

# **CLAUSE 4.6 VARIATION - HEIGHT OF BUILDINGS**

**634-638 HIGH STREET,  
87-91 UNION ROAD,  
PENRITH**

**URBIS STAFF RESPONSIBLE FOR THIS REPORT WERE:**

National Director	John Wynne
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Project Code	SA7220
Report Number	Revised Clause 4.6 Variation_V3

# EXECUTIVE SUMMARY

This variation request has been prepared pursuant to clause 4.6 of *Penrith Local Environmental Plan 2010* (**PLEP 2010**). The proposed development at 634-638 High Street and 87-91 Union Road, Penrith (**the site**) exceeds the 24m height of building standard prescribed by clause 4.3 of the PLEP 2010 by 29.1m.

The site is the subject of a planning proposal referred to by the Department of Planning and Environment (**the Department**) as Draft PLEP 2010 Amendment No. 14. The planning proposal is with the Department for assessment and gazettal and is pending final resolution, subject only to flood planning studies for the site being carried out. The Department wrote to Toga Penrith Developments (**the applicant**) on 11 July 2018 noting that the Department is satisfied that this development can proceed through a plan making process, as it appears the development can address flood resilient building design and the ability to manage safe evacuation. As such, the planning proposal is considered 'certain and imminent'. The planning proposal is a matter for consideration under clause 4.15(1)(a)(ii) of the *Environmental Planning and Assessment Act 1979* (**the Act**).

The planning proposal removes the application of the height of building control prescribed by clause 4.3 from the site and allows for the approval of development with a Floor Space Ratio (**FSR**) of up to 6:1 where that development is the subject of an Architectural Design Competition and provides an agreed public benefit. The planning proposal applies to the site and sites immediately to the east and west on High Street, described as 'key sites' 3 and 10. Future development within the locality will therefore be characterised by development informed by this FSR control of 6:1 and unlimited height of building control.

The development seeking consent does not propose to utilise the proposed FSR control of 6:1, however does propose a building height that is compatible with the desired future character of the locality and which enables the current maximum permissible FSR to be achieved by including a maximum building height of 53.1m. The applicant recognises the role of the site to facilitate a transitional development between existing development to the east and south, and the future development of the adjacent 'key sites'. Consequentially the proposed 15 and 12 storeys are less than the maximum 20 and 14 storeys illustrated within the master plan for the site.

Notwithstanding the status of the planning proposal, the proposed development must be considered under the existing planning controls. The proposal is compliant with the maximum FSR control for the site (3.3:1), however a floor space that achieves the maximum permissible FSR cannot be delivered on the site while adhering to the maximum height of building standard, the requirements of the Apartment Design Guide (**ADG**), and Penrith Development Control Plan 2014 (**the DCP**). This has been demonstrated in additional testing of a 'compliant scheme' outlined in this request. Notably the DCP requires the delivery of a new road through the site. The alignment of this road reduces the developable area of the site by approximately 25%.

This variation request demonstrates that:

- Compliance with the height development standard is unreasonable or unnecessary in the circumstances of the case as the objectives of the height development standard are achieved notwithstanding the non-compliance and would be thwarted if not varied as proposed such that requiring compliance with the height of building standard unnecessarily and inappropriately limits the development potential the site, prevents development on the site that achieves the maximum permissible FSR, and is a hindrance to the development and growth of the Penrith CBD;
- There are sufficient environmental planning grounds to justify contravening the development standard; and
- Notwithstanding the variation to the development standard, the proposed development is in the public interest.

The application of clause 4.6 to vary the development standard is not numerically limited. The consent authority has broad discretion under clause 4.6(2) and clause 4.6(4)(a)(i) of PLEP 2010 to determine variations of any numeric value above a development standard with the concurrence of the Secretary. This is confirmed in the published planning system circular PS 17-006 'Variations to development standards'.

In addition, no provision of clause 4.6(8) restricts the variation sought in this application. The consent authority can therefore be satisfied that this variation request can be lawfully approved pursuant to clause 4.6 of PLEP 2010.

# 1. INTRODUCTION

This variation request has been prepared pursuant to clause 4.6 of *Penrith Local Environmental Plan 2010* (**PLEP 2010**). The proposed development at 634-638 High Street and 87-91 Union Road, Penrith (**the site**) exceeds the maximum height of building standard prescribed by clause 4.3 of the PLEP 2010 by 29.1 metres. To achieve a better development outcome on the site, this clause 4.6 variation seeks an exception to this development standard.

At the time of writing this, case law relevant to the preparation of this clause 4.6 variation are as follows:

- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Four2Five Pty Ltd v. Ashfield Council* [2015] NSWCA 248 ('Four2five No 3')
- *Winten Property Group Ltd v North Sydney Council* [2001] NSWLEC 46
- *Zhang and Anor v Council of the City of Ryde* [2016] NSWLEC 1179
- *Micaul Holdings Pty Ltd v Randwick City Council* [2016] NSWLEC 7
- *Moskovich v Waverley Council* [2016] NSWLEC 1015
- *Gejo Pty Ltd v Canterbury-Bankstown Council* [2017] NSW LEP 1712

The relevant findings of these cases have been considered in the preparation of this request.

