Clause 4.6 Variation Request
Floor Space Ratio

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).

CONTIGENT 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.

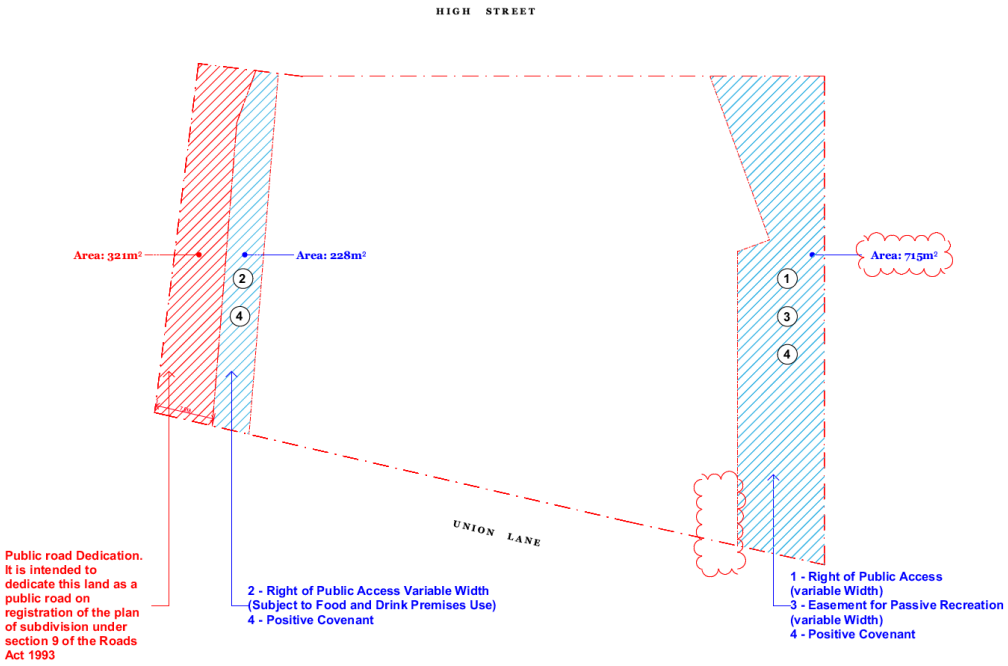
We will explain why.

The applicable maximum floor space ratio is 6:1 under clause 8.7(4)(b) of the *Penrith Local Environmental Plan 2010* (**the LEP**). The reasons why clause 8.7(4)(b) applies to the proposed development are set out in the letter from Mills Oakley that forms part of the amended application.

The proposed development is 5.96:1 when Lot 10 is the site area.

When the site area under clause 4.5 of the LEP is taken to be current existing 4,715m^2 registered allotment, Lot 10 DP 1162271 (**Lot 10**) — the proposed development complies with the applicable maximum floor space ratio.

However, the development application is also for the subdivision of land. Drawing DA416 is a draft plan of subdivision — an extract of which appears below:



This proposed subdivision creates, on registration, a 321m^2 public road reserve on the western portion of the site, as shown above and a separate 4,394m^2 allotment.

If the site area is taken to be the separate future 4,394m^2 allotment (which will be created as part of the subdivision proposed as part of the development application then the proposed development will contravene the applicable maximum floor space ratio.

There are two decisions by commissioners of the Land and Environment Court that suggest that where the subdivision of land is proposed as part of the application — and that subdivision is integral to the application — the lots to be created by the subdivision should be regarded as lots for the purpose of clause 4.5(3) of a standard-instrument compliant local environmental plan.

The first decision is *Lam v Inner West Council* [2017] NSWLEC 1332. This case concerned the erection of two semi-detached dwellings and the approval of an associated subdivision. In this decision it was not necessarily for any firm ruling to be made. However, the Commissioner said at [66] that it appeared 'logical' that the floor space ratio should be calculated with reference to the post development building form **and subdivision**.

The second decision is *Marrickville Development No.3 Pty Ltd v Inner West Council* [2019] NSWLEC 1132. This decision also concerned the erection of two semi-detached dwellings and the approval of an associated subdivision. In this decision

the Commissioner accepted (at [29]-[31]) that the development should be regarded as being carried out on two or more lots.

