

APPENDIX I - REQUEST UNDER CLAUSE 4.6 TO VARY THE HEIGHT OF BUILDINGS DEVELOPMENT STANDARD (CLAUSE 4.3 OF PENRITH LEP 2010)

This request has been prepared in support of a development application for the 'Baia da building' at 565-609 Luddenham Road, Luddenham, seeking exemption to the height of buildings development standard applying to the site under the *Penrith Local Environmental Plan 2010* (Penrith LEP 2010).

1. CLAUSE 4.6 CONSIDERATIONS

The proposed development involves a departure from the height of buildings standard in Clause 4.3 of the Penrith LEP 2010. Development consent may, subject to Clause 4.6 of the Penrith LEP 2010, be granted for development even though the development would vary a development standard.

The following considerations are addressed in this request to vary the development standard imposed under Clause 4.3 of the Penrith LEP 2010:

- *"That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;*
- *That there is sufficient environmental planning grounds to justify contravening the development standard;*
- *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;*
- *The public benefit of maintaining the development standard; and*
- *Any other matters required to be taken into consideration by the Director-General before granting concurrence."*

2. THE PROPOSED VARIATION

This variation seeks to vary the height of buildings (Clause 4.3) development standard, as it relates to the site. Clause 4.3(2) states that:

(2) The height of a building on any land is not to exceed height shown for the land on the Height of Buildings Map.

The Height of Buildings Map sets out a maximum building height of 24m to the part of the subject site to which the development application (DA) relates.

The proposal seeks consent for the following building heights (refer to **Table 1**).

Table 1 – Building Height Summary

| Elevation | Proposed Building Height (Range) (metres) | Range of Exceedance of 24m Limit (metres) |
|-----------|--|--|
| North | 35.1 | 11.1 |
| South | 29.5 | 5.5 |
| East | 29.7 – 35.1 | 5.7 – 11.1 |
| West | 31 - 35.1 | 6.1 – 11.1 |

2.1. ARCHITECTURAL ROOF FEATURE

Clause 5.6 of Penrith LEP 2010 permits architectural features to exceed the height limit where the consent authority is satisfied that:

“(a) the architectural roof feature:

(i) comprises a decorative element on the uppermost portion of a building;

(ii) is not an advertising structure;

(iii) does not include floor space area and is not reasonably capable of modification to include floor space area; and

(iv) will cause minimal overshadowing.

(b) any building identification signage or equipment for servicing the building (such as plant, lift motor rooms, fire stairs and the like) contained in or supported by the roof feature is fully integrated into the design of the roof feature.”

As shown in yellow at **Figure 1**, the architectural roof feature extends from the roof level (RL 93.9). The architectural roof feature satisfies the requirements of clause 5.6 (a) and (b) as it:

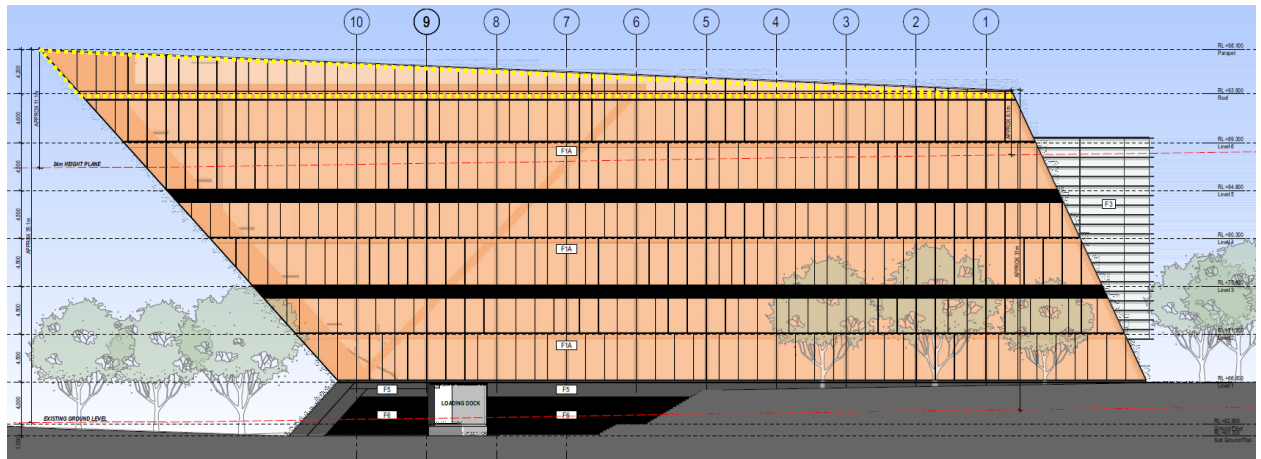
- Serves as a decorative element, designed to reinforce the corner and is elevated above the roof level;
- Does not include an *advertising structure*;
- Serves to screen the plant equipment and cooling tower. These elements are not defined as gross floor area (GFA) under the Penrith LEP 2010; and
- Results in minimal additional overshadowing.