This variation request is to be read in conjunction with the submitted Statement of Environmental Effects (**SEE**) and proposed architectural plans at **Appendix A** of the SEE.



## 2. BACKGROUND

The site is the subject of a planning proposal referred to by the Department of Planning and Environment (**the Department**) as Draft PLEP 2010 Amendment No. 14. The planning proposal is pending final resolution subject only to flood planning studies for the site being carried out and is with the Department for assessment and gazettal. The planning proposal is a matter for consideration under clause 4.15(1)(a)(ii) of the *Environmental Planning and Assessment Act 1979* (**the Act**).

The planning proposal applies to several sites, including the site, within the Penrith CBD. The site is located within 'key site' 10 as shown in **Figure 1** below.

**Figure 1** – PLEP 2010 Key Sites Map Extract



The planning proposal removes the application of clause 4.3, clause 4.4, and clause 8.4(5) of PLEP 2010 from the site and allows for the approval of a development with a Floor Space Ratio (**FSR**) of 6:1 where that development has been the subject of an Architectural Design Competition, and provides an agreed public benefit. The master plan prepared to inform the planning proposal includes building heights up to 25 storeys across key sites 3 and 10.

As such, the existing planning controls are outdated and soon to be replaced. Furthermore, there are fundamental inconsistencies and flaws in the existing development standards applying across the site, as a maximum compliant floor space ratio cannot be delivered on the site while adhering to the maximum height of building standard, the requirements of the Apartment Design Guide (**ADG**), and Penrith Development Control Plan 2014 (**the DCP**). Notably the DCP requires the delivery of a new road through the site. The alignment of this road reduces the developable area of the site by approximately 25% and will provide a significant public benefit.

The character of the locality is therefore changing, and the future desired character of the site and locality will be informed by the planning proposal and the future development standards for the site.

The development therefore needs to be compatible with both the existing character of the area and the desired future character of the locality, while maintaining feasibility to avoid the sterilisation of a key site within the Penrith CBD.

The Department wrote to Toga Penrith Developments (**the applicant**) on 11 July 2018 noting that the Department is satisfied that this development can proceed through a plan making process, as it appears the development can address flood resilient building design and the ability to manage safe evacuation. As such, the planning proposal is considered 'certain and imminent'.

### 3. DEVELOPMENT STANDARD AND PROPOSED VARIATION

The site includes the land described as 634-638 High Street and 87-91 Union Road, Penrith. The site comprises three allotments, legally described as Lot 1 in Deposited Plan (DP) 544302, and Lots 1 and 2 in DP 1202310. The site is illustrated in **Figure 2** below.

