

clause 4.6 exception
for FSR development standard



Building 3 and 4, 1 – 11 neil street
merrylands

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for FSR development standard



Building 3 and 4, 1 – 11 neil street
merrylands

construction of two residential flat buildings
(Buildings 3 & 4) and associated site works

prepared for
Landmark Group

prepared by



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1 introduction

1.1 The Submission

This submission has been prepared for Landmark Group to accompany a Development Application (DA) for Building 3 and 4 at 1-11 Neil Street, Merrylands (the Site) to Cumberland Council. It seeks a variation of the development standard pertaining to Floor Space Ratio (FSR) contained in Clause 4.4(2) of the Holroyd Local Environmental Plan 2013 (HLEP 2013).

1.2 The Proposal

The variation relates to the two newly proposed residential flat buildings located at 1-11 Neil Street, Holroyd. The buildings are known as Building's 3 and 4.

1.3 Background

This submission has been prepared in accordance with the provisions of Clause 4.6 of the HLEP 2013.

It is noted that Clause 4.6 of the HLEP 2013 requires the concurrence of the Secretary to be obtained prior to granting of consent for development that contravenes a development standard. Given that the HLEP 2013 is a Standard Instrument, concurrence can be assumed in accordance with the Planning Circular PS 08-003 (dated May 2008).

2 the current legal context to clause 4.6 submissions

The NSW Department of Planning and Environment's publication "Varying development standards: A Guide" (August 2011), states that:

The NSW planning system currently has two mechanisms that provide the ability to vary development standards contained within environmental planning instruments:

- *Clause 4.6 of the Standard Instrument Local Environment Plan (SI LEP).*
- *State Environment Planning Policy No 1 – Development Standards (SEPP1).*

In this instance, SEPP 1 does not apply as the HLEP 2013 is a Standard Instrument LEP.

This proposal seeks to vary the FSR development standard applicable to the Site in the requisite DA and not introduce new controls across an area.

The Clause 4.6 guidelines also state specifically when this clause is not to be used as specified in Clause 4.6 (6) of the HLEP 2013. Neither the Site nor the proposal satisfies these criteria and therefore, the use of Clause 4.6 to vary the FSR is appropriate in this instance.

3 nature of variation

3.1 Proposed Development

The development application relates to the land known as 1-11 Neil Street, Holroyd. The proposed development involves the construction of two Residential Flat Buildings on the Site which are known as Building 4 (located along the north-east part of the Site) and Building 3 (located along the south-eastern corner of the Site). Both buildings directly adjoin the Railway line to the east. The location of Buildings 3 and 4 is shown in **Figure 3.1** below.

