



# Clause 4.6 Variation Request Height of Building

614-632 HIGH STREET  
PENRITH

JUNE 2022



## PREPERATION OF THIS REQUEST

This clause 4.6 request has been prepared by Think Planners on behalf of Urban Apartments Pty Ltd (the applicant).

## CONTINGENT NATURE OF THIS REQUEST

This is a 'contingent' clause 4.6 request. That is, the applicant does not consider that this request is legally necessary.

We will explain why.

The applicable maximum height of building is 24m on Map Sheet 06 of the *Penrith Local Environmental Plan 2010 (the LEP)*. Relevantly, Clause 8.7 of the LEP applies to the proposed development, and the reasons why are set out in the letter from Mills Oakley that forms part of the amended application. Pursuant to clause 8.7(3) of the LEP the consent authority may consent to development on land that exceeds the maximum height shown on the applicable height of building map. Clause 8.7 does not apply a new or alternative height for the site, rather allows for the maximum height to be exceeded.

The proposed development is 146.4m in height.

When the development proposal is subject to Clause 8.7 of the LEP then there is no breach to the height of building control, as the clause permits the control to be breached without limitation.

However, if it is found that Clause 8.7 of the LEP does not apply to the proposal, then the height breach is 121m or 600%.

## ASSUMPTION THAT A CLAUSE 4.6 IS REQUIRED

The applicant has arranged for this clause 4.6 request to be prepared and submitted on the **assumption** that this clause 4.6 is required.

This clause 4.6 request can be relied upon by the Court if either:

- the Court does not accept the applicant's position that no clause 4.6 request is required; or
- the Court decides to uphold the clause 4.6 request and determines that it is therefore not necessary to rule on whether a clause 4.6 request is required.

This clause 4.6 addresses the proposed Height of Building on the assumption that the Clause 8.7(3) of the LEP does not apply because the proposed development does not include community infrastructure (despite the Mills Oakley letter that forms part of the amended application).

It is our view that Clause 8.7(3) applies to the proposal and that a Clause 4.6 is not necessary in the circumstances.

## INTRODUCTION

Clause 8.7 of the LEP stipulates that where a development proposal includes community infrastructure, that a consent authority may consent to development on land to which this clause applies that exceeds the maximum height shown for the land on the Height of Buildings Map.

The clause states (emphasis added) –

### **8.7 Community infrastructure on certain key sites**

- (1) *The objectives of this clause are—*
  - (a) *to allow higher density development on certain land in the City Centre where the development includes community infrastructure, and*
  - (b) *to ensure that the greater densities reflect the desired character of the localities in which they are allowed and minimise adverse impacts on those localities.*
- (2) *This clause applies to land identified as a key site on the Key Sites Map.*
- (3) *Despite clauses 4.3, 4.4 and 8.4 (5), the consent authority may consent to development on land to which this clause applies (including the erection of a new building or external alteration to an existing building) that exceeds the maximum height shown for the land on the Height of Buildings Map or the floor space ratio for the land shown on the Floor Space Ratio Map, or both, if the proposed development includes community infrastructure.*
- (4) *The consent authority must not consent to the erection of a building on land to which this clause applies if the floor space ratio for the building exceeds the following floor space ratio—*
  - (a) *in relation to development on land identified as “Key Site 1”, “Key Site 2”, “Key Site 8” or “Key Site 9”—5.5:1,*
  - (b) *in relation to development on land identified as “Key Site 3” or “Key Site 10”—6:1,*
  - (c) *in relation to development on land identified as “Key Site 4”, “Key Site 7” or “Key Site 11”—5:1,*
  - (d) *in relation to development on land identified as “Key Site 5”—2:1,*
  - (e) *in relation to development on land identified as “Key Site 6”—2.5:1,*
  - (f) *in relation to development on land identified as “Key Site 12”—6:1.*

- (5) *In deciding whether to grant development consent under this clause, the consent authority must have regard to the following—*
- (a) *the objectives of this clause,*
  - (b) *whether the development exhibits design excellence,*
  - (c) *the nature and value of the community infrastructure to the City Centre.*
- (6) *In this clause, **community infrastructure** means development for the purposes of recreation areas, recreation facilities (indoor), recreation facilities (outdoor), recreation facilities (major), public car parks or public roads.*

Some key elements of clause 8.7 are as follows:

- The trigger for the application of the clause is that:
  - the land the subject of a development application is an identified key site (clause 8.7(2)); and
  - the proposed development includes community infrastructure (as per clause 8.7(3) of the LEP).
- When it applies clause 8.7:
  - sets aside the maximum building height of 24 metres that would otherwise apply to the site under clause 4.3 'Height of buildings' under the LEP — meaning that there is no maximum building height; and
  - sets aside the maximum floor space ratio 3:1 that would otherwise apply to the site under clause 4.4 'Floor space ratio' under the LEP — replacing it with a maximum floor space ratio of 6:1; and
  - sets aside the 10 per cent additional maximum height or floor space ratio that might otherwise be available under clause 8.4 'Design excellence'.

The development proposal (as amended) seeks consent for the construction of a part 7 storey and part 45 storey mixed-use development including a 4 storey podium and basement parking.

The proposal includes community infrastructure in the form of a portion of public road, that has been identified by the Council as required for the precinct. (The letter from Mills Oakley explains this further. This letter forms part of this clause 4.6 request.)

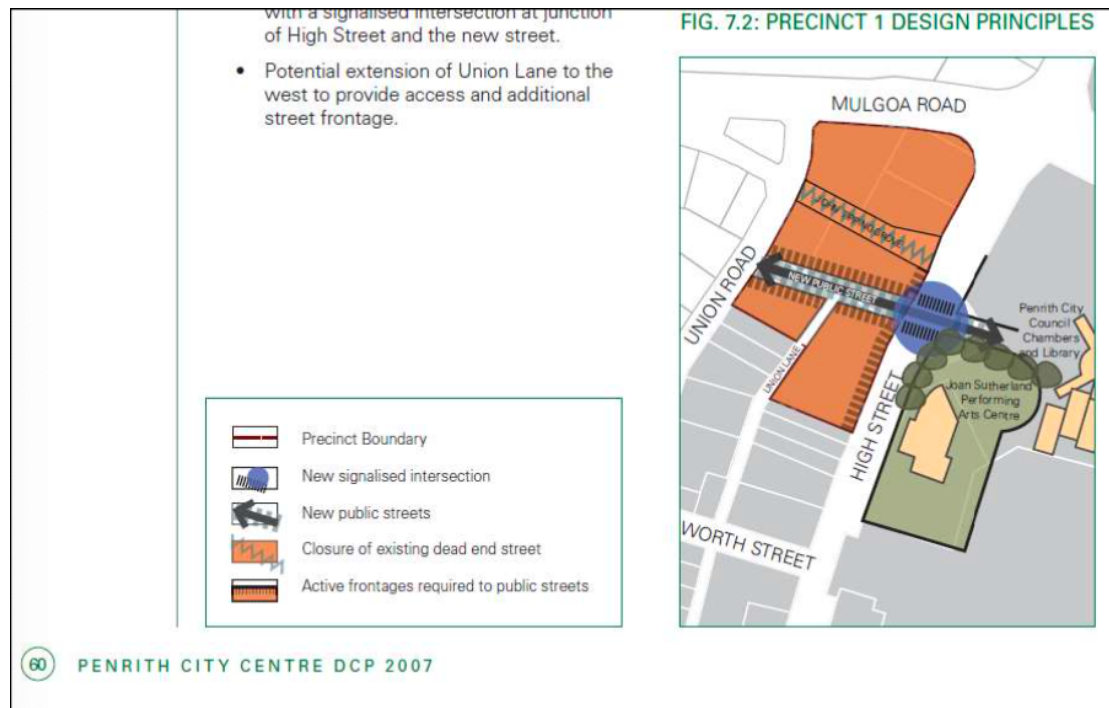
A restriction on the use of the land, registered on title, states –

*“No development or building shall be allowed or be permitted on the portion of Lot 10 shown as a new public street under Figure 7.2 of the Penrith City*



*Development Control Plan 2007 unless satisfactory arrangements have been made with Penrith City Council and the owners of the adjoining lots”.*

Figure 7.2 of the Penrith City DCP 2007 -



The variation request is made under clause 4.6 of the LEP.

Clause 8.7 is intended to ensure that Key Site development provides community infrastructure, and the DCP confirms what community infrastructure is required for Key Site 10. The planning provisions are interrelated. The planned intensity for the Key Site is 6:1 and it is also intended that a portion of the site be the site of community infrastructure. The planned density shares an implicit relationship with the anticipated height of building that would arise from such density.