The applicant does not consider that *Lam* is a precedent — as the Commissioner considered that it was not necessary for the issue to be resolved. The applicant does not consider *Marrickville Development* to be correct.

Nonetheless, for the purposes of this clause 4.6 request, these two cases are **assumed** to be a correct indication of the law. The balance of this request is prepared on that basis.

In determining the site area, proposed gross floor area and the FSR achieved by the proposal, there are three matters that must be considered:

- What lots comprise the 'site area' under clause 4.5 of the LEP?
- Is any part of the site community land or a public place under clause 4.5(4) of the LEP?
- Is any part of the site excluded for lack of 'significant development' under clause 4.5(6) of the LEP?

LOTS WHICH COMPRISE THE 'SITE AREA' UNDER CLAUSE 4.5(3) OF THE LEP

Clause 4.5(3) of the LEP is as follows:

> ***Site area*** *In determining the site area of proposed development for the purpose of applying a floor space ratio, the site area is taken to be—*
>
> *(a) if the proposed development is to be carried out on only one lot, the area of that lot, or*
>
> *(b) if the proposed development is to be carried out on 2 or more lots, the area of any lot on which the development is proposed to be carried out that has at least one common boundary with another lot on which the development is being carried out.*
>
> *In addition, subclauses (4)–(7) apply to the calculation of site area for the purposes of applying a floor space ratio to proposed development.*

The definition of 'site area' in clause 4.5(3) of the LEP has two parts to it.

Firstly, if the proposed development is to be carried out on only one 'lot', the area of that 'lot' is the site area.

Alternatively, if the proposed development is to be carried out on two or more lots, the 'site area' is the area of any lot on which the development is proposed to be carried out that has at least one common boundary with another lot (on which the development is being carried out).

Lot 10 in DP 1162271 is a single registered lot.

As discussed earlier, this request is prepared on the assumption that where the subdivision of land is proposed as part of the application — and that subdivision is integral to the application — the lots to be created by the subdivision should be regarded as lots for the purpose of clause 4.5(3) (*Lam v Inner West Council* [2017] NSWLEC 1332 at [66] and *Marrickville Development No.3 Pty Ltd v Inner West Council* [2019] NSWLEC 1132 at [29]-[31]). This is consistent with the approach taken in relation to the similar word 'allotment' in earlier provisions of environmental planning instruments (*Demihale Pty Ltd v Ku-ring-gai Municipal Council* [2002] NSWLEC 178 at [18]; cf *Issa v Burwood Council* (2005) 137 LGERA 221).

The word 'lot' is defined in the *Macquarie Dictionary* to mean:

> *a distinct portion or piece of land; plot*

The two parcels of land proposed to be created by the registration of the plan of subdivision (the 321m^2 public road reserve and the 4,394m^2 residue lot) should be regarded as 'lots' within the meaning of clause 4.5(3) of the LEP as they will be the product of the subdivision that form part of the proposed development.

The two lots **do** have a common boundary.

The proposed development **will** be carried out on both lots. This is shown in the 'Ground Level' landscape plan (L-DA-11). An extract from this plan appears below:

Additionally, 'development' is defined to include the 'subdivision of land' (section 1.5(a) of the *Environmental Planning and Assessment Act 1979).* This means that, in addition to the landscape works shown above, the development will be carried out on both lots by reason of the subdivision itself (which will create both the lots).

Accordingly — **subject to the exclusions in subclauses 4.5(4)–(7)** — the site area comprises both the parcels of land to be created by the subdivision of Lot 10 and will be 4,715m^2.

COMMUNITY OR PUBLIC LAND UNDER CLAUSE 4.5(4) OF THE LEP

Clause 4.5(4) of the LEP is as follows:

> *(4)* ***Exclusions from site area*** *The following land must be excluded from the site area—*
> *(a) land on which the proposed development is prohibited, whether under this Plan or any other law,*
> *(b) community land or a public place (except as provided by subclause (7)).*

Community land and public land is to be excluded from the site area under clause 4.5(b).

'Community land' is defined in the LEP's dictionary by reference to the *Local Government Act 1993* (**LG Act**). Similarly, a 'public place' is defined under clause 4.5(11) also by reference to the **LG Act**.