Figure 3.1 The location and siting of Building 3 and 4 on the Site

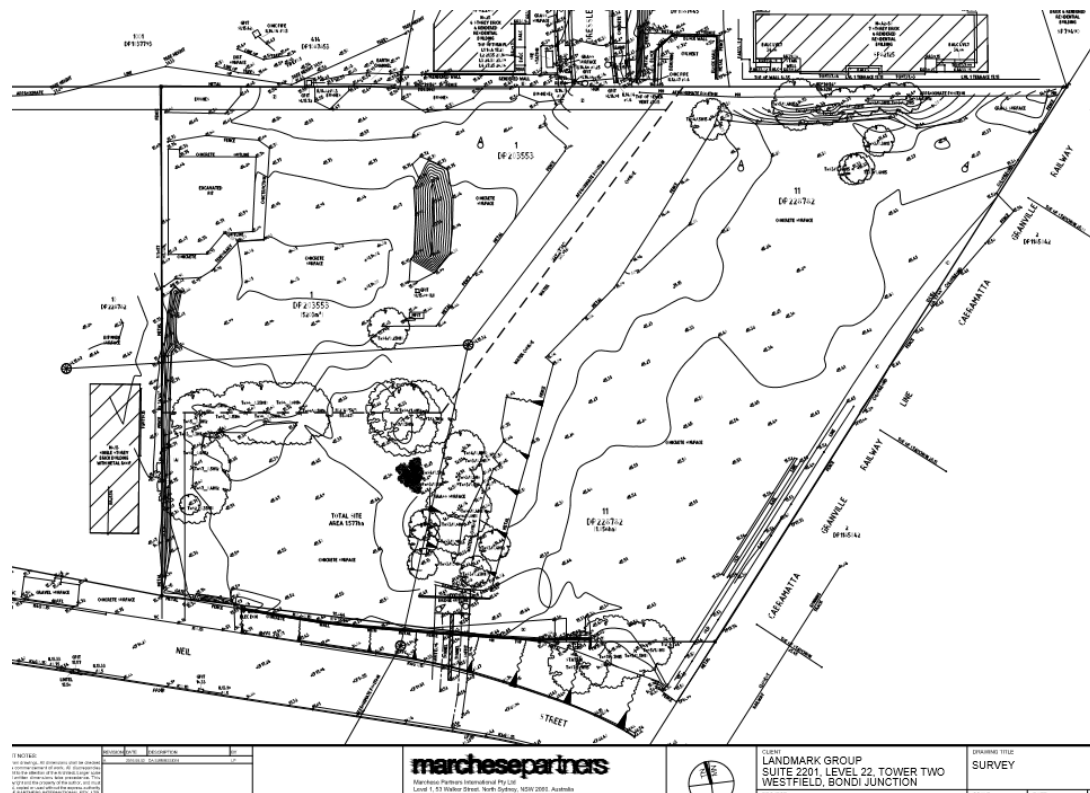


Source: Architectural plans prepared by Marchese Partners

The Site consists of two allotments of land as shown on the survey plan in **Figure 3.2** below.

Council's planning controls in respect to height and FSR for the site follow these allotment boundaries.

Figure 3.2 | Survey Plan



In this case, Buildings 2, 3 and 4 sit on the southern allotment known as Lot 11 DP228762 whilst Building 1 sits on the north-western allotment known as Lot 1 DP 203553.

In respect to the floor space control, Lot 11 DP 228762 has a maximum FSR of 2.8:1. As such, Buildings 2, 3 and 4 need to satisfy this control. Lot 1 DP203553 has a maximum FSR of 3:1. Building 1 sits within this lot and therefore, the GFA for this building needs to comply with this control.

The proposed development has been designed in a way that distributes the total GFA across the Site in an uneven manner to achieve a better planning and design outcome for the Site. This has meant that the FSR for the Lot 11 (Buildings, 2, 3 and 4) slightly exceeds the 2.8:1 FSR control.

Table 3.1 below highlights the actual distribution of gross floor area across the Site.

Table 3.1 | GFA Calculations

Total Development GFA Analysis	
Total GFA For B2, B3 and B4:	30,626 sqm
FSR for B2, B3 and B4 Combined:	2.90 to 1
Permissible GFA under Current Controls:	29,568 sqm
Permissible FSR:	2.8 to 1
E/O GFA for B2, B3 and B4 (Area to be Transferred from B1):	1,058 sqm
Building 1 Approved GFA:	9424 sqm
Remaining GFA Allowed on Land for Building 1:	6185 sqm
Remaining GFA Allowed on B1 Land Post B3/B4 Approval:	5,127 sqm

Total Achieved GFA for B1, B2, B3 and B4:	40,050 sqm
Total Allowable GFA for B1, B2, B3 and B4:	45,177 sqm
GFA Unused Vs Total Allowable:	5,127 sqm

From the table above the total GFA for buildings 2, 3 and 4 combined is 30,626m² which translates to an FSR of 2.9:1. This exceeds the permissible FSR of 2.8:1 by 1,058m².

This additional floor space can be redistributed from Lot 1 DP 203533 where Building 1 is located. The GFA of Building 1 is well below the FSR of 3:1 for this portion of the Site with over 6,185m² in excess gross floor space.

3.2 What is the applicable Planning Instrument and Zoning

The Holroyd Local Environmental Plan 2013 (HELP 2013) is the environmental planning instrument that applies to the Site.

3.3 What are the Zone Objectives

The relevant objectives of the R4 High Density Residential zone:

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

3.4 What is the standard being varied?

The standard being varied is the floor space ratio development standard contained in Clause 4.4 of the HLEP 2013.

