

Clause 4.6 Variation

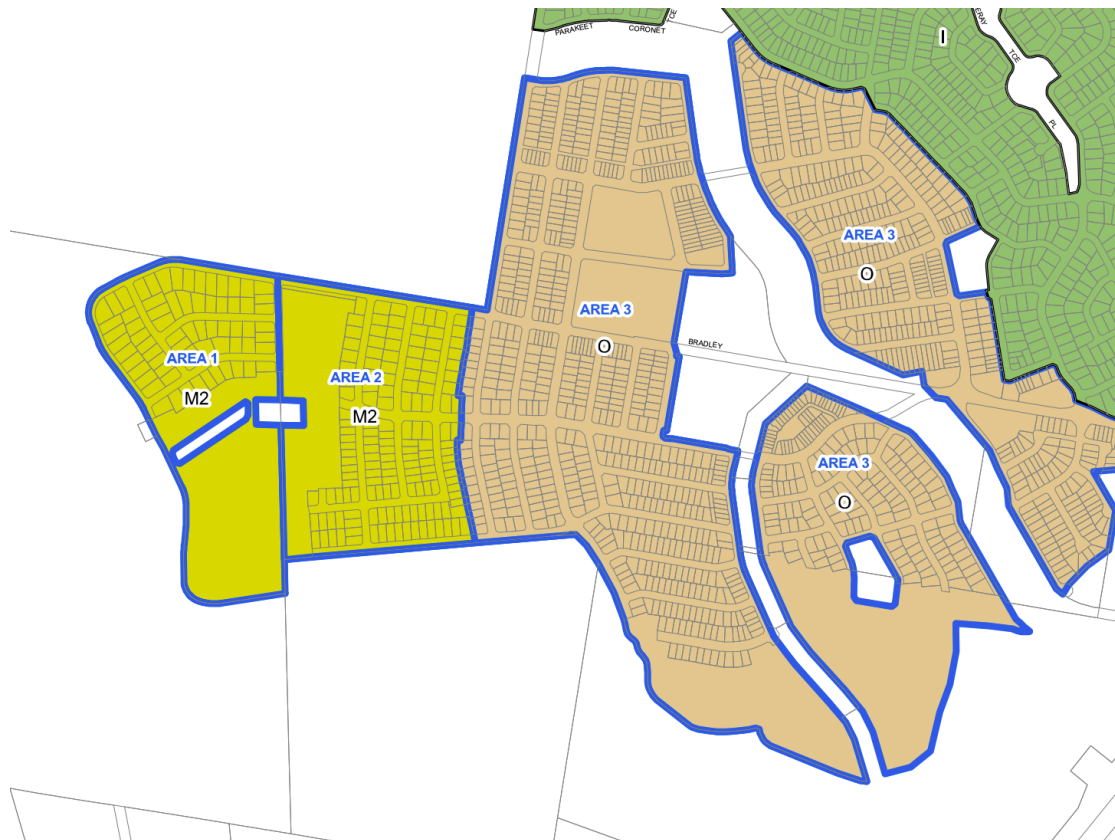
GLENMORE PARK STAGE 2 TOWN
CENTRE
90-98 GLENMORE RIDGE DRIVE,
GLENMORE PARK
30 JULY 2020



CLAUSE 4.6 VARIATION: MAXIMUM BUILDING HEIGHT DEVELOPMENT STANDARD

BACKGROUND, CONTROLS, AND THE DEPARTURE

Clause 4.3 of the Penrith LEP 2010 sets a maximum building height of 15m for the subject site, noting the site is mapped as 'Area 3'. This is reflected on the mapping extract below.



Clause 7.16 of the Penrith LEP also contains a height limit for particular dwelling types in the Glenmore Park Stage 2 release area. This is reproduced below over the page.

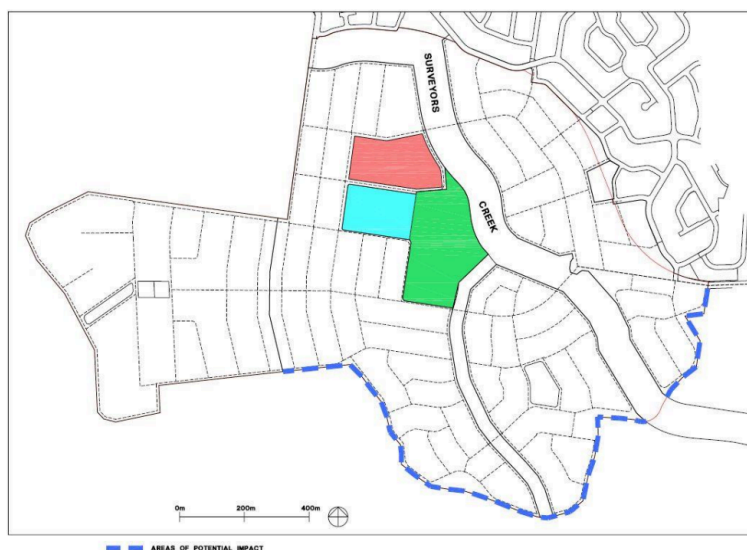
It is noted that this Clause 4.6 seeks a departure to both provisions- noting they are the same numerical standard.

