

UPDATED CLAUSE 4.6 VARIATION – 50 BELMORE STREET, PENRITH

1.1. CLAUSE 4.6 - EXCEPTIONS TO DEVELOPMENT STANDARDS

Clause 4.6 provides flexibility to vary the development standards specified within the LEP where it can be demonstrated that the development standard is unreasonable or unnecessary in the circumstances of the case and where there are sufficient environmental grounds to justify the departure. Clause 4.6 states the following:

“(2) 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...

(3) 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,*
- c) 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;*
- d) The public benefit of maintaining the development standard; and*
- e) Any other matters required to be taken into consideration by the Director-General before granting concurrence.”*

Accordingly, we set out below the justification for the departure from the FSR standard under Penrith LEP 2010 (PLEP). The purpose of the information provided is to demonstrate that strict compliance with the standard is unreasonable or unnecessary in the circumstances of this particular case. It also provides justification for the departure from this control.

1.2. PROPOSED VARIATION

Pursuant to clause 4.4 of the PLEP, and the accompanying FSR map, an FSR of 4:1 applies to the site. The proposed FSR noncompliance is limited to an additional 1,016sqm (9.2%) resulting in a FSR of 4.39:1.

This non-compliance relates to 477m² of additional gross floor area, and 609m² of car parking area that is required to be included in GFA calculations as detailed below;

The proposed development includes three levels of basement parking accommodating 143 car spaces. 121 spaces (100%) are required under the provisions of the DCP. However, the DCP further stipulates that only 60% of these spaces are to be allocated onsite.

As the DCP technically requires 121 spaces, we consider the additional 22 spaces and associated manoeuvring areas should be included in the gross floor area calculation. Amended plans have been provided and Plan No. DA50.00(D) specifically shows this inclusion. This results in an increase in GFA from 11,493m² to 12,102m² or a variation of 9.2% of the allowable floor area (see **Table 1** below).

Table 1 – Proposed GFA

	Proposal as submitted	Amended Proposal
GFA attributable car spaces	Nil	609m ² (or 22 spaces and associated manoeuvring areas)
GFA attributable floor area	477m ²	unchanged
GFA	11,493m ²	12,102m ²
FSR	4.17:1	4.39:1
Variation %	4.3%	9.2%

Figure 1 – Basement GFA calculation



Source: Bates Smart

1.3. NSW LAND AND ENVIRONMENT COURT CASE LAW

Clause 4.6 (3)(a) of the PLEP2010 states that a proposed variation to the development standard must demonstrate that compliance with the development standard is *'unreasonable and unnecessary in the circumstances of the case'*.

In **Wehbe V Pittwater Council (2007) NSWLEC 827** Preston CJ set-out five ways of establishing that compliance with a development standard is unreasonable or unnecessary in support of justifying a variation. These are:

- 1) *The objectives of the standard are achieved notwithstanding non-compliances with the standard;*
- 2) *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.*
- 3) *The underlying objective of purpose would be defeated or thwarted if compliance was required and therefore compliance is unnecessary*
- 4) *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.*
- 5) *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. This is, the particular parcel of land should not have been included in the particular zone.*

1.4. OBJECTIVES OF THE ZONE AND THE STANDARD

1.4.1. Objectives of the B3 Zone

The site is located within the B3 Commercial Core zone, under which 'Commercial premises' is permitted with consent. The following table demonstrates that the proposed development is consistent with the objectives of the B3 Commercial Core Zone.

Table 2 – B3 zone objectives

Objective	Proposal
<i>To provide a wide range of retail, business, office, entertainment, community and other suitable land uses that serve the needs of the local and wider community.</i>	The proposal includes an 8 storey commercial building within the Penrith Town Centre. The ground floor of the development will incorporate both food and beverage or retail uses, whilst the extended public domain area will facilitate a variety of commercial activities.
<i>To encourage appropriate employment opportunities in accessible locations.</i>	The proposal will provide employment opportunities on a site directly adjacent to the

	<p>railway station and bus interchange. The variety of commercial activities provided by the development will also encourage additional employment opportunities in the Penrith City Centre.</p>
<p><i>To maximise public transport patronage and encourage walking and cycling.</i></p>	<p>The proposed development is located less than 400m from Penrith Railway Station and 300m from bus services on Henry Street. The proximity of this development to public transport nodes will maximise pedestrian use of these features. The development will also provide 68 bike parking spaces, which will encourage this form of sustainable transport. Excellent end of trip facilities will also be provided at ground level.</p>
<p><i>To strengthen the role of Penrith City Centre as the business, retail and cultural centre of the region.</i></p>	<p>The proposed building is a high – quality development including flexible floor plate layouts, internal amenity for occupants, access to natural light through the building and parking provision onsite. The proposed development will attract new business and valuable new tenants to the area further enhancing and supporting the Penrith Town Centre.</p>

1.4.2. Objectives of Clause 4.4

Clause 4.4 sets out the objectives of the FSR standard. The consistency of the proposed development with these objectives is set out below.