**Figure 2 – Site Area**

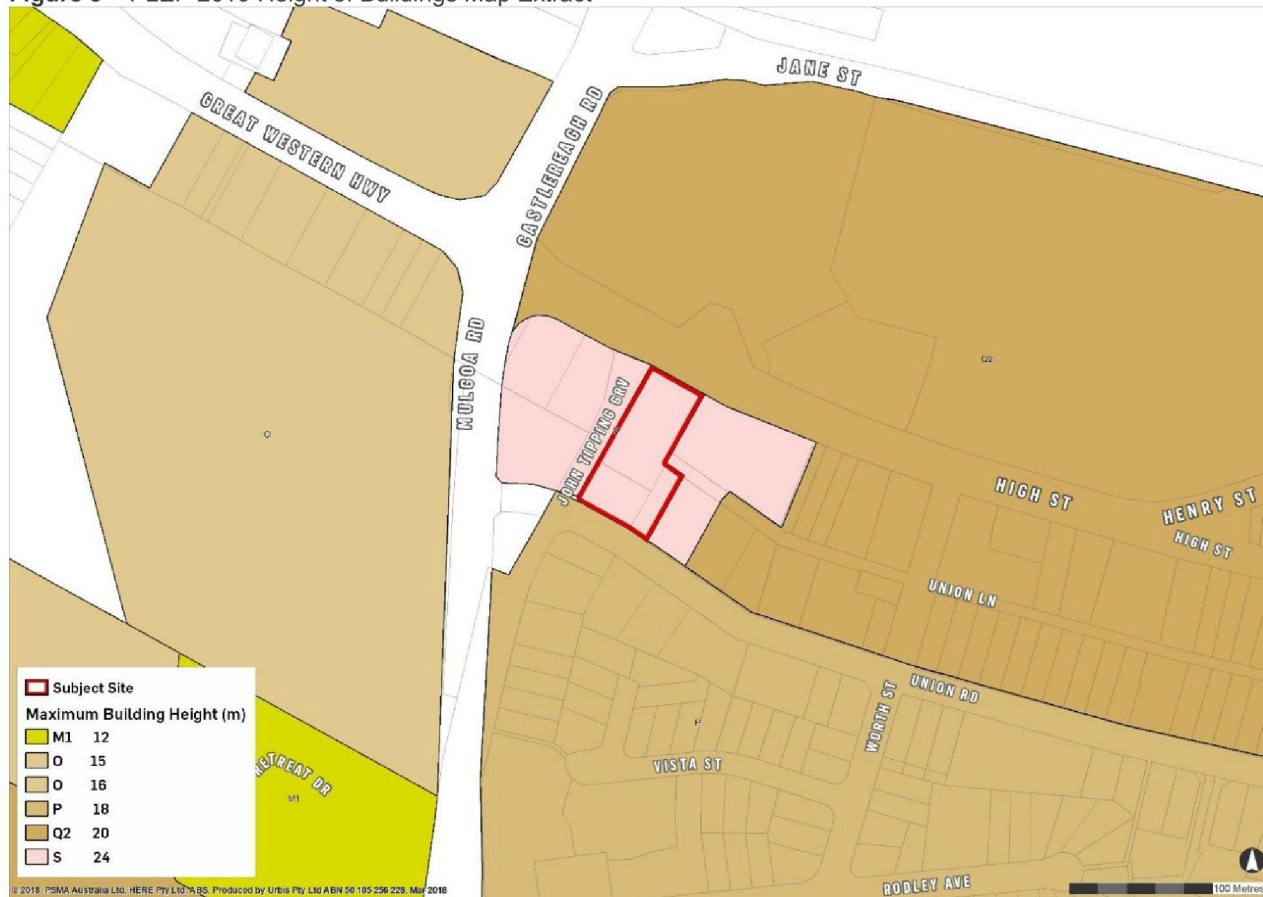


The configuration and layout of the proposed development on the site is shown in the Architectural Plans at **Appendix A** of the SEE. The proposed development comprises two residential towers over a three level podium, with a total rise of 15 storeys.

As shown in **Figure 3**, the site is subject to a maximum height of building control of 24m under PLEP 2010. The proposed development has a maximum height of 53.1m (RL 80.4) as measured from existing ground level (RL 27.3) to the top of the lift core of Building 2. The majority of Building 2 has a height of 50m. Building 1 has a maximum height of 43.1m at the top of the lift core, with a height of 40.8m across the majority of the building.



Figure 3 – PLEP 2010 Height of Buildings Map Extract



## 4. ASSESSMENT OF CLAUSE 4.6 VARIATION

This variation request has been informed by an assessment of the proposed development on:

- Whether compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.
- Whether there are sufficient environmental planning grounds to justify contravening the development standard.
- Whether the proposed development is in the public interest.

As outlined in this assessment it is concluded that the request is well founded and that the particular circumstances of the case warrant flexibility in the application of the maximum height of building development standard.

### 4.1. COMPLIANCE UNREASONABLE OR UNNECESSARY

Compliance with the maximum height of building control is unreasonable or unnecessary in the circumstances of the application, for the following reasons.

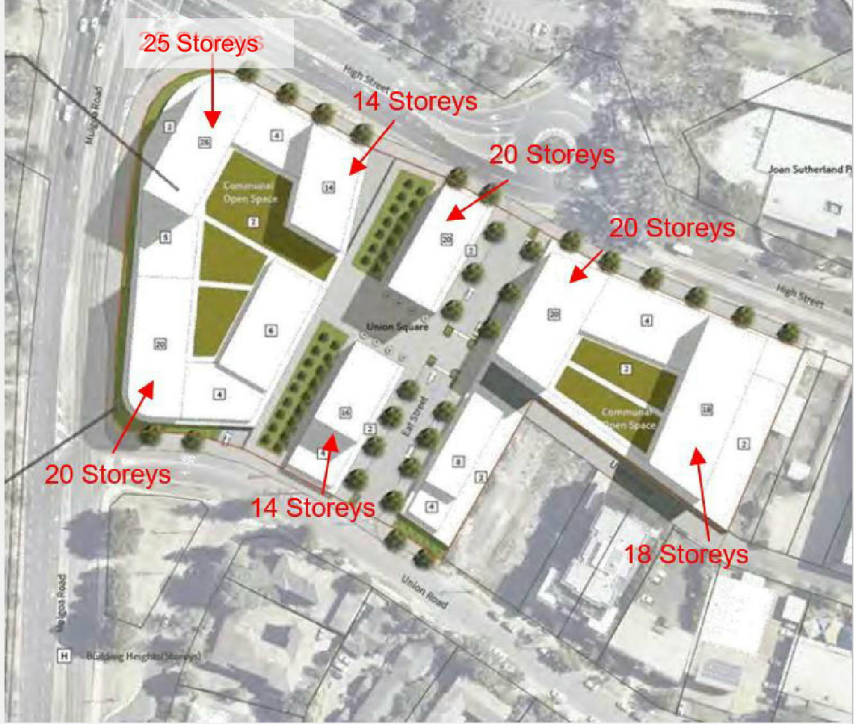
#### **The proposal achieves the objectives of the development standard**

Clause 4.3 of the PLEP 2010 outlines objectives for the height of buildings development standard. The proposed development's achievement of the objectives of the clause 4.3 is outlined below.

This assessment demonstrates that the proposed development is both consistent with (as required by cl 4.6(4)(a)(ii)) and will achieve (as required by cl 4.6(3)(a)) the objectives of the development standard, notwithstanding the non-compliance with the development standard.