The request deals with each relevant aspects of clause 4.6 below.

### THE PROPOSED HEIGHT OF BUILDING

The height of building proposed is 145m. The mapped height of building is 24m. The planned density for Key Site 10 is 6:1 and the nomination of the site is seen in the below extract by from the LEP's 'Key Sites Map – Sheet KYS\_006' below:



Clause 8.7 is triggered by 'community infrastructure' generally, rather than specific infrastructure that has an express link to the development potential of the site.

The purpose of the clause is to create an incentive for developers to provide public benefits that they would not be obliged to supply for the proposed development to have merit.

The objective set out in clause 8.7(1)(a-b) of the LEP is to allow higher density development and to:

*ensure that the greater densities reflect the desired character of the localities in which they are allowed and minimise adverse impacts on those localities.*

It may be inferred that the site and the locality is able to sustain — in terms of the contribution to desired character and the extent of adverse impacts — a height of building greater than 24m, irrespective of whether the community infrastructure within the strict meaning of clause 8.7 is provided.

### **RELEVANT CASE LAW**

There are a number of recent Land and Environment Court cases including *Four 2 Five v Ashfield* and *Micaul Holdings Pty Ltd v Randwick City Council* and *Moskovich v Waverley Council*, as well as *Zhang v Council of the City of Ryde*.

In addition, the judgment in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard.

A decision in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 has identified further consideration of this matter which requires that a consent authority must be satisfied that:

- The written request addresses the relevant matters at clause 4.6(3) and demonstrates that compliance is unreasonable or unnecessary and that there are sufficient environmental planning grounds; and
- The consent authority must consider that there are planning grounds to warrant the departure in their own mind and there is an obligation to give reasons in arriving at a decision.

The approach in *Al Maha* was reinforced by *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 where it was found that:

*... in order for a consent authority to be satisfied that an applicant's written request has "adequately addressed" the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3) (which is the process required by cl 4.6(3)), the request must in fact demonstrate the matters in subcl (3) (which is the outcome required by cl 4.6(3) and (4)(a)(i)).*

Finally the decision in *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 confirmed that the consent authority must be directly satisfied that the matters are adequately addressed in the written clause 4.6 variation request.

Therefore, these decisions are to be considered when evaluating the merit of the height of building departure as this is the context in which the consent authority must consider and evaluate and form a view on the content of the clause 4.6 variation request and the relevant matters for consideration under clause 4.6.

The key tests or requirements arising from the above judgments is that:

- The consent authority be personally satisfied the proposed development will be in the public interest because it is 'consistent with' the objectives of the development standard and zone is not a requirement to 'achieve' those objectives. It is a requirement that the development be 'compatible' with them or 'capable of existing together in harmony'. It means "something less onerous than 'achievement'".
- Establishing that 'compliance with the standard is unreasonable or unnecessary in the circumstances of the case' does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (*Wehbe* "test" 1). Other methods are available, for example that the relevant objectives of the standard would not be achieved or would be thwarted by a complying development (*Wehbe* "test" 3).
- Despite earlier case law (*Four 2 Five*) when pursuing a clause 4.6 variation request, it is not necessary to demonstrate how the proposal achieves a better outcome, or a neutral outcome, as compared to a complying scheme per *Initial Action*; and
- The proposal is required to be in 'the public interest'.



## CLAUSE 4.6 OF THE LEP

Clause 4.6 of the LEP provides that development consent may be granted for development even though the development would contravene a development standard.<sup>1</sup> That clause is in the following terms:

### 4.6 Exceptions to development standards

- (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.*

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<sup>1</sup> Clause 4.6(2)

- (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 RU3 Forestry or Zone RU6 Transition.*

- (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 6.1, 6.2, 6.6, 6.7, 6.16, 7.7, 7.17, 7.21, 8.4(5) or Part 9.*

Consequently, by this request, the applicant seeks to justify the contravention of the Standard by demonstrating (as clause 4.6(3) requires):

- “(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.”*

Further, the Consent authority must be satisfied (as clause 4.6(4) requires) that:

- “(i) (this 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 Secretary has been obtained.”*

## CLAUSE 4.6(3) COMPLIANCE UNREASONABLE OR UNNECESSARY

### Clause 4.6(3) - Objectives of the Standard

The standard being varied is the 24m maximum height of building set by clause 4.3 of the LEP.