(7) Despite any other provision of this Plan and subject to subclause (8), the height of a type of dwelling specified in Column 2 of the table to this subclause, on land in an area specified opposite that dwelling in Column 1 of that table and identified on the Height of Buildings Map must not exceed the height specified opposite in Column 3 of that table.

Column 1	Column 2	Column 3
Area 1 and Area 2	Dwelling houses and dual occupancies	10 metres
Area 1 and Area 2	Dwelling houses and dual occupancies on a slope greater than 1 in 8	12.5 metres
Area 3	Residential flat buildings	15 metres
Area 3	Multi dwelling housing	10 metres
Area 3	Dwelling houses and dual occupancies on land in Zone B2 Local Centre	12.5 metres
Area 3	Dwelling houses and dual occupancies on a slope greater than 1 in 8	12.5 metres
Area 3	Shop top housing	15 metres

(8) Development consent under subclause (7) may only be granted to a building of a height that the consent authority is satisfied would not have an adverse impact on views to or from The Northern Road.

In relation to (8) this is informed by Figure E7.20 in the DCP which nominates those areas of potential views from The Northern Road. The site (shown in pink) is not in proximity to this and the maximum height of the building is approximately RL70. The RL of the ridgeline is approximately RL90- meaning the site itself and the height of the development sits substantially below the ridge.

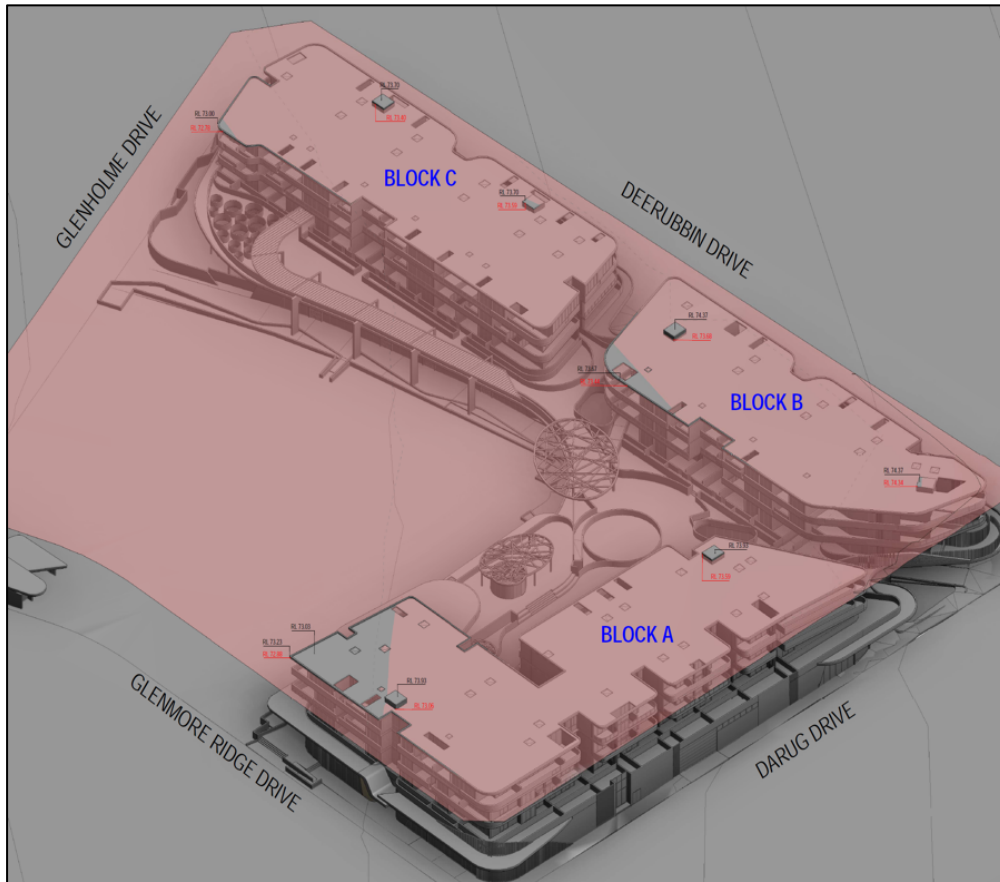


**Figure
E7.20:
Areas of
Potential
Views from
The
Northern
Road**

The development presents a minor breach of the height standards in Clause 4.3 and Clause 7.16. The numerical departures are as follows and are most appropriately understood from the 'height blanket' produced below.