**Table 1** – Assessment of Achievement of and consistency with Development Standard Objectives


Objective	Comment
(a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,	<p>The proposed building heights, whilst different to the immediately surrounding development, are compatible with and will positively contribute and respond to the existing character of the locality as:</p> <ul style="list-style-type: none"><li>• The proposed development includes a three level podium which responds to the lower scale residential flat buildings located south of Union Road. The architectural expression of the podium breaks down the perception of height and presents a rich building materiality at the human scale.</li><li>• The proposed building height does not result in unreasonable wind impacts to existing development surrounding the site as outlined within section 7.3 of the SEE.</li><li>• The proposed development does not cause unreasonable overshadowing to existing development given the CBD context of the site as outlined in section 6.7.4 of the SEE. Further, the proposal results in a potentially improved solar impact to the immediately adjacent residential development (83-85 Union Road) compared to a 'compliant scheme' that results in a comparable FSR achieved as outlined in section 4.3 of this report.</li><li>• The proposed development provides necessary building separation specified by the Apartment Design Guide (<b>ADG</b>) for a building above 12 storeys to existing and potential future surrounding development.</li></ul>

Objective	Comment
	<ul style="list-style-type: none"> <li>The proposed building height is compatible with the desired future character of the locality as: <ul style="list-style-type: none"> <li>The proposed height is less than the building heights identified within the master plan for 'key sites' 3 and 10 and the proposed controls within the planning proposal as excerpted at <b>Figure 6</b> below. The planning proposal, which has legislative relevance in the assessment of the DA, provides context for the future character of 'key sites' 3 and 10 within the Penrith CBD.</li> <li>The maximum 15 storeys proposed will provide a transition between the existing eight storey building at 83-85 Union Street and the future massing planned between 18 and 25 storeys adjacent to the site.</li> </ul> </li> </ul> <p><b>Figure 6 – Master Plan for Sites 3 and 10 (Source: JBA, 2015)</b></p>  <ul style="list-style-type: none"> <li>The proposed development has been designed to be compatible with the massing of the future character of the locality. The siting of the proposed buildings enables the delivery of a new road within the site aligning with the masterplan and the DCP requirements, provides an appropriate landscape treatment and active frontage to this new road, and provides an active frontage to John Tipping Grove which is identified as the future public open space and recreation area for the locality.</li> <li>The floor plates of the proposed buildings are modest, being approximately 764sqm and 767sqm, and the building massing is further articulated by the projection of building corners and balconies which provide architectural variety across the site.</li> </ul>



Objective	Comment
<p>(b) <i>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,</i></p>	<ul style="list-style-type: none"> <li>• The proposed development minimises visual impact with a three-storey podium providing a human scale to the building massing that responds to the scale of surrounding development.</li> <li>• The applicant's response to Council RFI dated June 2018 includes photomontages of the proposal from key public locations including major roads and open space surrounding the site. The photomontages demonstrate that the proposed built form does not result in an adverse visual impact to surrounding public areas.</li> <li>• The proposed development further minimises visual impact through the provision of tower setbacks including approximately 3.9m to High Street, 5.3m to Union Street, and compliant building separation to properties at the east. The reduction in the street wall height to High Street compared to the DCP controls provides a continual three storey datum height that relates to surrounding development and the finer grain main street retailing at High Street.</li> <li>• Due to the site location at the end of High Street, disruption of some views towards the Blue Mountains is inevitable with a redevelopment of the site. The disruption of views is minimised by shorter building heights in comparison to the anticipated built form informing the Draft PLEP 2010 No. 14.</li> <li>• The proposed development minimises loss of privacy by adhering to the required building setbacks and separation distances contained within the ADG.</li> <li>• The proposed development minimises loss of solar access to existing development and public areas through siting the development to the west of the site as reasonably possible providing building separation that meets or exceeds the requirements of the ADG, and setting back the northern most portion of Building 2 further to the north west of the site to reduce shadowing impacts on 83-85 Union Road and 79-81 Union Road.</li> <li>• To achieve the objective to 'minimise' loss of solar access there is no burden on the applicant to improve solar access to existing properties or avoid any additional overshadowing to existing properties. The proposal achieves the objectives of the development standard by balancing the minimisation of all impacts to surrounding development with the achievement and consistency of the development with other planning considerations including increasing site permeability, achieving active frontages, providing a mix of dwelling types in a commercial feasible development, mitigating flooding and stormwater impacts, providing communal open space and landscaping and so forth.</li> <li>• Consideration has been given to the likely shadow impact associated with a 'compliant scheme' that adheres to the height of building standard and achieves a commensurate FSR as the proposed development. As outlined in Section 4.3 of this report, such a</li> </ul>