When the architectural roof feature is excluded from the height of buildings calculation, the height of the proposal is outlined in **Table 2**.

Table 2 – Building Height Summary (Excluding the Architectural Roof Feature)

| Elevation | Proposed Building Height (Range) (metres) | Range of Exceedance of 24m Limit (metres) |
|-----------|--|--|
| North | 30.9 | 6.9 |
| South | 29.5 | 5.5 |
| East | 29.7 – 30.9 | 5.7 – 6.9 |
| West | 30.1 – 30.9 | 6.1 – 6.9 |

Figure 1 – West Elevation (Extract)



3. OBJECTIVES OF THE ZONE AND THE STANDARD

Clause 4.6 (4)(a)(ii) requires that a request for exemption from a development standard must establish that the proposed contravention is **consistent** with both the objectives of the standard and the zone.

3.1. OBJECTIVES OF THE B7 BUSINESS PARK ZONE

The proposed variation to the height of buildings development standard is consistent with, and does not prevent the satisfaction of the B7 Business Park zone objectives. Specifically, the proposal addresses each of the zone objectives in the following ways:

- *To provide a range of office and light industrial uses,*
 - The proposed development involves the construction of a commercial office building that can accommodate a flexible array of uses including high technology industries, office premises, business premises and the like. The floor to floor heights are designed to accommodate flexibility in use.
- *To encourage employment opportunities,*
 - The intent of the proposed Baiada building is to accommodate a broad range of uses within the field of research and development, and therefore provide opportunities for employment onsite. Strict compliance with the height standard would result in a reduction of employment floorspace within the building.
- *To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area,*
 - The proposal will not compromise this objective.
- *To provide for a range of higher order job opportunities including health, cultural and high technology industries,*
 - The Baiada building is proposed to accommodate a range of higher order job opportunities. This will be the subject of future use and fit-out development applications. Strict compliance with the height standard would result in a reduction of employment floorspace within the building.

- *To provide for a range of development that relates to university activities, creative and cultural industries, and business incubators.*
 - The Baiada building will provide opportunity for a range of tenancies that may relate to universities and business incubators. The use of each level will be the subject of separate DAs as individual tenants are secured. The proposed height variation accommodates greater floor to floor heights, which will assist in attracting a range of tenants.

3.2. OBJECTIVES OF THE HEIGHT OF BUILDINGS DEVELOPMENT STANDARD

The proposed variation to the height of buildings standard is consistent with, and does not prevent the relevant objectives of the standard being met, as outlined below.

- *to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,*
 - The Baiada building has been intentionally designed as a 'marker' building on an identified Gateway Site in the First Community Precinct Plan (Precinct Plan). Consistent with the character statements in the Precinct Plan, the Baiada Building exhibits an iconic building form that reinforces the street intersections. The Precinct Plan identifies that buildings on Gateway Sites may exhibit greater height to reinforce their prominence.
 - The building will set a precedence for design excellence within Sydney Science Park. This attribute has been recognised by the Urban Design Review Panel (UDRP) who have stated that the *"the overall building has a dynamic built form and demonstrates a level of architectural excellence which has not been seen in Penrith City"*.
 - As demonstrated in the artist impression of the First Community Precinct the height and scale of the development will ultimately be compatible with other buildings in the precinct (refer **Figure 2**). The appropriateness of the size of scale of the building in relation to the future urban context has been acknowledged by the UDRP.
 - The additional height is an appropriate built form outcome that responds to the characteristics of a 'Gateway Site', as identified in the First Community Precinct Plan. The Precinct Plan has been endorsed by the Council on 21 June 2017 and identifies that prominent Gateway Sites have the potential to accommodate landmark buildings.
 - Successive developments within the precinct will have consideration of the built form of the Baiada building, and will therefore be compatible within the surroundings. The additional height proposed for the Baiada building will not have a significant impact on surrounding buildings in the Precinct.
- *to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,*
 - The surrounding sites have not been developed and therefore there is negligible impact on views, privacy and solar access.
 - There is no shadow cast on land zoned RE1 Public Recreation. Shadow impacts are mostly concentrated within the site on June 21, ensuring that future surrounding development will receive generous direct sunlight. The shadow on the future park to the east (which is not zoned RE1) occurs from 3pm onwards.