3.5 Is the standard to be varied a development standard?

Yes, the floor space development standard is considered to be a development standard in accordance with the definition contained in Section 4(1) of the Environmental Planning and Assessment Act, 1979 and not a prohibition.

3.6 Is the development standard a performance based control?

No, the development standard is a numerical control.

3.7 What is the underlying object or purpose of the standard?

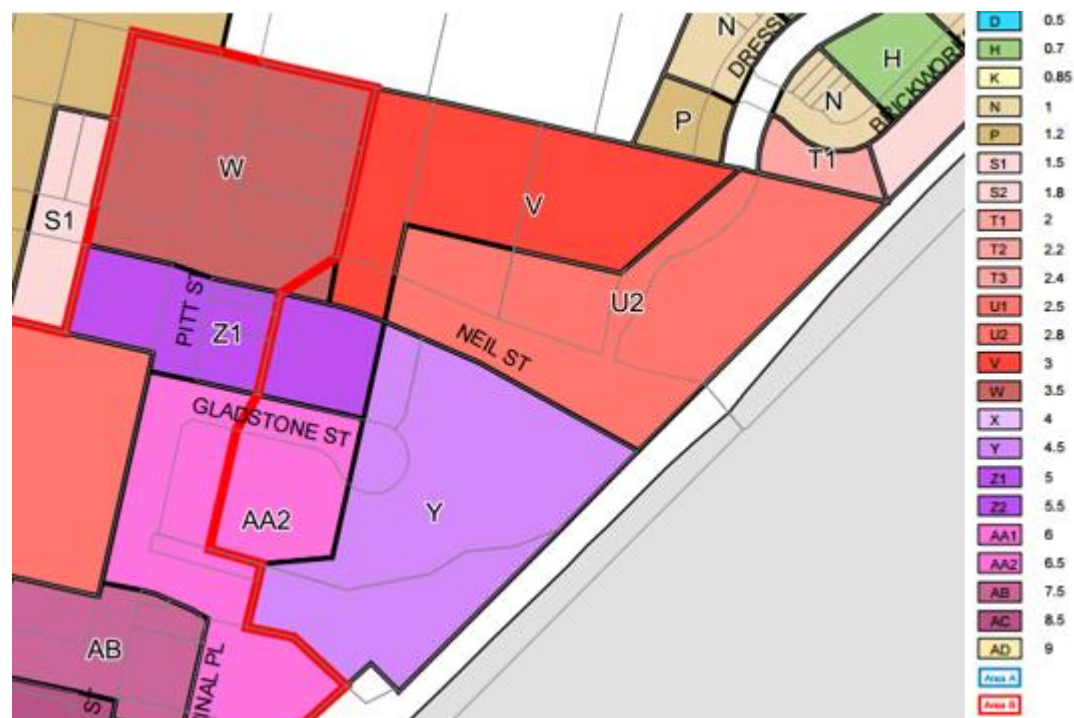
The objectives of Clause 4.4 are as follows:

- a) *To support the viability of commercial centres and provide opportunities for economic development within those centres.*
- b) *To facilitate the development of a variety of housing types.*
- c) *To ensure that development is compatible with the existing and desired future built form and character of the locality.*
- d) *To provide a high level of amenity for residential areas and ensure adequate provision for vehicle and pedestrian access, private open space and landscaping*

3.8 What is the numeric values of the development standard in the environmental planning instrument?

Clause 4.4(2), in association with the Site indicated on map FSR_009 of HLEP 2013, establishes a maximum FSR for the Site. An excerpt is provided as **Figure 3.1**. The Site has two separate FSRs across the Site. It shows that where Building 1 is proposed, the maximum FSR is 3:1. Where Buildings 2, 3 and 4 are proposed, the maximum FSR is 2.8:1.