Accordingly, each of these phrases mean (as per the dictionary in the LG Act) the following:

> ***community land*** *means land that is classified as community land under Division 1 of Part 2 of Chapter 6 of the LG Act.*
>
> ***public place*** *means:*
>
> *a public reserve, public bathing reserve, public baths or public swimming pool, or*
>
> *a public road, public bridge, public wharf or public road-ferry, or*
>
> *a Crown reserve comprising land reserved for future public requirements, or*
>
> *public land or Crown land that is not:*
> *(i) a Crown reserve (other than a Crown reserve that is a public place because of paragraph (a), (b) or (c)), or*
> *(ii) a common, or*
> *(iii) land subject to the Trustees of Schools of Arts Enabling Act 1902, or*
> *(iv) land that has been sold or leased or lawfully contracted to be sold or leased, or*
>
> *land that is declared by the regulations to be a public place for the purposes of this definition.*

The exclusion in clause 4.5(4)(b) of the LEP in relation to community land and public places only applies to land that has that status at the time that a development application is determined.

No part of the site is currently:

- classified as community land under the LG Act;
- a public reserve, public bathing reserve, public baths or public swimming pool;
- a public road, public bridge, public wharf or public road-ferry;
- a Crown reserve comprising land reserved for future public requirements;
- Crown land; or

- vested in or under the control of the Council.

Accordingly, no part of the site is 'community land' or a 'public place' as defined under the LG Act, and therefore no part of the site is excluded from the 'site area' under clause 4.5(4)(b) of the LEP.

'SIGNIFICANT DEVELOPMENT' UNDER CLAUSE 4.5(6)

The proposal has more than one component. For example, it includes the construction of the pedestrianised public road within the land proposed to be subdivided, as well as the construction of a mixed-use development including residential apartments, serviced apartments, commercial/retail suites, car parking and associated landscaping works.

However, this does not prevent the components from being included in a single development application (*TK Commercial Property Holdings Pty Ltd v Canterbury-Bankstown Council* [2017] NSWLEC 144 at [83]).

Different components are still regarded as being part of the same proposed development for the purposes of calculating FSR (*TK Commercial Property Holdings* at [96]).

In *TK Commercial Property Holdings,* the Land and Environment Court said that some specific:

- excavation;
- the construction of a masonry stairway;
- the creation of new pathways and ramps; and
- the construction of a new sewer main and new drainage infrastructure,

were sufficient to constitute 'significant development' and therefore justify the inclusion of the lot in the site area for the purposes of calculating floor space ratio (at [96]).

In *XLJ Investment Group Pty Ltd v Ku-ring-gai Council* [2020] NSWLEC 1607, the Land and Environment Court found (at [45]) that:

- a proposed use of a lot for passive recreation was **not** significant development; and

- a proposed use of a lot for the sole vehicular access to the neighbouring residential flat building **was** significant development.

The proposal to subdivide Lot 10 to create the parcel of road land is development and is significant.

Additionally, the proposed construction of the pedestrian lane within the future parcel of road land is significant.

Accordingly, no part of Lot 10 is excluded from the 'site area' under clause 4.56(6) of the LEP.

SUMMARY ON SITE AREA UNDER CLAUSE 4.5

In short, the applicant considers that there is no need for a clause 4.6 request to vary the floor space ratio control as:

- all of Lot 10 is the 'site area' under clause 4.5; and

- as a result, the proposed floor space ratio is compliant with the 6:1 maximum floor space ratio set by clause 8.7(4)(b) of the LEP.

ASSUMPTION THAT A CLAUSE 4.6 IS REQUIRED

Nonetheless, 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.

In *Gan v City of Sydney Council* [2021] NSWLEC 1370, the Court said that where there is a dispute between the parties with respect to the extent of the exceedance of the FSR development standard, there is no reason as to why a single written request cannot deal with the various alternatives.

This clause 4.6 addresses the proposed FSR on the assumption that the correct calculation of FSR is any one of the following alternatives:

- **Scenario 1**: No community infrastructure, site area is the new residual lot

    - Clause 8.7(4)(b) 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); and

    - the site area for the land to be occupied by the new building is the 4,394m^2 residual allotment to be created by the proposed subdivision.

- **Scenario 2**: No community infrastructure, site area is the existing lot

    - Clause 8.7(4)(b) 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); and

    - the site area for the land to be occupied by the new building is Lot 10, being a 4,715m^2 existing registered allotment.