In accordance with the provisions of this clause, it is considered that compliance with the development standard(s) is unreasonable or unnecessary in the circumstances of the case as the objectives of the control is achieved.

The objectives of the development standard established by clause 4.3 are as follows:

- (1) *The objectives of this clause are as follows—*
  - (a) *to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,*
  - (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,*
  - (c) *to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,*
  - (d) *to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.*

The objectives of the exceeding of the height of building development standard established by clause 8.7 are as follows:

### **8.7 Community infrastructure on certain key sites**

- (a) *to allow higher density development on certain land in the City Centre where the development includes community infrastructure, and*
- (b) *to ensure that the greater densities reflect the desired character of the localities in which they are allowed and minimise adverse impacts on those localities.*

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

This was recently re-affirmed by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [16]-[17]. Similarly, in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [34], the Chief Judge held that:

*establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary.*

This request addresses the first method outlined in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method alone is sufficient to satisfy the ‘unreasonable and unnecessary requirement’.

The request also addresses the third method, that the underlying objective or purpose of the development standard would be undermined, defeated or thwarted if compliance was required with the consequence that compliance is unreasonable (*Initial Action* at [19] and *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]). In this regard, this request submits that the objectives set out below would be undermined if the proposed contravention was not allowed:

- Clause 4.4(1)(d):

*To ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality*

- Clause 8.7(1)

(a) *to allow higher density development on certain land in the City Centre where the development includes community infrastructure, and*

(b) *to ensure that the greater densities reflect the desired character of the localities in which they are allowed and minimise adverse impacts on those localities.*

The development departs from the height of building control as a result of the (assumption that) community infrastructure that is proposed as part of the development is not community infrastructure within the meaning of clause 8.7 of the LEP.

Strict compliance with the applicable development standard is unnecessary in this case having regard to the objectives of clauses 4.4 and 8.7. In particular, clause 8.7 that expressly permits a consent authority to grant consent to development that exceeds the maximum height where community infrastructure (which is not necessarily development that relates to the carrying capacity of the subject development site) is included in the proposal.


Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case for the following reasons:

- The development has been designed to follow the setback controls applying to the key site and is designed to concentrate the building mass in a podium and single tower form intended to limit the footprint of the building on the site and express the GFA in a tall slender tower. As a nominated key site, the bulk and scale of the development is intentionally to be distinct to surrounding development, and the proposal meets the bulk and scale intended by the control.
- The density is consistent with the character sought for the locality and has been guided by a Design Integrity process that has included design experts' representation from Government Architect NSW; Penrith City Council; and the proponent. The proposal represents a high quality outcome that is confirmed through the design integrity process.
- The overall design scheme, bulk, scale and height of the development is compatible with the intended character sought through the key site provisions that increases the FSR for the site and removes the applicable height control.
- The built form, inclusive of departure from the height and noting the related FSR applicable to the site, is compatible with the desired role of the site within the Penrith CBD as a "key site".

The above comments apply to all the objectives of both clauses. Additionally, each of the objectives for those above clauses are further addressed in the table below.

Objectives	Comments (in addition to the comments made above)
to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality,	The LEP provides for the development of 6:1 on the site, land to the south of Lot 10 and a development site to the north-west of Lot 10 (Key Site 3) — as shown in the map extract below:



Objectives	Comments (in addition to the comments made above)
	 <p>The LEP assumes that these sites can be developed to an unlimited height, consistent with the desired character and the appropriate management of adverse impacts.</p> <p>Accordingly, a development proposing a height greater than 24m should be accepted as being compatible with the desired future character of the locality.</p> <p>The supporting DCP confirms that the City West Mixed Use Precinct (which the site is within) should be redeveloped primarily as a high density residential precinct. It is acknowledged that the precinct currently enjoys unobstructed views of the Blue Mountains escarpment and that redevelopment will result in loss of such views. This confirms that buildings of significant height and density are anticipated in the precinct.</p>
to minimise the adverse impact of development on heritage conservation areas and heritage items,	The site is not a heritage item nor within a heritage conservation area. Heritage items are very distant from the site as evidenced in the LEP map extract below.