Table 3 – Clause 4.4 Objectives

Objectives	Proposed Development
<p><i>(a) to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality,</i></p>	<p>The proposed works are deemed to be consistent with the desired future character of the Penrith City Centre. The proposal was subject to a Design Integrity Panel review through-out the design development phase to DA lodgement. The Panel concluded that the proposal achieves design excellence. This included consideration of the built form in relation to the adjoining development at 2-6 Station Street. The site is located at a curve in the streetscape and the building has been designed to form three separate elements or bars in a stepped response to this. Removal of a portion of the floor area will impact on the design integrity of the building. The proposed building is consistent with the desired</p>

Objectives	Proposed Development
	future character of the locality albeit strict compliance with the FSR standard is not achieved.
<i>(b) to minimise the adverse impact of development on heritage conservation areas and heritage items,</i>	The development will not impact on either the former Station Master's House (a heritage listed two-storey building of state significance); located on the northern side of Belmore Street. or the locally listed TAFE Building at 115–119 Henry Street. The separation distances from the listed items, coupled with the careful design and proposed finishes will prevent any potential impact on the significance of the heritage items.
<i>(c) to regulate density of development and generation of vehicular and pedestrian traffic,</i>	<p>The application is accompanied by a Traffic Impact Assessment prepared by Traffix and included at Appendix D of the lodgement package. Traffic counts were conducted at nearby intersections to determine the performance of the intersection. SIDRA modelling was used to project the impact of the additional traffic generation from the proposed development on the intersections. The intersections will continue to operate with spare capacity when the additional traffic generation from the development is considered.</p> <p>The site is located less than 400m from Penrith Railway Station and 300m from bus services on Henry Street encouraging the use of public transport to and from the site. The development will encourage an active pedestrian environment along Belmore Street through the incorporation of restaurant and retail uses on the ground floor. These will be open to tenants of the building as well as members of the public traveling from the station during and beyond business hours. This area is level to the street front and will be an accessible path of travel for people with a disability.</p>
<i>(d) to provide sufficient floor space for high quality development.</i>	The proposed floor plate was the preferred design of the Design Integrity Panel (see Section 2 above). This comprises a stepped built form fronting Belmore street. This design will minimise the need for artificial heating, cooling and lighting by utilising the northern aspect of the development to its full potential. This design also provides for better internal amenity by increasing the amount of usable floor space. This is

Objectives	Proposed Development
	achieved via a reduced need for supporting columns, which has the additional effect of maximising view sharing and view corridors throughout the building.

The proposal is considered to be in the public interest as the development is consistent with the underlying objectives of the FSR development standard within PLEP and the land use objectives for the B3 Commercial Core as prescribed by Penrith LEP 2010.

1.5. THE DEVELOPMENT STANDARD IS UNREASONABLE AND UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE

As discussed in **Section 1.4** above, the proposed development is consistent with the underlying objectives of the FSR standard. Whilst the development standard has not been abandoned by Council, the strict application of the FSR control would prevent effective redevelopment of the site to the standard of design excellence which has been achieved through the current proposal. We consider that;

- Removal of the non-complying elements to achieve strict compliance would not result in an improved planning outcome. The additional 477m² of floor area does not contribute to the perceived bulk of the building, rather completes the stepped form to complement the streetscape.
- The proposed variation results in an improved internal amenity for the occupants of this development by increasing the amount of usable floor space and allowing natural ventilation of the building via the large atrium. The larger floorplate maximises both the utility of the meeting and conference spaces and view corridors throughout the building.
- Strict compliance with the standard would result in a built form that is inconsistent with the streetscape and adjoining built form. The proposed development was subject to a detailed design integrity process. The assigned panel confirmed that design excellence has been achieved.
- The proposed development results in an improved streetscape outcome. The building has been design with specific reference to the adjoining built form. Amendment of the design to achieve strict compliance would have a negative impact on the future streetscape of the area.
- We consider the proposed building floorplate to be an intricate part of the desired architectural design and outcome for the site and believe that the architectural quality of the streetscape will be significantly improved by the development. This reflects the desired future quality of the city centre, to present as a vibrant location with activated public spaces.

1.6. SUFFICIENT ENVIRONMENTAL PLANNING JUSTIFICATION

Clause 4.6 (3)(b) of the PLEP2012 states that a proposed variation to a development standard must demonstrate that there are *sufficient environmental planning grounds to justify contravening the development standard*.