Objective	Comment
	<p>'compliant scheme' would result in fewer apartments achieving the minimum two hours solar access in mid-winter at 83-85 Union Road compared to the proposal. All other surrounding properties maintain achievement of a minimum two hours solar access in mid-winter notwithstanding the non-compliance to the height of building standard. As such, the development satisfactorily achieves the objectives of the development standard.</p>
<p>(c) <i>to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,</i></p>	<p>The proposed development achieves this objective as it does not adversely impact on heritage items, heritage conservation areas, or areas of scenic or visual importance as identified within the PLEP 2010.</p>
<p>(d) <i>to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.</i></p>	<p>The proposed building heights will provide a high quality urban form for all buildings as:</p> <ul style="list-style-type: none"> <li>• The architecture has been informed by an architectural design competition and refined through continued workshops with the appointed competitive design process Jury. This process has sought to ensure the architecture of the building responds to the desired future character of the locality in terms of materiality, scale, and articulation, and will provide a high quality urban form.</li> <li>• The proposed buildings have been designed to be consistent with the future character of development to the west through the competitive design process, so that the first stage of development delivers a high quality urban form capable of being consistent with the future context of the site.</li> <li>• The proposal of a 15 storey building on the western portion of the site allows for the delivery of a new public road on the eastern portion of the site which result in a higher quality urban form for the locality by: <ul style="list-style-type: none"> <li>○ Improving vehicle and pedestrian movements and legibility to the Penrith CBD and Civic Centre;</li> <li>○ Providing more ground floor activation within the Penrith CBD;</li> <li>○ Resulting in lesser shadow impacts to 83-85 Union Road than a 'compliant scheme' built further to the east of the site; and</li> <li>○ Providing opportunities for public open space and landscaping within the public domain.</li> </ul> </li> <li>• The proposed development provides a transition in built form and land use intensity as: <ul style="list-style-type: none"> <li>○ The proposed development has an FSR of 3.28:1 which provides an appropriate transition between the existing 3:1 FSR control to the east of the site to the future FSR of 6:1 on the site and surrounding</li> </ul> </li> </ul>

Objective	Comment
	<p>sites (referred to as Sites 3 and 10 in Draft PLEP 2010 Amendment 14).</p> <ul style="list-style-type: none"> <li>○ As detailed elsewhere in this table, the siting of the proposed development provides significant setbacks to existing and future development to the south and east while also providing compliant building separation within the site. This ensures an appropriate transition in built form from the east and south to the site and future building heights to the north and west of the site.</li> <li>○ The maximum 15 storeys proposed will provide a transition from the existing eight storey building at 83-85 Union Street to the future massing planned between 18 and 26 storeys adjacent to the site. The relationship between the proposed development and adjacent eight storey building is illustrated in <b>Figure 7</b> below.</li> </ul> <p><b>Figure 7</b> – Perspective of development, viewed from south east (Source: SJB, 2018)</p> 

### Objectives of the development standard would be thwarted by a compliant development

As illustrated in Figure 5 and discussed below under the subheading “The proposal is a superior planning outcome compared to a compliant scheme and better achieves the objectives of the height standard”, the objectives of the development standard would be thwarted by a complaint scheme as:

- The massing and building bulk that would result from a ‘compliant’ scheme is inconsistent with the future desired character of the locality; and
- A transition in built form and land use intensity would not be achieved between adjacent sites; and
- The desired future character of the locality (including as envisaged in the planning proposal) would not be achieved through a ‘complaint’ scheme.

### Compliance with the existing control is unreasonable given status of planning proposal

In the specific circumstances of the development a planning proposal which has statutory relevance for the assessment of the DA applies to the site. Through site specific controls, this draft environmental planning instrument removes the application of the height of building standard contained within clause 4.3. As such the proposed building height is compliant with the draft height of building standard proposed for the site.



Through the drafting, public exhibition, and finalisation of the planning proposal, the proposal to remove the maximum height of building control for the site and apply a FSR control of 6:1 was maintained for the site. While significant building heights are anticipated at the corner of High Street and Mulgoa Road to mark the western entrance of Penrith CBD, increased heights on the site the subject of this DA can deliver an appropriate transition in building form from this gateway site to existing development to the east and south.

Draft clause 8.7 of PLEP 2010 will require the provision of an agreed material public benefit in consideration for additional FSR yield above the existing levels. In the circumstances of the proposed development, no additional FSR above the existing controls is proposed and as such there is no requirement to provide an additional material public benefit in addition to those required by developer contributions.

Notwithstanding, the proposed development does provide *in kind* developer contributions and a significant public benefit through the delivery of a new road through the site, to be constructed and dedicated to the Council.

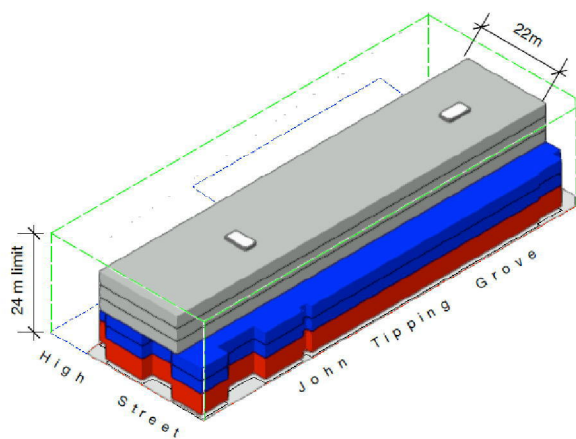
### **The proposal is a superior planning outcome compared to a compliant scheme and better achieves the objectives of the height standard**