Objectives	Comments (in addition to the comments made above)
	 <p>No impact arises from the development on heritage items or conservation areas.</p>
to regulate density of development and generation of vehicular and pedestrian traffic,	<p>The height of a building does not have a direct impact on the generation of vehicular and pedestrian traffic. However, as previously noted there is a relationship between FSR, site area and the height bulk and scale of a building.</p> <p>The LEP assumes a 6:1 FSR of the site that has a relationship with the density of the development and so the generation of vehicular and pedestrian traffic.</p>
to provide sufficient floor space for high quality development.	<p>As per above, the LEP plans for an intensity of a 6:1 building across the site.</p> <p>This indicates that there is a planning need for floor space at this volume.</p> <p>This also leads to the need to provide flexibility in the height of building on the site to accommodate the desired FSR.</p> <p>Relevantly the floor space is to be provided in a “high quality development”.</p> <p>The proposal for a tall slender tower has arisen through a design integrity process that has determined that a single tall tower on the site represents a high quality development, that is better than alternative built forms.</p>

Objectives	Comments (in addition to the comments made above)
<p>to allow higher density development on certain land in the City Centre where the development includes community infrastructure, and</p>	<p>The proposal includes community infrastructure in the plain English sense (even if it is assumed that it is not ‘community infrastructure’ under the terms of clause 8.7 of the LEP).</p> <p>The application includes a proposal to dedicate land for a road reserve. This proposal is set out in drawing DA416, titled ‘Draft plan of subdivision of Lot 10 DP1162271.’</p> <p>The proposed public domain works on the existing and intended public road reserve (as shown in public domain drawing C201) are also community infrastructure in a plain-English sense.</p> <p>The amended development application includes — in drawings DA201 and DA416 — a proposed recreation area which would be open to the public (under an easement in gross benefiting the Council). The recreation area would be a ‘garden’. It is community in a plain-English sense.</p> <p>The above works arise from Councils expressed desire to create a new public street between High Street and Union Lane that will:</p> <ul style="list-style-type: none"> <li>- Provide north-south connectivity;</li> <li>- Result in an active ‘eat street’;</li> <li>- Be proximate and contribute to the adjoining Civic and Cultural Precinct; and</li> <li>- Provide a new traffic route and connection from Union Road to High Street, with the intersection of the new road and High Street being signalised.</li> </ul> <p>The eastern through site link public garden / recreation space arose through the Design Integrity process with the Panel supporting a through site link with a laneway character. The</p>

Objectives	Comments (in addition to the comments made above)
	planning controls assist in the provision of the public benefit over the private land.
to ensure that the greater densities reflect the desired character of the localities in which they are allowed and minimise adverse impacts on those localities.	<p>The proposed development reflects the desired character for the site and locality.</p> <p>The design includes measures that minimise adverse impacts in the locality. In addition to the standard ADG commentary and meeting the DCP intentions such as an 'eat street', the proposal also includes design that minimises adverse impacts on the locality such as:</p> <ul style="list-style-type: none"> <li>- Introduction of a new through site pedestrian laneway that improves CBD pedestrian permeability and that is designed to provide casual recreation space and is ideal for the location of art that will benefit the community generally and not the occupants of the building only;</li> <li>- Intentional location of the lobby and café on the pedestrian laneway to activate the space and provide passive surveillance;</li> <li>- Sleeving and screening of the podium level parking areas to ensure that the key streets are activated above the ground level;</li> <li>- Adopting a podium and single elegant tower form that ensures that the shadowing arising from the site are from a tall north-south oriented tower that has a fast moving shadow through the day, rather than a wide and deep bulky form that would generate a broader shadow impacting areas for longer periods of the day'; and</li> <li>- Provision of substantial areas of landscaping across the site that will provide an aesthetic quality to the</li> </ul>

Objectives	Comments (in addition to the comments made above)
	building when viewed from public places and play a part in minimising the heat island effect prevalent in Western Sydney.

Clause 8.7 operates as an exception to both clauses 4.3 and 4.4 of the LEP. It does this by providing for greater height limits and floor space limits in a particular circumstance (cf *GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216 at [27]).

The ability to exceed the maximum height of building control provision set out in clause 8.7 contains distinct requirements to be fulfilled in order to trigger the benefits of that clause (cf *GM Architects* at [27]). This requirement is that the proposed development includes community infrastructure (as per clause 8.7(3) of the LEP).

One of these requirements is that the building/structure height of the development must not exceed the maximums set out in the ‘Incentive Height of Buildings Map’ (discussed above).

