1 OBJECTIVES OF THE STANDARD

A key determinant of the appropriateness of a Clause 20 Variation to a development standard is the proposal's compliance with the underlying objectives and purpose of that development standard.

Pursuant to Clause 22 of the Central River City SEPP, the proposal seeks exception to the floor space ratio pursuant to Clause 19 of the Central River City SEPP.

Clause 20 of the Central River City SEPP sets out specific objectives. Those objectives under the Central River City SEPP are responded to in **Table 2** below:

TABLE 2: CONSISTENCY WITH THE CLAUSE 20 OBJECTIVES	
Objective	Response
(a) to define floor space ratio,	Noted.
(b) to set out rules for the calculation of the site area of development for the purpose of applying permitted floor space ratios.	The calculation of the floor space ratio and site area has been carried out in accordance with the relevant requirements of the Central River City SEPP.

4.2 OBJECTIVES OF THE ZONE

The Subject Site is zoned B4 Mixed Use pursuant to the Central River City SEPP. Therefore, consideration has been given to the B4 zone objectives in **Table 3** below:

TABLE 3: CONSISTENCY WITH THE B4 ZONE OBJECTIVES	
Objective	Response
(a) to protect and promote the major events capability of the Sydney Olympic Park site and to ensure that it becomes a premium destination for major events,	The proposed development relates to internal works only and would not impact the major events capability of the Sydney Olympic Park site.
(b) to integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling,	The proposed development seeks to enhance the existing office development by providing additional employment generating floor space in an accessible location which will assist in maximising public transport patronage, walking and cycling.
(c) to ensure that the Sydney Olympic Park site becomes an active and vibrant town centre within metropolitan Sydney,	The proposed development seeks to enhance the existing office development by providing additional employment generating floor space which will



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	assist in ensuring the Sydney Olympic Park becomes an active and vibrant town centre
(d) to provide for a mixture of compatible land uses,	The proposed development will not alter the existing land use.
(e) to encourage diverse employment opportunities,	The proposed development will generate additional employment opportunities through the provision of additional employment generating floor space.
(f) to promote ecologically sustainable development and minimise any adverse effect of land uses on the environment,	The proposed development relates to internal alterations which would not impact on the environment.
(g) to encourage the provision and maintenance of affordable housing.	The proposed development does not involve affordable housing.

4.3 ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY

Subclause 4.6(3)(a) and the judgement in *Four2Five Pty Ltd v Ashfield Council* (refer to **Section 2.1**) emphasise the need for the proponent to demonstrate how the relevant development standard is unreasonable or unnecessary in the circumstances.

In view of the particular circumstances of this case, strict compliance with Clause 19 of the Central River City SEPP is considered to be both unnecessary and unreasonable. Should strict compliance with the development standard be enforced, the proposed development would not be viable, resulting in a less efficient development with reduced opportunities for employment generation. This would, in circumstances where the variation does not generate any adverse impacts, be unreasonable.

Strict compliance with the standard is unnecessary as a result of the variation to the floor space ratio standard not generating any adverse impacts and facilitating a more efficient employment generating land use.

In accordance with the Court's findings in *Wehbe v Pittwater Council* [2007] NSWLEC 827 the most commonly invoked way to establish that compliance with the development standard is unreasonable or unnecessary is because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

We have set out above a detailed assessment against the objectives of the development standard and also accordingly, adopted test 1 in *Wehbe* to establish that compliance is unreasonable or unnecessary because the objectives of the floor space ratio controls are satisfied notwithstanding the variation.

The proposal does not conflict with the intent of the development standard and zone as demonstrated above, notwithstanding the proposed numeric variation. The proposed variation will retain compatibility with surrounding development, will enhance employment generating land and continue to support the commercial land uses in the locality, consistent with the objectives of the B4 zone.

The abovementioned justifications are considered valid, and in this instance the proposed Clause 22 Variation is considered to be acceptable. The proposed development represents a more efficient use of the Subject Site. The objectives of the relevant clause and B4 zone would be upheld as a result of the proposed



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development. In light of the above, the application of the floor space ratio development standard is therefore unreasonable and unnecessary in response to the proposed development.

4.4 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

There are a number of environmental planning grounds that justify the additional floor space ratio in this particular circumstance.

In addition to compliance with the objectives of the zone and development standard; environmental planning grounds include the provision of equitable access and services within sensitively located areas of the built form, the provision of a high quality and consistent streetscape which responds to the public domain levels and makes a positive contribution to the streetscape of the locality, the orderly and economic development of the land being facilitated through a high quality design which responds to the site-specific controls and the provision of a building form and design which promotes the high quality outcomes sought by the suite of site-specific planning controls.

The Variation Request is considered well founded because, notwithstanding the proposed non-compliance with the maximum floor space ratio:

- The variation to the floor space ratio control facilitates the removal of redundant staircases which minimise operational efficiencies and restrict employment generating floor space;
- The minor variation, being internal works only, will not result in any impacts to the surrounding area;
- The variation to the floor space control facilitates the orderly and economic use of land by permitting a design and built form which responds to, and is consistent with, the controls for the Subject Site. Strict compliance would require a design which was not orderly or economic if it was enforced. The Chief judge held in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at para 23 that environmental planning grounds are matters which go to and further the objectives of the EPA Act, one of which is the orderly and economic development of land, as outlined above;
- Should compliance with the development standard be enforced, the effective operation of the office building and efficiency of the Subject Site in providing employment generation would be significantly reduced;
- The proposal is consistent with the desired future character of the Subject Site within the area and complies with the relevant built form controls; and
- The proposal has been designed to be sympathetic and respectful to the existing surrounding amenity.