In developing the design of the proposed building, options were considered to prepare a 'compliant scheme'. However, this is not considered desirable or feasible for the site as:

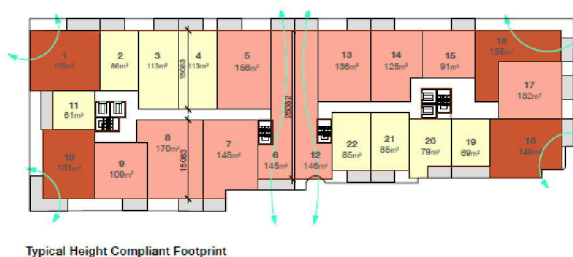
- A building that is compliant with the height of building standard prevents the provision of the public benefits associated with a new road through the site;
- A better design outcome that is compatible with the desired future character of the area can be achieved by extending the building vertically compared to horizontally across the site; and
- A better design outcome that is compatible with existing development surrounding the site can be achieved by extending the building vertically compared to horizontally.

In order to demonstrate that a compliant building would not be possible whilst delivering the public benefits associated with a new road through the site, an investigation has been completed by a third-party Architect, Olsson and Associates. The investigation sought to determine the likely footprint and building massing of a 'compliant scheme' including the delivery of a road through the site. This is illustrated in **Figure 4** below.

**Figure 4 – Potential Massing of a Compliant Scheme with Road (Source: Olsson and Associates)**



Picture 1 – Potential 'compliant' building envelope, with new road



Typical Height Compliant Footprint

Picture 2 – Potential 'compliant' building floor plan, with new road

The requirement to construct a new road through the site specified in the DCP results in a reduction in the developable area of the site by approximately 25%. Through massing studies, it is demonstrated that it is not feasible to distribute this floor space within the height of building standard.

The potential 'compliant' building envelope shown in **Figure 4** above results in a maximum FSR of 1.83:1, made up of:

- 1,362.7sqm of ground floor retail GFA; and
- 2,836sqm of residential GFA per level (three floors).

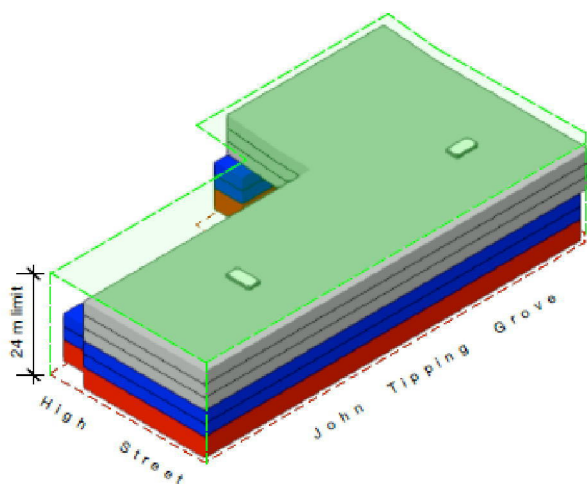
This is not consistent with the FSR control for the site, nor that of surrounding development and will unnecessarily limit the development potential of the site.

In addition to not being commensurate with the FSR control, the proposed building massing is also monotonous, results in an extraordinarily long building frontage without building breaks, and results in more residential apartments orientated towards the adjacent development to the east than proposed within the DA.

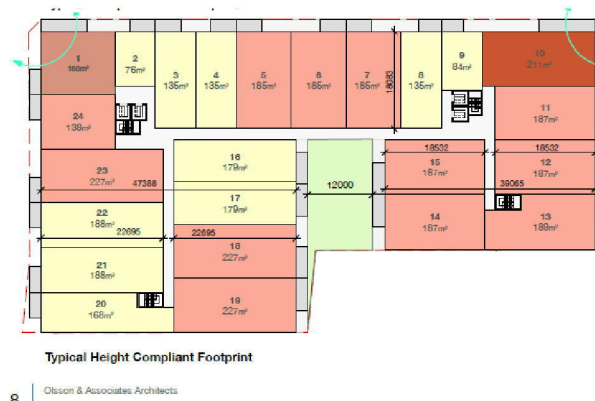
Therefore, to deliver a scheme which complies with the maximum height of building control and is generally consistent with the FSR control, significant increases to the development footprint are required.

A second investigation completed by Olsson and Associates, assesses the likely footprint and building massing of a 'compliant scheme' without the delivery of the new road through the site. This is described as Option 2 in the diagrams at **Appendix A**. Option 2 is extracted at **Figure 5** below.

**Figure 5** – Potential Massing of a Compliant Scheme across site (Source: Olsson and Associates)



Picture 3 – Potential 'compliant' building envelope, without new road



Picture 4 – Potential 'compliant' building floor plan, without new road

Despite increasing the building footprint to the east of the site, the above building massing still does not achieve the maximum FSR control applicable to the site when applying the constraint of two above ground levels of parking and absent any articulation or breaking up of built form which would be required. In this scenario the maximum FSR achieved is 2.95:1 made up of:

- 2,530sqm of ground floor retail; and
- 4,468sqm of residential GFA per level.