Figure 3.1 | Excerpt of FSR_009 map from HLEP 2013



Source: HLEP 2013

3.9 What is the proposed numeric value of the development standard in the development application?

The maximum FSR varies across the Site:

Table 3.2 | Clause 4.4 Control against the Proposed Variation

Building No.	Clause 4.4 Control	Allowable GFA	Achieved / Approved GFA	Surplus GFA
B1	3:1	15,609m ²	9,424m ²	6,185m ²
B2	2.8:1	29,568m ²	7,274m ²	(1,058m ²)
B3			13,592m ²	
B4			9,760m ²	
Total GFA for B1, B2, B3, B4		45,177m²	40,050m²	5,127m²

The variation to the control is 1,058m² in floor space which amounts to a 4% variation which is considered to be minor and the redistribution of this floor space across the Site is considered acceptable given that the total GFA for the whole development will satisfy Council's current controls.

4 assessment of proposed variation

4.1 Overview

Clause 4.6 of HLEP 2013 establishes the framework for varying development standards applying under HLEP 2013. Subclause 4.6(3)(a) and 4.6(3)(b) state that Council must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating:

4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

4.6(3)(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

Subclause 4.6(4)(i) mandates that development consent must not be granted for a development that contravenes a development standard unless Council is satisfied:

- (i) The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).*
- (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....*

An assessment of the Clause 4.4 variation is provided below, in accordance the requirements of Clause 4.6. In addition, this variation has also been prepared in accordance with the Guidelines, which identifies matters to be addressed in an application to vary a development standard.

4.2 What is the context of the variation?

The Site is very accessible and well located only a short distance from the Merrylands Town Centre and the Merrylands Railway Station, which justifies the redevelopment of such a well-positioned Site is advantageous for the wider community.

A Planning Proposal to rezone the Site and reconsider the FSR across the Site was prepared by Cumberland Council. The Planning Proposal was developed in accordance with the recommendations of the *Development Feasibility of Merrylands Neil Street Precinct*. This Study was initiated by Council's concerns regarding the viability and practicality of implementing a series of controls within the HLEP 2013. In particular, the study found that the current controls coupled with the requirement to cater for and accommodate new roads and public infrastructure within the Neil Street Precinct restricted redevelopment for a number of sites. As a result, the study proposed to alter the FSR limit to 3.5:1 across the whole Site.

The Merrylands Neil Street Precinct, Urban Design Review acknowledged discrepancies between the FSR and Height controls across the Neil Street precinct and recognized site constraints through the provision of additional infrastructure service. The study stated that “given there are some inconsistencies between the LEP maximum permitted building heights and FSRs, this review recommends significant changes to the permitted building heights for the Neil Street precinct”. As a result the study suggested that the density for many sites be increased and this has been translated into the PP.

Currently, the Site has two approved buildings, being Building 1 and Building 2. The DA that this Clause 4.6 report relates to is for proposed Building 3 and Building 4 on Lot 11 DP228782. Council has requested that the FSR be divided in their corresponding FSR’s on the individual parcels and therefore, where Building 2, Building 3 and Building 4 are located within Lot 11, the FSR is non-compliant at 2.9:1, where the development standard has a maximum FSR of 2.8:1.

What is proposed is a redistribution of the gross floor area over the site. In summary, the proposal has a compliant floor space across the collective Site.

4.3 Is strict compliance with the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case

In this instance, the strict numerical compliance with the development standard for FSR is unreasonable and unnecessary. It is submitted that compliance with the FSR standard would be unreasonable or unnecessary for the following reasons:

- The Site is a prominent corner location, within the Neil Street Precinct within 300m to significant development at Merrylands Town Centre. The corner has been appropriately celebrated with a higher built form component along the Neil Street to the south and the railway corridor to the east, stepping down to a lower component to provide an appropriate transition to the west, which adjoins residential properties. This built form affords additional density without material adverse impacts and spreads the density across the site in more appropriate locations.
- Clause 4.4 of the HLEP 2013 provides opportunity for an additional FSR within the Merrylands Town Centre and surrounding properties. The Site is on the outer fringe of the Merrylands Town Centre however, is located within an area that can cater for greater density. In addition, the Site is a corner allotment and therefore, providing the greater density within the south eastern portion of the Site acts as a gateway Site to Merrylands Town Centre and celebrates the corner.
- The non-compliance is minor as it amounts to a 4% variation and given the large, integrated nature of the site this additional floor space will not add any visual bulk and scale to the buildings (2, 3 and 4) located along the southern side of the property.
- The context of the Site is suitable for additional development given the services in close proximity, including :