Figure 2 – Artist Impression of First Community Precinct



Note: Proposed landscaping along boulevard road subject to change under DA consent 16/0176.

- *to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,*
 - As Kelleher Nightingale identify within the OEH Aboriginal Heritage Information Management System (AHIMS) (12 December 2016), no Aboriginal sites were identified within the part of the site the subject of this DA.
 - A portion of the site adjacent to Luddenham Road is identified as 'land with scenic and landscape values'. However, it must be recognised that in coming years, Luddenham Road is to be widened and the adjacent land will be completely transformed. It is therefore unrealistic to assume that the existing character will remain unchanged. The proposed development will be the first in Sydney Science Park, and will be highly visible from Luddenham Road. The visual impact will be significant; however, the building design quality and choice of materials will ensure that the impact is positive.
 - Urbis Heritage have reviewed the proposal and have advised that:

“The proposed works to the subject site under DA17/0495 are removed from and will not physically impact on the historic alignment of Luddenham Road. The form, location and alignment of Luddenham Road will still be visible and remain able to be interpreted, and the proposed works will in no way obscure or remove the ability to read the alignment of Luddenham Road from the public domain.”

They conclude that the proposal will not impact the heritage listed Luddenham Road and as such the proposal is supported on heritage grounds.

- *to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.*
 - The Baiada building is concentrated towards the intersection of the Boulevard Road and Connector Road, creating a built form intensity which emphasises the development's status as a Gateway Site. The maximum height transitions from a maximum of 29.5m to 35.1m (or 29.9m to 30.9m when the architectural roof feature is excluded) above natural ground, creating a high quality and iconic urban form within the landscape.
 - The additional height is necessary to ensure that the Baidia building remains the dominant built form within the First Community Precinct, as a Gateway site under the Precinct Plan. A reduction in the height of the proposal would compromise the objective to establish an iconic building.
 - The UDRP supports additional height on this site and also acknowledge that the GFA of the proposal is "significantly less than the amount which could be achieved by a lower but fatter building". Reducing the height to comply with the maximum height limit would require the floorspace at the upper levels to be redistributed to the lower levels. This would significantly compromise the design of the proposal as it would:
 - Increase the site coverage of the proposal, which would in turn reduce the area of landscaping and compromise the amenity for future employees; and
 - Increase the width and consequently the bulk of the building.

3.3. PUBLIC INTEREST CONSIDERATION

In accordance with Clause 4.6(4)(a)(ii), the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

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

Clause 4.6(3) (a) of the Penrith LEP 2010 requires 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 Pittwatter 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-compliance 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 or 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 or 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.*

In this particular case, the objectives of the standard are achieved notwithstanding non-compliance with the standard. Further, the underlying objective or purpose of the standard would be defeated if compliance was required and therefore compliance is unnecessary.

The following is noted in this regard:

- As outlined in Section 3.2, the proposed development is consistent with the objectives of the height of buildings development standard.
- The strict application of the 24m maximum height of buildings standard would be inconsistent with the Precinct Plan which identifies the site as a Gateway Site, which is appropriate for additional height. Compliance with the LEP height limit is therefore unreasonable and unnecessary.
- The aim of exceeding the height limit on Gateway sites is to encourage design innovation beyond the typical business park model. A consistent 24m height could create a monotonous and repetitive built form.
- The additional height is in part created as a result of the architectural roof feature. The roof feature is imperative in creating a dynamic building, which not only reinforces the slightly sloping topography of the site, but creates visual interest and serves as a marker to the First Community Precinct.
- The intent of the additional height to the Baiada building is to accommodate greater floor to ceiling heights, and therefore provide flexibility in spatial needs for future tenants, which include high technology industry users within the field of research and development.
- The dispersion of floorspace would compromise the objective to create a dense and vibrant research and development ecosystem, with the proposed floorplate size considered by the developer to be ideal for this purpose.

5. SUFFICIENT ENVIRONMENTAL PLANNING JUSTIFICATION

Clause 4.6 (3) (b) of the Penrith LEP 2010 requires that a proposed variation to a development standard must demonstrate that there are *sufficient environmental planning grounds to justify contravening the development standard*.