If this requirement is fulfilled the limitations generally applicable under clause 4.3 are able to be overridden under clause 8.7 (cf *GM Architects* at [27]).

In *GM Architects*, the Land and Environment Court considered a similar set of provisions.

In *GM Architects*, the proposed development did not meet the requirements to access the additional height/floor space under the clauses that were similar to clause 8.7 (at [53] and [63]). This meant that the incentive provisions did not apply.

The Court considered that, nonetheless, development consent could be granted varying clause 4.3 and clause 4.4 of the LEP under clause 4.6. The consequence was that additional height/floor space — that would have been available if the ‘incentive’ provision had applied — was able to be accessed (at [63]-[64], [71]-[72], [77], [79], [82]-[83], [85], [87]-[88], [102]-[103]).

Critically, the Court concluded (at [82]) that:

*the approval of ... [the proposed additional] FSR ... and the proposed [h]eight provides a better planning outcome as it allows the subject lot to achieve the*



*planned residential density for the locality without generating an adverse impact (bold added).*

It also said [at [87]]:

*If I determine that the [clause 4.6 requests] ... are well founded under clause 4.6 and this leads to development consent being granted, then in my opinion that would be a better outcome than restricting development to the base development standards under clauses 4.3 and 4.4 in all the circumstances (bold added)...*

The Court did so determine (at [79] and [102]-[103]). That is, the clause 4.6 requests were upheld, varying clauses 4.3 and 4.4, on the basis that a better outcome would be achieved than by restricting the development to the 'base' height/floor space. This was done, despite the fact that the application:

- sought significant additional height and floor space provided for in separate incentive clauses; and
- did not comply with the requirements set out under the separate incentive clauses.

As a result, a height exceedance of 103 per cent was approved, along with a floor space ratio exceedance of 44.7 per cent.

## CLAUSE 4.6(3) ENVIRONMENTAL PLANNING GROUNDS

The Land and Environment Court judgment in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018 provides assistance in relation to the consideration of sufficient environmental planning grounds, whereby Preston J observed that:

*... in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and*

*... there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development*

If the contravention is not allowed, the **planned intensity** of the site that is anticipated by the LEP will not be achieved.

The failure to achieve the planned intensity for the site, without a strong reason, is suboptimal in the light of the relevant planning goals. These are set out below.

### *LEP's aims*

- Clause 1.2(b) 'to promote development that is consistent with the Council's vision for Penrith ...'
- Clause 1.2(c) — 'to accommodate and support Penrith's future population growth by providing a diversity of housing types, in areas well located with regard to services, facilities and transport, that meet the current and emerging needs of Penrith's communities and safeguard residential amenity';
- Clause 1.2(d) — 'to foster viable employment, transport, education, agricultural production and future investment opportunities and recreational activities that are suitable for the needs and skills of residents, the workforce and visitors, allowing Penrith to fulfil its role as a regional city in the Sydney Metropolitan Region'.

### *The objects of the Environmental Planning and Assessment Act 1979*

- Section 1.3(a) — 'to promote the social and economic welfare of the community and a better environment by the proper management, development ... of the State's ... resources';

- Section 1.3(c) — ‘to promote the orderly and economic use and development of land’;
- Section 1.3(g) — ‘to promote good design and amenity of the built environment’

### *The B4 zone objectives*

- The second zone objective — ‘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.’;
- Section 1.3(c) — ‘to promote the orderly and economic use and development of land’;
- Section 1.3(g) — ‘to promote good design and amenity of the built environment’

The points already advanced earlier in this request are adopted to establish the ‘environmental planning grounds’ in the context of the above planning goals. Additionally, the following further facts are advanced to establish these grounds:

1. There is a planning desire to provide higher density development on a key site in the Penrith CBD. The departure from the height of building standard facilitates the delivery of mixed use development consistent with the objectives of the key sites provision of the LEP to facilitate higher density development on this site.
2. There is a planning desire to deliver community-orientated infrastructure associated with the development of key sites. The proposal balances the delivery of community-orientated infrastructure and a development proposal over the single parcel of land. The provision of a tall slender tower gives rise to the opportunity for parts of the ground floor level to be used for other purposes that benefit the community, such as dedication of land for the provision of a new road and introducing a new through site pedestrian link in the town centre.
3. Further, there is no material adverse environmental planning consequence that could be said to arise from the departure from the control.