The departures to the controls are as follows:

Block A	Lift Over-Run 1 Lift Over-Run 2 Roof Form	900mm= 6% 900mm= 6% 650mm= 4.3%
Block B	Lift Over-Run 1 Lift Over-Run 2 Roof Form	30mm= 0.2% 31mm= 0.2% 230mm= 4.3%
Block C	Lift Over-Run 1 Lift Over-Run 2 Roof Form	210mm= 4% 300mm= 4.5% 220mm= 3.3%



The design of the building ensures that the habitable floor space is contained below the maximum building height line which indicates that the variation is not simply a means of achieving additional development yield on the site, but a site specific design response. In this case the variation stems from a portion of the lift overrun and minor part of the structures associated with the roof level and the topography on the site- which is relatively flat but does have a gentle fall meaning the breaches respond to the topography and desire to present a built form with finished floor levels closely matching the street levels and carpark levels at the most active frontages- rather than 'sinking' the buildings. The Survey Plan shows that the site has a fall of 2.5m from the south-west to the north-east corner- which is gentle in the context of the site.

There is also the practical consideration of the 4.5m floor to ceiling height to the loading dock that sets the height of the first residential floor level.

It is noted that the lift overruns are recessed and not visible from the street level with the portion of the roof structure that encroach upon the prescribed building height control is negligible when viewed from the street level and as addressed below the proposal continues to be consistent with the underlying intent of the control and the variation is considered appropriate.

Furthermore, the extent of variation is not overly dominant of the street and does not discernibly increase privacy or overshadowing impacts to surrounding properties, with the shadows to fall upon the street level.

RELEVANT CASE LAW

There are a number of recent Land and Environment Court cases including *Four 2 Five v Ashfield* and *Micaul Holdings Pty Ltd v Randwick City Council* and *Moskovich v Waverley Council*, as well as *Zhang v Council of the City of Ryde*.

In addition a recent judgement in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) NSWLEC 118 confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard. Therefore this must be considered when evaluating the merit of the lot width departure.

Further a decision in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 has adopted further consideration of this matter which requires that a consent authority must be satisfied that:

- The written request addresses the relevant matters at Clause 4.6 (3) and demonstrates compliance is unreasonable or unnecessary and that there are sufficient environmental planning grounds; and
- The consent authority must consider that there are planning grounds to warrant the departure in their own mind and there is an obligation to give reasons in arriving at a decision.

The approach in *Al Maha* was reinforced by *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 where it was found that:

... in order for a consent authority to be satisfied that an applicant's written request has "adequately addressed" the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3) (which is the process required by cl 4.6(3)), the request must in fact demonstrate the matters in subcl (3) (which is the outcome required by cl 4.6(3) and (4)(a)(i)).

Finally the decision in *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 confirmed that the consent authority must be directly satisfied that the matters are adequately addressed in the written Clause 4.6 variation request.

On that basis it is necessary that the following be satisfied.

- The consent authority must be satisfied the written request demonstrates the matters in Clause 4.6(3).
- The consent authority be satisfied the proposed development will be in the public interest because it is “*consistent with*” the objectives of the development standard and zone is not a requirement to “*achieve*” those objectives.

It is a requirement that the development be compatible with the objectives, rather than having to ‘achieve’ the objectives.

- Establishing that ‘compliance with the standard is unreasonable or unnecessary in the circumstances of the case’ does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe “test” 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in *Wehbe v Pittwater*.
- The proposal is required to be in ‘the public interest’.

CLAUSE 4.6 OF THE LEP

Clause 4.6 of the Penrith Local Environmental Plan 2010 provides that development consent may be granted for development even though the development would contravene a development standard. It is submitted that cl.4.3(2) of LEP 2010 is consistent with the definition of “development standard” contained in s.1.4(1) of the *Environmental Planning and Assessment Act 1979 (the Act)*, being:

..... provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of—

.....

*(c) the character, location, siting, bulk, scale, shape, size, **height**, density, design or external appearance of a building or work,*

Clause 4.6(3) to (5) of LEP 2010 follows:

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

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

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Director-General has been obtained.

(5) In deciding whether to grant concurrence, the Director-General must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.