If no above ground parking was delivered in the Option 2 scheme, while a commensurate FSR would be achieved compared to the proposed DA (with a shortfall of approximately 3-5 apartments), the resulting built form would not be a superior planning outcome for the site as:

- The percentage of south facing apartments would not be consistent with the ADG;
- The percentage of naturally ventilated apartments would not be consistent with the ADG;
- The depth of the overall building and individual apartments would be excessive compared to the guidelines provided with the ADG; and
- As demonstrated in the shadow diagrams and shadow impact analysis included at **Appendix A**, Option 2 while shorter than the proposed scheme, result in a greater adverse impact to the nearest adjacent development at 83-85 Union Road compared to the proposed scheme.

Further, the above 'compliant scheme' is considered a significantly poorer design outcome than the proposed development when considering the evaluation criteria for 'good design' outlined in the Government Architect's guide to 'Evaluating Good Design' (2018), as outlined below:



- *Better fit* – The proposed development has been designed to respond to the needs of the local environment by providing a new public road through the site, and providing a transitional building from between existing and future high-density development.
- *Better performance* – The proposed design complies with the requirements of the ADG for apartment amenity and environmental performance, which would be undermined in the ‘compliant scheme’ above resulting in apartments in close proximity to each other and adjacent development.
- *Better for community* – The proposed design provides a more inclusive and connected development by providing public linkages through the site not only from Union Road and High Street but through the proposed building from the east to John Tipping Grove which is flagged for the location of a new public plaza and recreation space.
- *Better for people* – The proposed design is considered a better outcome for the future residents of the development compared to the ‘compliant scheme’ above as the podium communal open space will achieve better solar access, greater separation between residential units are achieved, and greater opportunities for views to the Blue Mountains is achieved.
- *Better working* – From a construction perspective, the proposed design is more practical and feasible than a ‘courtyard’ style development shown in the ‘compliant’ scheme.
- *Better value* – The proposed development with high quality links to surrounding public open space and development will create greater value for residents and users of the space.
- *Better look and feel* – By achieving a yield commensurate with the FSR control a higher quality architectural design of the building is delivered, compared to a ‘compliant scheme’ that does not achieve the required development yields.

In addition, as the proposal complies with the FSR control that applies to the site the variation to the height of building control does not result in any additional floor area or intensity of development within the site compared to what is currently envisaged for the site.

Finally, the fact that the design excellence provisions of cl 8.4 of the PLEP 2010 have been invoked and the development successful in an architectural design competition under that clause further supports the conclusion that a superior planning outcome will be achieved by the proposed development compared to development that is likely to result if constrained by the current height standard. It is reasonable to assume that the jury responsible for determining the competition considered the matters in cl 8.4(2) of the PLEP 2010 in making its decision that the proposed development achieved design excellence.

Taking into account the above and the particular circumstances of the proposal it is neither, reasonable or necessary to require compliance with the height of building standard.

## 4.2. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

There are sufficient environmental planning grounds to justify contravening the development standard for the following reasons:

- The proposed development achieves a superior planning outcome compared to a ‘compliant’ scheme and better achieves the objectives of the height standard (as described in **section 4.1**).
- The variation does not diminish the development potential of adjacent land as shown in the Architectural Plans at **Attachment A** as the proposal has been designed to be compatible with adjacent future development.
- The proposal is under the maximum permitted FSR control that applies to the site, meaning it is highly consistent with what one could reasonably expect in terms of site layout design and land use intensity of the site.
- The proposal provides an appropriate transition in building scale from the existing development to the south and east and future high-rise development at Sites 3 and 10 of the Penrith CBD, which could not be achieved without the proposed variation to the height of building standard.
- The proposal appropriately responds to the desired future character of the locality as envisaged in the planning proposal (and discussed in Sections 2 and 4.1 of this Report).

- While overshadowing impacts are anticipated with new development of this height, the overshadowing impacts are reasonable for the site, as described at Section 6.7.4 of the SEE and as further considered within this report, including **Appendix A** of this report.
- The visual impact of the proposed development has been mitigated through the architectural design which emphasises a three-storey podium relating to existing development south of Union Road. The proposed development is consistent with the general height of buildings recommended within the master plan which informed the planning proposal for the future controls of the site.
- The proposed building height is therefore highly consistent with the draft height of building standard (no maximum) applying to the site.

Given the high level of compliance with other key design guidelines, high quality design of the overall proposal the variation to the development standard is supportable from environmental planning grounds.

### 4.3. CONSISTENCY WITH OBJECTIVES OF B4 MIXED USE ZONE

As shown in page 27 of the SEE, the site is zoned B4 Mixed Use under the PLEP 2010. The objectives of the B4 Mixed Use zone in the PLEP 2010 are considered within **Table 2** below.

As outlined below the proposal is consistent with the objectives of the zone, and the proposed height is appropriate for the site and the locality.