The above commentary demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

The size of the variation is set out as follows:

- Height of Building on the LEP Sheet 006 – 24m
- Proposed height of building – 146.4m
- 610% departure

Clause 4.6 of the LEP is similar to the long-standing *State Environmental Planning Policy No 1 — Development Standards (SEPP 1)*.

From its earliest days it was established that SEPP 1 may be applied to vary development standards even when the variation could not be regarded as minor: *Michael Projects v Randwick Municipal Council* (1982) 46 LGRA 410, 415).

The Court of Appeal considered the issue in *Legal and General Life v North Sydney Municipal Council* (1990) 69 LGRA 201. In that matter North Sydney Council had approved a SEPP 1 objection and the decision was subject to third party legal challenge.

The applicable floor space ratio control was 3.5:1, but — as a consequence of upholding the SEPP 1 objection — the approved floor space ratio was 15:1 (a variation to floor space of 329 per cent). The applicable height control was five storeys whereas the approved height was 17 storeys (a variation of 240 per cent).

The Court approved the following statement by the then Chief Judge of the Land and Environment Court (in *Legal and General Life v North Sydney Council* (1989) 68 LGRA 192, 203):

*The discretion vested in councils under SEPP No 1 is wide and, subject to limitations found in the instrument itself and its relation to the Environmental Planning and Assessment Act 1979, is unconfined.*

The Court upheld the validity of the Council's decision.

Clause 4.6 of LEP is in similar terms to SEPP 1 in this respect. Relevantly, like SEPP 1, there are no provisions that make necessary for a consent authority to decide whether the variation is minor. This makes the Court of Appeal's decision in *Legal and General Life* equally applicable to clause 4.6. There is no constraint on the degree to which a consent authority may depart from a numerical standard under clause 4.6 (*GM Architects* at [85]).

It is not necessary to consider case studies in order to address the above issue, as each case ultimately turns on its own facts. However, decisions of the Land and Environment Court are informative, as they demonstrate how the flexibility offered by

clause 4.6 works in practice. Some examples are as follows:

- In *GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216, a height exceedance of 103 per cent was approved, along with a floor space ratio exceedance of 44.7 per cent.
- In *Baker Kavanagh Architects v Sydney City Council* [2014] NSWLEC 1003, the Land and Environment Court granted a development consent for a three-storey shop top housing development in Woolloomooloo. In this decision, the Court approved a floor space ratio variation of 187 per cent.
- In *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582, the Court granted a development consent for a residential flat building. In this decision, the Court approved a floor space ratio variation of 85 per cent (from 0.65:1 to 1.21:1).
- In *Abrams v Council of the City of Sydney* [2019] NSWLEC 1583, the Court granted development consent for a four-storey mixed use development containing 11 residential apartments and a ground floor commercial tenancy with a floor space ratio exceedance of 75 per cent (2.63:1 compared to the permitted 1.5:1).
- In *Moskovich v Waverley Council* [2016] NSWLEC 1015, the Land and Environment Court approved a residential flat building in Bondi with a floor space ratio of 1.5:1. The development standard was 0.9:1. The exceedance was around 65 per cent.
- In *Edmondson Grange Pty Ltd v Liverpool City Council* [2020] NSWLEC 1594, the Court granted a development consent for three residential flat buildings. In this decision, the Court approved a floor space ratio variation of 59 per cent (from 0.75:1 to 1.19:1).
- In *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386, the Land and Environment Court approved a residential flat building in Randwick with a 55 per cent exceedance of the height limit (at its highest point) and a 20 per cent exceedance of the floor space ratio control.
- In *Landco (NSW) Pty Ltd v Camden Council* [2018] NSWLEC 1252, the Land and Environment Court granted development consent for a land subdivision with clause 4.6 variations of between 47-51 per cent on the minimum 450m<sup>2</sup> lot size (allowing lots sizes ranging from 220 to 240m<sup>2</sup>).
- In *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112, the Court granted development consent to a six-storey shop top housing development



with a floor space ratio exceedance of 42 per cent (3.54:1 compared to the permitted 2.5:1).

- In *Artazan Property Group Pty Ltd v Inner West Council* [2019] NSWLEC 1555, the Court granted development consent for a three-storey building containing a hardware and building supplies use with a floor space ratio exceedance of 27 per cent (1.27:1 compared to the permitted 1.0:1).
- In *Season Group Pty Ltd v Council of the City of Sydney* [2016] NSWLEC 1354, the Land and Environment Court granted development consent for a mixed use development on the basis of a clause 4.6 request that sought a 21 per cent height exceedance over a 18-metre building height standard.