Clause 4.6 does not fetter the consent authority's discretion as to the numerical extent of the departure from the development standard.

Consequently, by this request, the applicant seeks to justify the contravention of the Standard by demonstrating (as clause 4.6(3) requires):

3 “(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

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

Further, the Consent authority must be satisfied (as clause 4.6(4) requires) that:

4 “(i) (this request) has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Secretary has been obtained.”

Notably, as the subject land is not in any of the zones referenced in clause 4.6(6), that sub-clause has no application.

RELEVANT MATTERS TO BE DEMONSTRATED IN CLAUSE 4.6

As Clause 4.6 provides, to enable development consent to be granted, the applicant must satisfy the consent authority that:

this request has adequately addressed the matters required to be demonstrated by subclause (3),¹ namely that:

- a. compliance with the development standard is unreasonable or unnecessary in the circumstances of the case,² and*
- b. there are sufficient environmental planning grounds to justify contravening the development standard³;*

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

the concurrence of the Secretary has been obtained.⁴

The request deals with each relevant aspect of clause 4.6 below.

¹ Clause 4.6(4)(a)(i)

² Clause 4.6(3)(a)

³ Clause 4.6(3)(b)

⁴ Clause 4.6(4)(b)

COMPLIANCE UNREASONABLE OR UNNECESSARY

Clause 4.6(3)- Objectives of the Standard

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control are achieved.

The underlying objectives of the control are satisfied, known as the first way in the decision of *Wehbe v Pittwater Council* (2007) 156 LGERA 446;

The objectives of the 'Height of Buildings' development standard are stated as:

(1) The objectives of this clause are as follows:

- a) *to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,*
- b) *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,*
- c) *to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,*
- d) *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 objectives of Clause 7.16 are stated as:

7.16 Glenmore Park Stage 2

(1) *The objectives of this clause are as follows—*

- (a) to provide for a transition of lot sizes between the urban areas of Glenmore Park and the surrounding rural landscape and adjoining Mulgoa Nature Reserve,*
- (b) to restrict the maximum dwelling yield for certain land,*
- (c) to ensure existing extractive industries have ceased on land and that the land has been adequately rehabilitated for urban development.*

It is noted that in relation to 7.16 these are broad objectives relating to matters such as lot size, dwelling yield, and extractive industries- arguably none of which are strictly relevant to the proposal- however they are addressed as relevant. It is noted that the height of building objectives in Clause 4.3 are considered to be relevant as 7.16 reflects the same numerical height standard as that mapped.

Strict compliance with the development is unnecessary in this particular case having regard to the design merit of the proposal and noting that the proposal satisfies the underlying objectives of the control of the height of buildings standard.

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

Each objectives is considered below.

- **Objective (a):**
- The proposed development aligns with the desired future character of the B2 Local Centre noting the proposal exhibits a 4 storey form within the 15m height limit and aligns with the intended height, bulk and scale for this portion of the Glenmore Park Stage 2 release area.
- Notably the proposal also only seeks to construct built form (height) on a portion of the site to provide visual relief and avoid an over bearing bulk and scale as viewed 'in the round'.
- The proposed development, however, is not incompatible with the existing character of the locality noting the roads provided the desired transition to the 1-2 storey built form in the vicinity of the site.
- **Objective (b):**
- The additional height does not generate any additional amenity impacts with regard to overshadowing, visual privacy, acoustic privacy, or view loss. The non-compliant portions of the buildings do not increase the shadows cast by the building in any consequential way noting the lift cores are recessed such that there is no increase in impact. The minor point encroachments to the roof form also have no impact on views, privacy and solar access.
- In regard to visual impact, the area of the development which contravenes the development standard is largely imperceptible at street level given the minor nature of the departure and the lift cores being recessed. Considering the departure is slightly visible from the northern side, the view is still considered appropriate as it is setback from the street and also screened by existing buildings, mature trees and integrated with the design building. Therefore the proposal minimises visual impact as viewed from the public domain and surrounds- again noting the built form is clustered on 3 sides of the site.
- A development of a compliant height would have a similar visual appearance when viewed from the public domain and adjoining properties
- The proposal, and specifically the additional building height, will not impact on views enjoyed from the public domain or adjoining residential properties.