- All major services, being within close proximity to a major shopping centre district.
- Walking distance to regular public transport.
- There will be no adverse amenity impacts on adjoining residents as a result of the additional FSR as the additional floor space is located in that part of the site that is physically separated from adjoining residences to the east by the railway corridor and the additional floor space will not adversely affect the amenity of these immediately adjoining properties.
- The FSR of Building 1 is well below the permissible GFA. If this building was designed to be a compliant form along this north-western corner there would be more detrimental amenity impacts to residential properties to the north in terms of additional visual bulk, scale and potential overlooking. The resultant lower GFA along this side of the site and more floor space along the southern side is a better planning outcome for the Site.
- Providing some additional floor space to Buildings 2, 3 and 4 results in much better internal amenity outcomes for these buildings as they will be able to achieve the standard SEPP 65 design requirements, particularly in respect to achieving the required solar access and cross ventilation for apartments.
- Also the southern side of the site allows for greater bulk and scale due to its corner location and a higher built form will create a gateway through to the commercial centre.

In this instance, strict compliance with the development standard would not result in any discernible benefits to the amenity of adjoining sites or the public. In fact, it would compromise and adversely affect the overall design and quality of development on the Site if strict compliance was achieved with the current controls. The proposed design outcome is a much more sensitive and more appropriate solution for the Site as opposed to a compliant development form .

Further, the proposal satisfies the underlying objectives of both the zone and the development standard, and provides a transition in scale of development compatible with the existing and future development in the locality. The proposal is also consistent with the desired future character of the area and is consistent with the aims and objectives of the Merrylands Neil Street Precinct – Urban Design Review.

The development as proposed is consistent with the provisions of orderly and economic development. Strict compliance with the standard is not required in order to achieve compliance with the objectives.

The proposed development will be in the public interest because it is consistent with the objectives of the particular standards and the objectives for development within the zone in which the development is proposed to be carried out.

4.4 Are there sufficient environmental planning grounds to justify contravening the development standard?

Yes. In the circumstances of the case, there are sufficient planning grounds to justify the variation to the development standard, namely:

- The reasons discussed in the section above.
- The non-compliance with the standard will not result in a scale of development, incompatible with the desired future character of the locality.
- The FSR is a result of the considered built form which provides an appropriate design as a gateway to the precinct and a better transition to the Merrylands Shopping Centre.
- The FSR being averaged across the Site is a better environmental outcome to maximise amenity and solar access to each of the buildings rather than allocating the GFA based on the HLEP 2013 information on the development site.

Despite the non-compliance, the proposed development is an appropriate development for the Site and provides a better environmental outcome. It will not prejudice the amenity of any proposed apartments and/or contribute to any variances to the applicable detailed controls of the ADG and DCP. In this instance, the development as proposed is consistent with the provisions of orderly and economic development, as required by the EP&A Act and facilitates a positive environmental planning outcome for the Site.

Since this site is a large, integrated one there is greater potential for more density and height to be achieved on the southern site as it is very well located and will assist in defining this prominent corner junction and edge of the precinct. It also assists in providing better solar access outcomes with more form to the south of the site allowing greater solar penetration into the buildings and surrounding space.

The development through its design is creating a much better planning outcome than a compliant scheme will achieve.

4.5 The Public Interest

The proposal remains consistent with the relevant objectives of the R4 zone, despite the non-compliance with the FSR control as demonstrated in the assessment of the zone objectives below:

Objective: To provide for the housing needs of the community within a high density residential environment.

The high density scale of the development is consistent with the zone objectives and future development character for the precinct. The proposed development scheme has a number of advantages in that it is providing a holistic, integrated development that will provide for a mix of housing styles and types. The proposal complies with the objectives and intentions of the R4 High Density zone.

To provide a variety of housing types within a high density residential environment.

The design, layout and size of apartments provides a wide variety of housing choice. The development caters for one, two and three bedroom apartments all of a high quality finish. There are some apartments that will have lower internal amenity due to their size or aspect however these will be more affordable. The development will cater for a variety of buyers in the housing market in this location as currently there is a shortage of housing stock.