- **Scenario 3**: Community infrastructure included, site area is the new residual lot

    - Clause 8.7(4)(b) of the LEP does apply because the proposed development does include community infrastructure; and

    - the site area for the land to be occupied by the new building is the 4,394m^2 residual allotment to be created by the proposed subdivision.

- **Scenario 4**: Community infrastructure included, site area is the existing lot

    - Clause 8.7(4)(b) of the LEP does apply because the proposed development does include community infrastructure; and

    - the site area for the land to be occupied by the new building is Lot 10, being a 4,715m^2 existing registered allotment.

As per the decision in *Gan v City of Sydney Council* [2021] NSWLEC 1370, the calculations and analysis in this request will address each of the above scenarios.

INTRODUCTION

Clause 8.7 of the LEP stipulates that where a development proposal includes community infrastructure, that a floor space ratio (**FSR**) of 6:1 applies to Key Site 10.

The land at 614-643 High Street Penrith is within Key site 10.

The clause states –

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'.

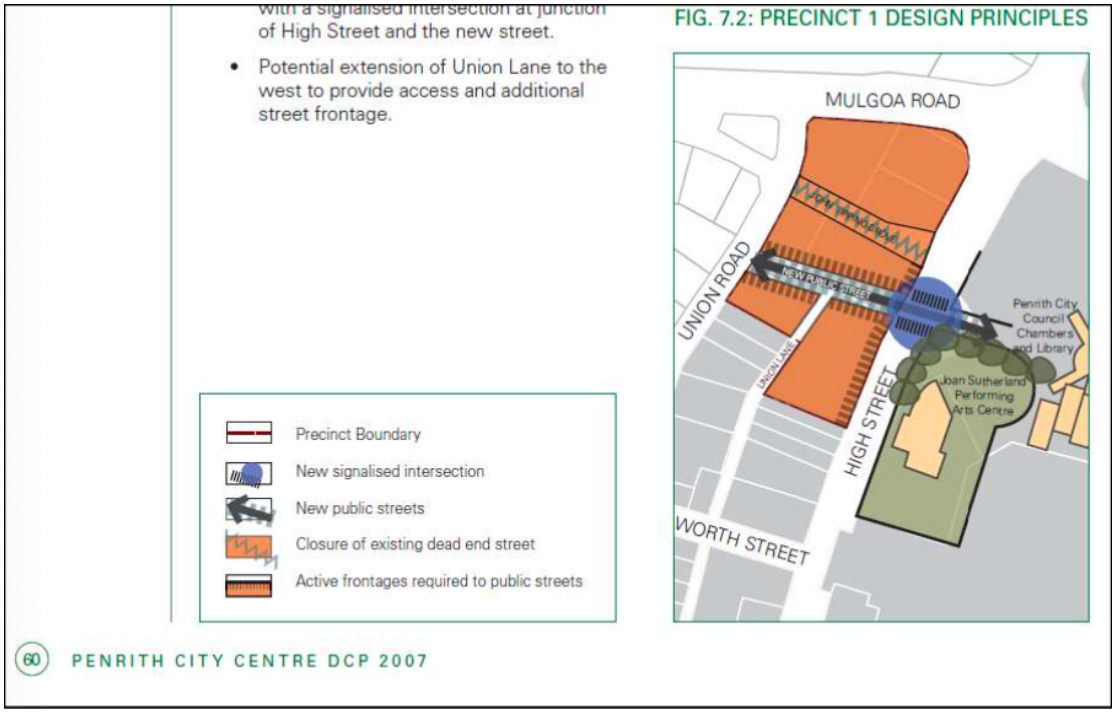
The development proposal (as amended) seeks consent for the construction of a part 7 storey and part 45 storey mixed-use development including a 4 storey podium and basement parking.

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 'site area' under clause 4.5 of the LEP is:

- under scenario 1 — 4,394m^2;
- under scenario 2 — 4,715m^2; and
- under scenario 3 — 4,394m^2.

Irrespective of the technical definition of 'site area', the development will be carried out over a 4,715m^2 area of land and is legally known as Lot 10 in DP 1162271.

This request seeks to vary the FSR standard prescribed for the site:

- under scenario 1 — under clause 4.4(2) of the LEP (3:1);
- under scenario 2 — under clause 4.4(2) of the LEP (3:1); and
- under scenario 3 — under clause 8.7(4)(b) of the LEP (6:1).