- **Objective (c):** The subject property is not proximate to heritage items, heritage conservation areas and areas of scenic or visual importance. This objective is not relevant to the proposed development.
- **Objective (d):** The subject property is at the interface with an area of lesser intensity, noting the site is nominated B2 with a 15m height limit that contemplates a height similar to that proposed with the roads providing the height transition to the 'R1' areas. It is noted that the mapped height limit is actually the same in the vicinity of the site but 10m-15m under Clause 7.16. Hence the transition is a factor of the chosen building typology opposite the site which all could have been much higher per the LEP and DCP. Regardless the proposal provides a suitable transition- notwithstanding the minor height breach.
- Objective (d) is satisfied by the proposed development, notwithstanding the variation to the numerical standard. The breach enables the buildings presentation and contribution to the street to be improved (adopting a suitable finished ground level to interface to the street) and results in a high quality built form. The proposal is well balanced in terms of the location and design of the roof form and the windows and the works above the height of building control do not result in any impact to the adjoining land. It is noted that the Urban Design Review Panel are in support of the proposal, and the height departure, and expresses a high quality urban form is achieved.

On the basis of the above points the development is clearly in the public interest because it is consistent with the underlying objectives of the height control; and the numerical departure from the height control facilitates a positive design outcome on the site.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable in the circumstances.

Clause 4.6(3)- Environmental Planning Grounds

The following factors demonstrate that sufficient environmental planning grounds exist to justify contravening the lot size development standard.⁵ For that purpose, the critical matter that is required to be addressed is the departure from the development standard itself, not the whole development.⁶

1. The design of the building ensures that the habitable floor space is contained below the maximum building height line which indicates that the variation is not simply a means of achieving additional development yield on the site, but a site specific design response. In this case the variation stems from a portion of the lift overrun and minor part of the structures associated with the roof level and the topography on the site- which is relatively flat but does have a gentle fall meaning the breaches respond to the topography and desire to present a built form with finished floor levels closely matching the street levels and carpark levels at the most active frontages- rather than 'sinking' the buildings. The Survey Plan shows that the site has a fall of 2.5m from the south-west to the north-east corner- which is gentle in the context of the site however given the integrated nature of the scheme the topography is the reason for the departure to the height limit.
2. There is also the practical consideration of the 4.5m floor to ceiling height to the loading dock that sets the height of the first residential floor level at a higher level than would otherwise occur in the absence of this need.
3. It is noted that the lift overruns are recessed and not visible from the street level with the portion of the roof structure that encroach upon the prescribed building height control is negligible when viewed from the street level and as addressed below the proposal continues to be consistent with the underlying intent of the control and the variation is considered appropriate.
4. The departure to height standard furthers the objects of the Environmental Planning and Assessment Act 1979 as set out below:
 - To promote the orderly and economic use and development of land;
 - To promote the delivery of affordable housing through increased housing supply and a diversity in housing forms;
 - To promote good design and amenity of the built environment through enabling the development on its active frontages to interface at the

⁵ As clause 4(3)(b) requires

⁶ As confirmed in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at 46, per Preston CJ

street level in terms of RL's- which strict compliance through sinking the building would not achieve.

The above analysis demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

CONSISTENCY WITH OBJECTIVES OF THE STANDARD AND THE ZONE & THE PUBLIC INTEREST

As clause 4.6(4)(a)(i) requires, the Consent Authority must also be satisfied that proposed development will be in the public interest because it is consistent with:

1. the objectives of the particular standard and
2. the objectives for development within the zone in which the development is proposed to be carried out.

The Applicant has already addressed the objectives of the development standard in the context of cl 4.3/7.16 in demonstrating that compliance is unnecessary or unreasonable.

The objectives of the B2 Zone are as follows:

“Objectives of zone

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*
- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To provide retail facilities for the local community commensurate with the centre's role in the local and regional retail hierarchy.*
- *To ensure that development reflects the desired future character and dwelling densities of the area.*

- The development directly satisfies the first objective of the zone as the development proposal provides for a range of retail, business and community uses that serve the needs of people who both live, work and visit the area.
- The development proposal generates employment opportunities through the mix of land uses provided in a highly accessible location within the nominated Local Centre.
- The development proposal is designed to be open and permeable to encourage walking and cycling as well as public transport patronage.
- The extent and quantum of retail aligns with the Local Centre status.
- The proposal reflects the desired future character and dwelling densities for the B2 zone.

For those reasons the applicant says the consent authority would be satisfied the development is in the public interest.

CONCURRENCE OF THE SECRETARY

The Secretary (of Department of Planning and Environment) can be assumed to have concurred to the variation. This is because of Department of Planning Circular PS 18–003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2000*. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

CONCLUSION

For the reasons set out above, the applicant says that:

1. the matters canvassed in this request have adequately addressed the requirements of clause 4.6(3) and
2. The Consent Authority should be satisfied that the proposed development is in the public interest, as it is consistent with both the objectives of the development standard, and the objectives of the B2 zone.