**Table 2** – Assessment of Consistency with B4 Mixed Use Zone Objectives

Objective	Comment
<i>To provide a mixture of compatible land uses.</i>	The proposed development provides a mixture of compatible residential and commercial land uses which are compatible given their complementary functions and are typical of development in the B4 Mixed Use zone.
<i>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.</i>	The proposed development includes residential and commercial uses at a highly accessible location within the Penrith CBD that will maximise public transport patronage and encourage walking and cycling through the provision of new footpaths, and bicycle parking located within the public domain and in a secure location at grade within the development.
<i>To minimise conflict between land uses within the zone and land uses within adjoining zones.</i>	The proposal is consistent with the existing land uses on adjoining sites, and will not result in any unacceptable land use conflicts. Operating conditions for the commercial tenancies will mitigate any potential conflicts.
<i>To create opportunities to improve public amenity.</i>	<p>The proposed development, and notably the proposed height variation, creates an opportunity to significantly improve public amenity by providing a new public road through the site which:</p> <ul style="list-style-type: none"> <li>• Enhances local connectivity from south of the site to the Penrith CBD; and</li> <li>• Provides more significant landscaping within the public domain than the existing site condition.</li> </ul> <p>The proposal improves the public domain and results in enhanced public amenity by including active street frontages, casual surveillance of public streets, and an architectural design that achieves design excellence through the completion of an architectural design competition.</p>
<i>To provide a wide range of retail, business, office,</i>	The proposal provides residential land uses within a range of dwelling types and sizes. The proposal includes a range of commercial tenancies



Objective	Comment
<i>residential, community and other suitable land uses.</i>	that will suit a range of tenants and future operators which will deliver business premises to the residents of the development and the surrounding locality.

## 4.4. PUBLIC INTEREST AND PUBLIC BENEFIT

Overall it is considered that the strict maintenance of the height of building development standard in this instance is not in the public interest as:

- The proposal achieves and is consistent with the objectives of the development standard as provided in clause 4.3 of PLEP 2010, as outlined in **section 4.3** of this variation request.
- The proposal is consistent with the objectives of development within the B4 Mixed Use zone, as outlined in **section 4.4** of this variation request.
- The proposal results in significant public benefit by the delivery of a new road through the site, which would not be able to be achieved within a compliant building height.
- A 'compliant scheme' would result in a larger building footprint with reduced residential amenity for future residents of the development and occupants of surrounding development than proposed within this DA.
- The proposal provides an appropriate transition in building scale from the existing development to the south and east and future high-rise development at Sites 3 and 10 within the Penrith CBD.
- Requiring compliance with the height of building standard unnecessarily sterilises the site and is a hindrance to the development and growth of the Penrith CBD

As such it is considered that notwithstanding the proposed variation to the development standard, the proposed development is in the public interest.

## 4.5. ANY MATTER OF SIGNIFICANCE

The non-compliance does not raise any matter of significance for State or regional environmental planning. Notably, the proposal does not include any increase in residential density in the CBD compared to existing planning controls. As no increase in residential density is proposed on the site, the deferral of Draft PLEP 2010 Amendment No. 14 for wider flood evacuation is not a barrier to determining the DA.

## 4.6. SECRETARY'S CONCURRENCE

The Planning Circular PS 18-003, issued on 21 February 2018 (**Planning Circular**), outlines that all consent authorities may assume the Secretary's concurrence under clause 4.6 of the *Standard Instrument (Local Environmental Plans) Order 2006* (with some exceptions). The PLEP is a standard instrument LEP and accordingly, the relevant consent authority may assume the Secretary's concurrence in relation to clause 4.6 (5). This assumed concurrence notice takes effect immediately and applies to pending development applications.

We note that under the Planning Circular this assumed concurrence is subject to some conditions - where the development contravenes a numerical standard by greater than 10%, the Secretary's concurrence may not be assumed by a delegate of council. This restriction however does not apply to decisions made by a local planning panel, as they are not legally delegates. The proposed development will be assessed by a local planning panel, and as such the 10% limit does not apply.

## 5. CONCLUSION

The proposed development exceeds the 24m height of building standard prescribed by clause 4.3 of the PLEP 2010 by up to 29.1m.

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

- The proposal achieves the objectives of the building height standard notwithstanding the non-compliance such that to require compliance with the height of building standard on this site would unnecessarily and inappropriately underutilises the site and would be a hindrance to the development and growth of the Penrith CBD. The proposed variation to the height development standard will result in a development that is compatible with the existing site context and is consistent with the desired future character of the site and locality.
- The objectives of the building height standard would be thwarted by a complaint scheme as:
  - The bulk of the building would be inconsistent with the future desired character of the locality; and
  - A transition in built form and land use intensity is not achieved between adjacent sites and the desired future character of the locality including the draft planning controls delivered within the planning proposal that applies to the site.
- There are sufficient environmental planning grounds to justify the non-compliance including the balance of benefits to the overall development (as well as current and future surrounding developments) as well as the mitigation of environmental impacts resulting from the development compared to a compliant design.
- The proposal is in the public interest as it is consistent with the objectives of the development standard and the objectives for development within the B4 Mixed Use zone. The proposal represents a superior urban design outcome for the site as it consolidates built form vertically rather than horizontally.

Based on the reasons outlined above, it is concluded that the request is well founded and that the particular circumstances of the case warrant flexibility in the application of the maximum height of building development standard.

# **APPENDIX A      COMPLIANT SCHEME PLANS AND SHADOW ANALYSIS (OLSSON AND ASSOCIATES)**





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