#### **CLAUSE 4.6(4) CONSISTENCY WITH OBJECTIVES OF THE STANDARD AND THE ZONE & THE PUBLIC INTEREST**

As clause 4.6(4)(a)(i) of the LEP requires, the Consent Authority must also be satisfied that proposed development will be in the public interest because it is consistent with:

1. the objectives of the particular standard and
2. the objectives for development within the zone in which the development is proposed to be carried out.

The Applicant has already addressed the objectives of the development standard in the context of cl 4.3 in demonstrating that compliance is unnecessary or unreasonable. The development, with its proposed contravention, is consistent with the development standard objectives.

The objectives of the B4 Mixed Use Zone are as follows:

##### **1 Objectives of zone**

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*
- *To minimise conflict between land uses within the zone and land uses within adjoining zones.*
- *To create opportunities to improve public amenity.*
- *To provide a wide range of retail, business, office, residential, community and other suitable land uses.*

The proposal is consistent with the objective of the zone because:

- The development directly satisfies the first, second and fifth objectives of the zone as it provides a variety of land uses on the site including commercial and residential, along with public benefits such as land dedication for road and a new CBD through site link. Relevantly, the site is in an accessible location that is within walking distance of public transport and is also proximate to the civic and entertainment and shopping precincts of the CBD. The proposal includes bicycle facilities. The proposal includes employment opportunities.
- The development satisfies the third objective of the zone as the proposal has been designed following a design excellence process that has led to the recommendation of a single tower that provides generous setbacks to neighbours, delivers community infrastructure, activates the street, provides generous landscaped areas, ensures that privacy is managed, and results in a tall slender tower that has a reduced overshadowing impact by virtue of a narrow and fast moving shadow. Accordingly, the design minimises conflicts between land uses in the zone and adjoining zones.
- The development satisfies the fourth objective through the provision of community infrastructure, landscaping of the public domain, the provision of a new through site link within the CBD and activates the streets that surround the development.

## CLAUSE 4.6(5) CONCURRENCE OF THE SECRETARY

The Secretary (of Department of Planning and Environment) can be assumed to have concurred to the variation. This is because of Department of Planning Circular PS 20–003 ‘Variations to development standards’, dated 5 May 2020. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2000*.

A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

In addition:

- a) **Clause 4.6(5)(a)** – The contravention of the maximum floor space control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal and unique site attributes associated with the subject site; and
- b) **Clause 4.6(5)(b)** – There is no public benefit in maintaining the development standard as it relates to the current proposal as the proposal is consistent with the underlying objectives of the control and the fact that the non-compliance does not lead to excessive bulk and scale and it will not set an undesirable precedent for future development within the locality.
- c) **Clause 4.6(5)(c)** – There are no known additional matters that need to be considered within the assessment of the clause 4.6 variation request prior to granting the concurrence, should it be required.

Strict compliance with the prescriptive height of building requirements is unreasonable and unnecessary in the context of the proposal and its particular circumstances.

The proposed development meets the underlying intent of the control and is a form of development that does not result in unreasonable environmental amenity impacts.

The proposal will not have any adverse effect on the surrounding locality and is consistent with the future characterised envisioned for the key site and its role in the locality.

## CONCLUSION

In summary:

- The intent of the Height of Building control is satisfied because the departure from the strict terms of the standard facilitates the delivery of a mixed-use podium and tower development including commercial/retail and residential uses consistent with the objectives of the key site provisions to facilitate higher density development.
- The proposal results in a better planning outcome and is in the public interest as it will result in a variety of uses including commercial/retail and residential uses.
- The proposed development achieves the objectives of the B4 zone. Strict compliance with the development standard would undermine the achievement of underlying objectives of the FSR control and the zone objectives.
- The matters canvassed in this request have adequately addressed the requirements of clause 4.6(3) of the LEP.
- Overall, it is considered that the proposed variation to the height of building development standard is deemed to be appropriate and well founded and should be supported under the provisions of clause 4.6 of the LEP.

For the reasons outlined above, the clause 4.6 request is well founded. In the circumstances of the case, flexibility in the application of the FSR development standard should be applied.