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

At the outset, the applicant says the proposed contravention needs to be considered in the context of the area of Lot 10 and the proposed construction of a pedestrianised public road (and its intended dedication to the Council). Also relevant to scenarios 1 and 2 is the proposal for a publicly accessible garden and through-site link on the western part of the Lot 10.

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 request deals with each relevant aspect of clause 4.6 below.

THE PROPOSED GROSS FLOOR AREA

The gross floor area proposed for Lot 10 is 28,116m^2. All of the gross floor area will be located within the proposed new residual lot.

Over the 4,715m^2 of Lot 10, this is equivalent to a floor space ratio of 5.96:1.

Scenarios 1 and 3

For scenarios 1 and 3, FSR is calculated over the land area deducting the area to be dedicated for the purposes of a new public road. When FSR is calculated over this reduced area (4,394m^2), it is 6.40:1.

This is a 6.6 per cent variation when the FSR is assumed to be 6:1 (as per scenario 3). This is equivalent to an additional 1,752m^2 of gross floor area over the permissible 26,364m^2 gross floor area (when 6:1 is applied to the reduced area).

This is a 213.3 per cent variation when the FSR is assumed to be 3:1 (as per scenario 3). This is equivalent to an additional 14,934m^2 of gross floor area over the permissible 13,182m^2 gross floor area (when 3:1 is applied to the reduced area).

For scenarios 1 and 3, the contravention of the development standard is (or is in part for scenario 3) a technical non-compliance which results from treating the 'site area' as simply being the land area less the area to be dedicated for the purposes of a new public road. The LEP envisages that the planned intensity for the **whole** of Lot 10 is 6:1. This is illustrated by extract from the LEP's 'Key Sites Map – Sheet KYS_006' below:

The map does not distinguish between any part of the land that may be used for community infrastructure and other land. It is reasonable to conclude that the authors of the map assumed that Lot 10 could be developed up to 6:1 in a manner that was consistent with the intent of the floor space ratio control, being 28,920m^2 of gross floor area.

If the site is developed on the basis of 6:1 — calculated by reference to the proposed residual lot — the site would only be developed to 26,364m^2, falling short of the planned floor space by 1,926m^2.

Scenarios 1 and 2

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)(b) of the LEP which effectively says that the 6:1 FSR control for Key Site 10 (Lot 10):

> *ensure[s] 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 6:1 floor space ratio, irrespective of whether the community infrastructure within the strict meaning of clause 8.7 is provided.

The extent of the variation for scenario 1 was dealt with above.

For scenario 2, the extent of the variation is 198.8 per cent when the FSR is assumed to be 3:1 (and the existing Lot 10 is taken to be the site area). This is equivalent to an additional 13,971m^2 of gross floor area over the permissible 14,145m^2 gross floor area.

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 FSR 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.[1] 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.

[1] 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

For scenarios 1 and 2, the standard being varied is the 3:1 maximum floor space ratio set by clause 4.4(2) of the LEP.

For scenario 3, the standard being varied is the 6:1 maximum floor space ratio set by clause 8.7(4)(b) 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 both controls are achieved.

The objectives of the development standard established by clause 4.4(2) are as follows:

(1) The objectives of this clause are as follows—
- *(a) to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality,*
- *(b) to minimise the adverse impact of development on heritage conservation areas and heritage items,*
- *(c) to regulate density of development and generation of vehicular and pedestrian traffic,*
- *(d) to provide sufficient floor space for high quality development.*

The objectives of the development standard established by clause 8.7(4)(b) 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 provide sufficient floor space for high quality development.*

- 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.*

For scenarios 1 and 3, the development departs from the floor space ratio control as a result of the dedication of a portion of the land for community infrastructure purposes and the exclusion of that land from the calculation of site area that arises.

For scenarios 1 and 2, the development (also) departs from the floor space ratio 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 permits an FSR of up to 6:1 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 land being dedicated for community infrastructure is for the purposes of a public road and will not contain any GFA. When considering both the dedicated parcel and the net parcel, the FSR is 6:1. The quantum of floor space and the proposed bulk and scale of the proposal is consistent with that intended by the planning controls to limit the GFA to 6:1.