The following outlines the key reasons the proposed development is appropriate for the site and a departure from the strict application of the development standard is reasonable:

- The proposed variation is required to facilitate the Baiada building as a Gateway Site within the First Community Precinct.
- Additional height is appropriate on a Gateway Site under the Precinct Plan.
- The additional height reinforces the road intersection and the prominence and iconic nature of the building.
- The additional height provides flexibility for future tenants, notably in the field of research and development. The reduction in the floor to floor heights or the increase in the site area would compromise the objective to create a dense and vibrant R&D ecosystem.

- The proposed development is highly consistent with the objectives of the standard and the zone.
- There are no environmental impacts as a result of the variation. The additional overshadowing does not impact land zoned RE1 Public Recreation or adversely impact surrounding development.
- The additional height facilitates a reduction of site coverage, allowing greater permeability and landscaping at the ground level.

6. THE PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD

Under Clause 4.6 (5)(b) the consent authority must consider if there is public benefit associated with maintaining the development standard. Given the nature of the proposed variation, which will facilitate the development of a uniquely iconic commercial building in a new major employment generating precinct, there would be no public benefit in applying the control strictly.

The delivery of the Baiada building will facilitate a collaborative research and development ecosystem that provides for high order and intensive knowledge jobs. The strict application of the 24m height of buildings standard, would impact on the design and use intent of the building.

7. ANY OTHER MATTERS

Under Clause 4.6 (5)(c) the prior to granting concurrence, the Secretary 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.

Endorsement by the Urban Design Review Panel

The UDRP has reviewed the proposal and has made the following comments in relation to the design:

- *With regard to future urban context, the Baiada development is located next to the Commercial Boulevard and is intended to establish a landmark for the entire development, so the extra height makes sense;*
- *The gross floor area is significantly less than the amount which could be achieved by a lower but fatter building;*
- *The overall building has a dynamic form and demonstrates a level of architectural excellence which has not been seen in Penrith City; and*
- *The Phase 1 DA retains substantial open space area which will provide a significant backdrop to the future Commercial Boulevard.*

The comments made by the UDRP acknowledge that the proposed building achieves design excellence, with the additional height necessary to create a landmark development. The building height proposed is fundamental to the design intent. The building achieves the characteristics of a Gateway Site, as stated in the Precinct Plan. Reducing the height of the proposal would compromise the objectives that are stated in the Precinct Plan for Gateway Sites.

Redistributing the floor space that is located above the height limit to the lower levels would result in an increase in site coverage. The additional height allows this employment generating floorspace to be provided in a more slender built form than what would otherwise be achieved on the site. The height, scale and site coverage of building also increases the provision of landscaping and communal staff areas.

Floor to Ceiling Heights

As shown in **Table 3** below, the floor to floor heights of the proposed development exceed general commercial floor to ceiling height standards of 3.6m. The proposed floor to floor heights of 4 - 4.6m will provide flexibility for future tenants (to be confirmed) and will allow the building to accommodate a broad range of innovative users within the field of research and development.

Table 3 – Proposed Floor to Ceiling Heights

| Level | Floor to Floor Height (m) |
|--------------|----------------------------------|
| Ground | 4 |
| 1 | 4.5 |
| 2 | 4.5 |
| 3 | 4.5 |
| 4 | 4.5 |
| 5 | 4.5 |
| 6 | 4.6 |

Research suggests that for a science park to be successful in attracting and retaining high value tenants, activities must be concentrated to promote knowledge sharing, social interaction and the like. Celestino's extensive study of science and technology facilities indicated that the floorplan size and total building area is ideal for this nature of facility. As such, any reduction in the number of storeys would compromise the objective to create a vibrant and dense research and development hub.

The additional height can also be attributed to the architectural roof feature. This has been designed to create an iconic built form to signify and strengthen the prominence of the Baiada building. Without this feature, a repetitive 24m built form within the surroundings would prevail. This would prevent the Baiada building being perceived as a landmark building within a Gateway Site.

Accordingly, there are particular circumstances that warrant the use of Clause 4.6.

8. SUMMARY AND CONCLUSION

A variation to the 24m height of buildings standard under Clause 4.6 of the Penrith LEP 2010 as it relates to development at 565-609 Luddenham Road, Luddenham will deliver a good planning outcome and will realise the potential of the Baiada building.

The proposal meets the objectives of the standard and the zone in accordance with Clause 4.6, demonstrating that strict compliance with the standard is unreasonable and unnecessary in this case.