For the reasons outlined above, it is considered that the proposed variation to the maximum floor space ratio under Clause 22 is appropriate and can be clearly justified having regard to the matters listed within Clause 22(4)(b) under the Central City River SEPP.



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4.5 OBJECTIVES OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

All planning determinations made under the EP&A Act are required to be made with regard to the objects of the Act in accordance with section 1.3 of the EP&A Act. **Table 4** below assesses the proposed development against the objects of the EP&A Act.

TABLE 4: EP&A ACT OBJECTIVES	
Objective	Response
<i>(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,</i>	The proposed development will positively contribute to the existing office land use on the Subject Site within the City of Paramatta LGA. The proposal can furthermore be progressed without any significant environmental impacts.
<i>(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,</i>	The proposed development will not alter the existing ecologically sustainable measures and has adequately considered environmental impacts on the surrounding locality.
<i>(c) to promote the orderly and economic use and development of land,</i>	The variation to the floor space control facilitates the orderly and economic use of land by permitting additional employment generating floor space, and is consistent with, the controls for the Subject Site. Strict compliance would require a design which was not orderly or economic if it was enforced.
<i>(d) to promote the delivery and maintenance of affordable housing,</i>	The proposed development does not involve affordable housing.
<i>(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,</i>	The proposed development has been sited so as to result in minimal impacts on the surrounding environment.
<i>(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),</i>	The Subject Site does not contain nor is it in close proximity to a heritage item or located within a heritage conservation area.
<i>(g) to promote good design and amenity of the built environment,</i>	The proposed development relates to internal works only which will not alter the design or amenity of the built environment.
<i>(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,</i>	The proposal can be constructed and maintained without health and safety risks to future tenants.
<i>(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,</i>	The application is submitted to the City of Paramatta.



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TABLE 4: EP&A ACT OBJECTIVES

Objective	Response
(j) to provide increased opportunity for community participation in environmental planning and assessment.	The DA will be subject to the relevant public notification requirements.

4.6 MATTERS OF STATE AND REGIONAL SIGNIFICANCE

The proposed non-compliance with Clause 19 of the Central River City SEPP will not give rise to any matters of significance for State or regional environmental planning. They will also not conflict with any State Environmental Planning Policy or Ministerial Directives under Section 9.1 of the EP&A Act.

Planning Circular PS 08-014, issued by the former NSW Department of Planning, requires that all development applications including a variation to a standard of more than 10% be considered by full Council rather than under delegation. It is noted that this variation does not exceed 10% and would be required to be determined by the Council.

4.7 PUBLIC BENEFIT IN MAINTAINING THE STANDARD

Strict compliance with Clause 19 of the Central River City SEPP will result in:

- A less efficient employment generating land use to respond to the economic needs of the Paramatta LGA; and
- Preventing the Subject Site being developed to its full potential.

Further to the above, in the event the development standards were maintained, the resulting benefits to the adjoining properties and wider public would be nil.

As such, there is no genuine or identifiable public benefit to be achieved in maintaining the maximum floor space ratio for the Subject Site.

4.8 SUMMARY

For the reasons outlined above, it is considered that the variation to Clause 19 of the Central River City SEPP is well-founded in this instance and is appropriate in the circumstances. Furthermore, the Variation Request is considered to be well-founded for the following reasons as outlined in Clause 22 of the Central River City SEPP, *Four2Five Pty Ltd v Ashfield Council* and *Wehbe v Pittwater Council*:

- Compliance with the development standard is unreasonable and unnecessary in the circumstances (refer to **Section 4.3** as part of the First Limb satisfied);
- There are sufficient environmental planning grounds to justify contravening the development standard (refer to **Section 4.4** as part of the First Limb satisfied);
- The development is in the public interest (refer to **Section 4.6** as part of the Second Limb satisfied);
- The development is consistent with the objectives of the particular standard (refer to **Section 4.1**



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as part of the Second Limb satisfied);

- The development is consistent with the objectives for development within the zone and long term strategic intentions to maintain and preserve employment land (refer to **Section 4.2** as part of the Second Limb satisfied);
- The development does not give rise to any matter of significance for the State or regional environmental planning and is consistent with the visions and objectives of the relevant strategic plans (refer to **Section 4.7** as part of the Third Limb satisfied);
- The public benefit in maintaining strict compliance with the development standard would be negligible (refer to **Section 4.8** as part of the Third Limb satisfied); and
- The objectives of the standard are achieved notwithstanding the non-compliance with the standard.

Overall, it is considered that the proposed variation to the maximum floor space ratio control is entirely appropriate and can be clearly justified having regard to the matters listed within Clause 22 of the Central River City SEPP.



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PART E CONCLUSION

For the reasons outlined above, it is requested that Council support the Variation Request, which seeks approval for non-compliance with Clause 19 of the Central River City SEPP for the following reasons:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- There are sufficient environmental planning grounds to justify contravening the development standards;
- The proposal will capitalise on the Subject Site's full planning potential;
- The proposal satisfies the objectives of the B4 zone and Clause 20 of the Central River City SEPP;
- No unreasonable environmental impacts are introduced as a result of the proposed development; and
- There is no public benefit in maintaining strict compliance with the standards.

Given the justification provided above, the Variation Request is well founded and should be favourably considered by Council.