- As no opportunity arises for GFA over and above that intended by the controls across the parent parcel, because the community infrastructure dedicated land will not contain any GFA, the density for the parent parcel is regulated consistent with the objective of 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, including the departure to FSR, 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 whole of Lot 10, 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:  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. Accordingly, a development of 6:1 across all of Lot 10, should be accepted as being compatible with the desired future character of the locality. 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.
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)
	 No impact arises from the development on heritage items or conservation areas.
to regulate density of development and generation of vehicular and pedestrian traffic,	As per above, the LEP assumes that a 6:1 building across all of Lot 10 may be consistent with the need to appropriately regulate the density of the development and generation of vehicular and pedestrian traffic. The vehicle and pedestrian generation arising from the compliant FSR has been considered by Varga Traffic engineers and confirmed in a peer review by McLaren Traffic Engineering. When analysing the vehicle generation arising from the development; the upgrading of intersections already being undertaken and that will be completed prior to occupation of the proposal; modelling of the nearby intersections; and factoring in the predominate traffic movement towards Mulgoa Road it is confirmed that the proposed development will not result in any significant increase in delays or change in Level of Service to the intersections.
to provide sufficient floor space for high quality development.	As per above, the LEP plans for an intensity of a 6:1 building across all of Lot 10. This indicates that there is a planning need for floor space at this volume. If the development is developed at

Objectives	Comments (in addition to the comments made above)
	a scale that falls short of 6:1 (calculated across all of Lot 10), this objective will be undermined. The site has been specifically identified in the planning controls for additional FSR in order to facilitate the intention of the Precinct as articulated in the DCP including – - Redevelopment of a high density residential precinct; - Provision of active frontage/land uses along the new street and High Street; and - Deliver a new public street between High Street and Union Lane, that delivers an "eat street".
to allow higher density development on certain land in the City Centre where the development includes community infrastructure, and	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). 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.' 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. 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. The above works arise from Councils expressed desire to create a new public street between High Street and Union Lane that will:

Objectives	Comments (in addition to the comments made above)
	- Provide north-south connectivity; - Result in an active 'eat street'; - Be proximate and contribute to the adjoining Civic and Cultural Precinct; and - 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. 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 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.	The proposed 6:1 development (as calculated over the whole of Lot 10). This reflects the desired locality of the area, given the LEP's mapping for Key Site 6 (which maps all of Lot 10 as 6:1). 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: - 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; - Intentional location of the lobby and café on the pedestrian laneway to activate

Objectives	Comments (in addition to the comments made above)
	the space and provide passive surveillance; - Sleeving and screening of the podium level parking areas to ensure that the key streets are activated above the ground level; - 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 - Provision of substantial areas of landscaping across the site that will provide an aesthetic quality to the 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 'incentive' 6:1 FSR provision set out in clause 8.7 is a development standard, but there is a distinct requirement 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 in paragraphs 1.8-1.10 above).

If this requirement is fulfilled the limitations generally applicable under clause 4.4 are able to be overridden by the large (200 per cent) increases in allowable floor space ratio 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 (6:1 calculated across all of Lot 10) will not be achieved.

The extent of the shortfall in gross floor will be as follows:

- under scenario 1 — 1,752m^2;
- under scenario 2 — 13,971m^2; and
- under scenario 3 — 14,934m^2.

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 FSR 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 ensuring that the reduced site area arises from the delivery of community infrastructure that will not contain any GFA and provides all the GFA on the reduced site area. The departure is reasonable as it does not seek to benefit obtain GFA over and above that intended for the parent parcel and does not give rise to any additional GFA being associated with the land to be dedicated for community infrastructure purposes.

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:

- 6.6 per cent variation under scenario 1;
- a 198.8 per cent variation for scenario 2; and
- 213.3 per cent variation under scenario 3.

This raw size is not, in itself, a material consideration as to whether the variation should be allowed.

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. I n 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 450m2 lot size (allowing lots sizes ranging from 220 to 240m2).

- 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 floorspace 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 proposal does not seek to add additional FSR to the proposal beyond what is envisaged by the LEP's Key Sites mapping. The development departs from the FSR standard as a result of technical issues, rather than issues of substantive merit.

- The intent of the FSR control is satisfied because the departure from the strict terms of the FSR standard facilitates the delivery of mixed-use 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 FSR 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.