This Clause 4.6 Request has been prepared in reference to the *Wehbe V Pittwater* text. As such, the grounds for the variation are particular to the circumstances of the proposed development noting that the site has been designed to complement the surrounding development and the future development planned for the Penrith City Centre.

In view of the particular circumstances of this case, strict compliance with Clause 4.4 of the PLEP is considered to be both unnecessary and unreasonable on the following environmental planning grounds:

- The proposed design sits 21m below the maximum height control, driven by the need to design a floorplate that is commercially desirable for tenants. The lower building height, together with the stepped building form will ensure the building appears smaller in scale than that a casual observer may expect on the site, given the allowable height control.
- 609m² of the additional GFA is a direct result of the inclusion of the additional 22 car spaces in the calculation. All car spaces are located within the basement and therefore the additional GFA will have no impact on the perceived scale of the development.
- The proposal is consistent with the public interest as it promotes the orderly and efficient use of land. Maintaining the development standard would not result in public benefit as it would unreasonably restrict the commercial viability of the building, as the current floor plate and massing are very attractive to potential government tenants.
- The magnitude of the variation is minor. For the reasons above it would have an unperceivable visual impact. Such a proposal would not create a negative precedent for Council in any future DA in the centre.
- The proposed development realises the qualities of design excellence.
- Although the built form exceeds the FSR, the SEE demonstrates that the variation will to the standard will not result in any unreasonable adverse impacts.

1.7. THE PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD

Under Clause 4.6 (5b) the consent authority must consider if there is public benefit associated with maintaining the development standard. Given the nature of the proposed variation and the justification of the impacts provided within this statement and the SEE, there would be no public benefit in strictly applying the standard. Appropriate built form design elements, visual analysis and consistency with the broader future skyline of Penrith supports this.

- Maintaining the development standard would not result in a public benefit. The additional 22 spaces proposed will be nominated as visitor parking. These spaces will be used by visitors to the tenant/tenancies of the building and will reduce the number of people using on street parking.

- Visitors to the building will be accommodated onsite, leaving available on street parking for other users within the City Centre. The additional parking will therefore result in an added public benefit. We note the additional spaces are included as a result of practical basement construction methods. Should they be excluded, it would not be economically viable to construct half of the basement level.
- The proposed variation results in an additional public benefit.

1.8. CONCURRENCE OF THE SECRETARY

Clause 4.6(4)(b) requires that the concurrence of the Secretary has been obtained.

Clause 4.6(5) provides that, in deciding whether to grant concurrence, the 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 standard
- c) Any other matters required to be taken into consideration by the Secretary before granting concurrence.

The contravention of the standard does not result in a matter of regional or state significance. Whilst the proposal results in a variation to the FSR standard, it is considered that strict compliance with the standard would not itself result in a public benefit. The additional FSR contributes to the architectural features of the building improving the space for the public and tenants of the building.

1.9. ANY OTHER MATTERS

Under Clause 4.6 (5)(c) the consent authority must consider if the proposal raises any other matters for consideration.

The decision in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEP 90* indicates that to justify there are sufficient environmental planning grounds for the variation may well require identification of grounds *particular to the circumstances of the proposed development*. There is a particular circumstance that applies to this development.

The site proposal was subject to a design integrity assessment. This involved detailed review of the proposal by an independent panel. The panel concluded that the proposed development achieves design excellence. The proposed development has been specifically designed and considered in relation to the surrounding built form context, the existing and future streetscape and the desired outcomes of the Penrith DCP. We consider that the merits of the proposal are sufficient to justify the departure from the standard in this instance.

SUMMARY

In summary, the proposal is considered appropriate and consistent with the objectives and intent of Clause 4.4 of Penrith LEP 2010. Strict compliance with the PLEP in this case is unreasonable and unnecessary because:

- The proposed development was subject to a detailed design review assessment with the assigned Design Integrity Panel confirming the proposal achieves design excellence. The proposed

development is in keeping with the desired future character of the area notwithstanding the proposed variation.

- The proposed variation is minor in nature and allows for the development of the site in keeping with that envisaged by the PLEP and DCP and the future planning controls for the site.
- 609m² of the additional GFA is contained below ground level and does not directly contribute to the perceived scale of the building.
- The additional car parking spaces (609m²) have been allocated to provide for visitor parking onsite. This provides a direct public benefit allowing visitors to utilise basement parking, freeing onsite spaces for public use.
- The exceedance of the FSR results in superior amenity for future occupants, providing an open, naturally ventilated floor plan with improved view corridors.
- The Design Integrity Panel has agreed that the proposed development achieves design excellence.

Therefore, strict compliance with the development standard is therefore considered to be unnecessary and unreasonable in this case.