To enable other land uses that provide facilities or services to meet the day to day needs of residents.

The development has been designed around new infrastructure facilities that aim to meet the day to day needs of the residents as well as improve accessibility for the wider community. The new roads, public open space and redesign of the drainage swale to become a more useable and functional space is beneficial for residents in the wider community not just for the future occupants of the Site.

The proposal remains consistent with the relevant objectives of the FSR outlined in subclause 4.4 despite the non-compliance, as demonstrated below:

(a) To support the viability of commercial centres and provide opportunities for economic development within those centres.

The development is very well located on the periphery of the Merrylands commercial centre and within close proximity to the Merrylands Railway station and other important facilities and services including Holroyd Gardens. The scheme also better achieves the objectives to provide housing in key locations to underpin the role of Merrylands as a key commercial centre.

(b) To facilitate the development of a variety of housing types.

The design, layout and size of apartments provides a wide variety of housing choice. The development caters for one, two and three bedroom apartments all of a high quality finish. There are some apartments that will have lower internal amenity due to their size or aspect however these will be more affordable. The development will cater for a variety of buyers in the housing market in this location as currently there is a shortage of housing stock.

(c) To ensure that development is compatible with the existing and desired future built form and character of the locality.

The Site is on the outer fringe of the Merrylands Town Centre however, is located within an area that can cater for greater density. In addition, the Site is a corner allotment and therefore, providing the greater density within the south eastern portion of the Site acts as a gateway Site to Merrylands Town Centre and celebrates the corner.

The high density nature of the proposal will be in keeping with the character and style of future development in the area. The overall massing, scale and density of the proposal is consistent with the desired future character of the area and has been carefully and

sensitively considered so that there are no adverse amenity impacts from the resultant increased density.

The proposed development has been designed to respect the character and nature of adjoining development's, both existing and future developments. There will be no adverse amenity impacts generated by the density in terms of view loss, overshadowing or acoustic/privacy issues. The high density nature of the proposal will be in keeping with the character and style of future development in the area. The overall massing, scale and density of the proposal is consistent with the desired future character of the area and has been carefully and sensitively considered so that there are no adverse amenity impacts from the resultant increased density.

The proposal provides a transition in scale of development compatible with the existing and future development in the locality. The proposal is also consistent with the desired future character of the area and is consistent with the aims and objectives of the Merrylands Neil Street Precinct – Urban Design Review.

(d) To provide a high level of amenity for residential areas and ensure adequate provision for vehicle and pedestrian access, private open space and landscaping.

The proposal adopts an envelope based on setbacks and a building height that celebrate the corner lot and take into account the surrounding context as described previously. It will not result in any significant amenity impacts on surrounding properties and the design has been arrived at to minimise the overshadowing and privacy impacts of the development.

The reduced density at the rear of the property, building up to the corner of the Site will allow for good internal amenity and reduce the impact on the adjoining buildings while allowing an appropriate density in close proximity to services and public transport. Building separation has been maintained to ensure that any future development is not compromised by privacy. The separation distances adopted are sufficient to ensure the amenity of the future residents.

5 Conclusion

This submission satisfies the provisions of Clause 4.6(3)(a) and (b), and 4.6(4)(a)(i) of the Holroyd Local Environmental Plan 2013 and tests outlined in the identified judgements relating to the preparation of a Clause 4.6 submission.

The submission demonstrates that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, as required by Clause 4.6(3)(a).
- There are sufficient environmental planning grounds to justify contravening the development standard as required by Clause 4.6(3)(b).
- The development meets objective (1)(b) of Clause 4.6 which requires development to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

Accordingly the consent authority can facilitate development consent under Clause 4.6, given:

- The written request is satisfactory with respect to Clause 4.6(4)(a)(i). It has adequately addressed the matters required to be demonstrated by Clause 4.6 (3), and
- The development achieves Clause 4.6(4)(a)(ii). It 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.

Consistent with the decision of Preston CJ in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, it is therefore submitted that variations can be supported.