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URBIS

CLAUSE 4.6 VARIATION REQUEST - FLOOR SPACE RATIO

711 Hunter Street, Newcastle
West

Prepared for
HUNTER STREET JV CO PTY LIMITEDP/L
August 2023

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1. INTRODUCTION

This Clause 4.6 Variation Request (**'the Request'**) has been prepared on behalf of Hunter Street JV Co Pty Limited (**the applicant**) and accompanies a Development Application (**DA**) for a mixed-use development at 711 Hunter Street, Newcastle West.

Clause 4.4 of Newcastle Local Environmental Plan 2012 identifies the site as having a maximum FSR of 8:1 which the proposed development is well under. In addition, the design excellence incentives under Clause 7.5 of NLEP allows for an additional 10% which would increase the FSR to 8.8:1. However, Clause 7.10(2) of NLEP clarifies that the maximum FSR for a mixed-use building is 5:1 (or 5.5:1 inclusive of the 10% design excellence bonus).

The FSR for Stage 1 is 5.58:1 and Stage 2 is 5.64:1, which represents a very minor variation of 1.6% for Stage 1 and 2.78% for Stage 2.

The key reason for seeking flexibility with the FSR development standard is two-fold, and aligned with the specific objectives of the development standard, which ensure that the building density, bulk and scale makes a positive contribution towards the desired built form in Newcastle City Centre.

Firstly, the mapped FSR standard for the site under Clause 4.4 incentivises the potential for a much larger floor plate and floor space outcome on the site for a commercial office development. However, the LEP does not provide any relief or flexibility where there is a mix of both residential and commercial/retail floor space as part of the one development, such as a pro-rated approach with the outcome for mixed use being a binary outcome from an FSR perspective (i.e. either the 5:1 for mixed use or 8:1 for commercial).

This is distinct from other similar 'incentive' floor space provisions in other City Centres such as the City of Sydney's 'accommodation' floor space system which is pro-rated dependent on the specific mix of land uses). In some ways, this has the potential to actually disincentive additional employment floor space as part of a mixed-use development given the lack of flexibility between Clause 4.4 and Clause 7.10.

Importantly, the gross floor area (GFA) of the residential component of the project alone would be below the maximum FSR of 5.5:1, noting that the commercial/retail components of 613.84sqm (Stage 1) and 529.43sqm (Stage 2) would be a large component of the area that exceeds the development standard.

Secondly, the site has been the subject of a competitive design process, whereby the endorsed competition brief identified significant environmental constraints with basement car parking on the site due to mine subsidence, contamination, a high-water table and flood risk which recommended the provision of above-ground car parking in an innovative, sleeved manner.

The winning design (which has been supported by the Design Integrity Panel and Council's UDRP) supported the preferred parking arrangement, and applauded the design's high-quality response to the ground plane, activation and public benefits associated with the quality of publicly accessible space and pedestrian connectivity through the site. However, the provision of waste collection and storage cages in the car park areas which would typically be excluded from GFA in a basement scenario have been included in these circumstances.

The proposed minor variations to the development standard do give rise to any unreasonable built form impacts, and the development maintains a positive contribution towards the desired built form for this key site.

The Request includes a detailed assessment and justification of the proposed variation in accordance with the relevant guidelines and relevant planning principles and judgements issued by the NSW Land and Environment Court.

This Request demonstrates that compliance with the maximum FSR development standard is not required for the development for the following reasons:

- The proposal is compliant with clause 4.6(3)(a) because a strict compliance with the FSR development standard is unreasonable and unnecessary in the circumstances of the case. The proposal achieves the objectives of the development standard and is consistent with the objectives for development within the zone despite non-compliance.
- There are sufficient environmental planning grounds to justify contravening the FSR development standard and is entirely consistent with the desired future character of the locality as outlined in the NDCP 2012.

- The scale of development in the surrounding area, demonstrates that compliance with the FSR development standard is not required in order to achieve the desired future character of the area.
- The development complies with the height control for the site and will preserve the amenity of the neighbouring properties.
- The proposed scheme would also be compliant with the prescribed FSR (including the design excellence bonus) if the areas typically excluded in the definition of GFA under NLEP for waste collection and storage where in a basement typology. However, as the site-specific circumstances have required a podium solution due to mine subsidence, water table and Aboriginal archaeology considerations, the provision of above ground waste rooms and storage, which are to be included in the GFA calculations, results in a non-compliant scheme.
- The additional floor space is isolated to waste and storage uses not residential floor space. This additional GFA is contained within the proposed podium and does not attribute any additional discernible bulk and scale. The proposed podium size is required to accommodate the parking requirements prescribed in the Newcastle Development Control Plan 2012.
- The scheme has been through a Design Excellence process. The Plus Architecture scheme was recommended by the Jury as the winning scheme in the competitive design process. The design is a result of iterative detailed engagement and input from various CN teams including planning, waste, engineering, and heritage; and the Chair of CN's UDRP.
- The proposal delivers a significant public benefit by the redistribution of floor space from the ground plane to the tower to provide generous and publicly accessible spaces with through site links creating greater permeability of the site.
- The proposed variation does not result in any unreasonable amenity impacts to adjoining properties or public spaces including Birdwood Park.
- The proposal will not result in any adverse impacts to surrounding heritage items and enhances view lines to the Army Drill Hall from National Park Street.

This report should be read in conjunction with the Statement of Environmental Effects prepared by Urbis Pty Ltd and dated November 2022 and subsequent Request for Additional Information responses. This Clause 4.6 Variation Request has been updated to respond to the Hunter and Central Coast Regional Planning Panel (HCCRP) comments outlined in the Record of Deferral dated 8 August 2023.

The following sections of the report include:

- **Section 2:** description of the site and its local and regional context, including key features relevant to the proposed variation.
- **Section 3:** brief overview of the proposed development as outlined in further detail within the SEE and accompanying drawings.
- **Section 4:** identification of the development standard, which is proposed to be varied, including the extent of the contravention.
- **Section 5:** outline of the relevant assessment framework for the variation in accordance with clause 4.6 of the LEP.
- **Section 6:** detailed assessment and justification of the proposed variation in accordance with the relevant guidelines and relevant planning principles and judgements issued by the Land and Environment Court.
- **Section 7:** summary and conclusion.

Figure 2 – Existing Site



Picture 1 – Corner of National Park and Hunter Street



Picture 2 – Middle of National Park Street (Pedestrian Bridge)



Picture 3 – View of Site looking north along National Park Street



Picture 4 – View of site looking east along King Street

Source: Urbis

2.2. LOCALITY CONTEXT

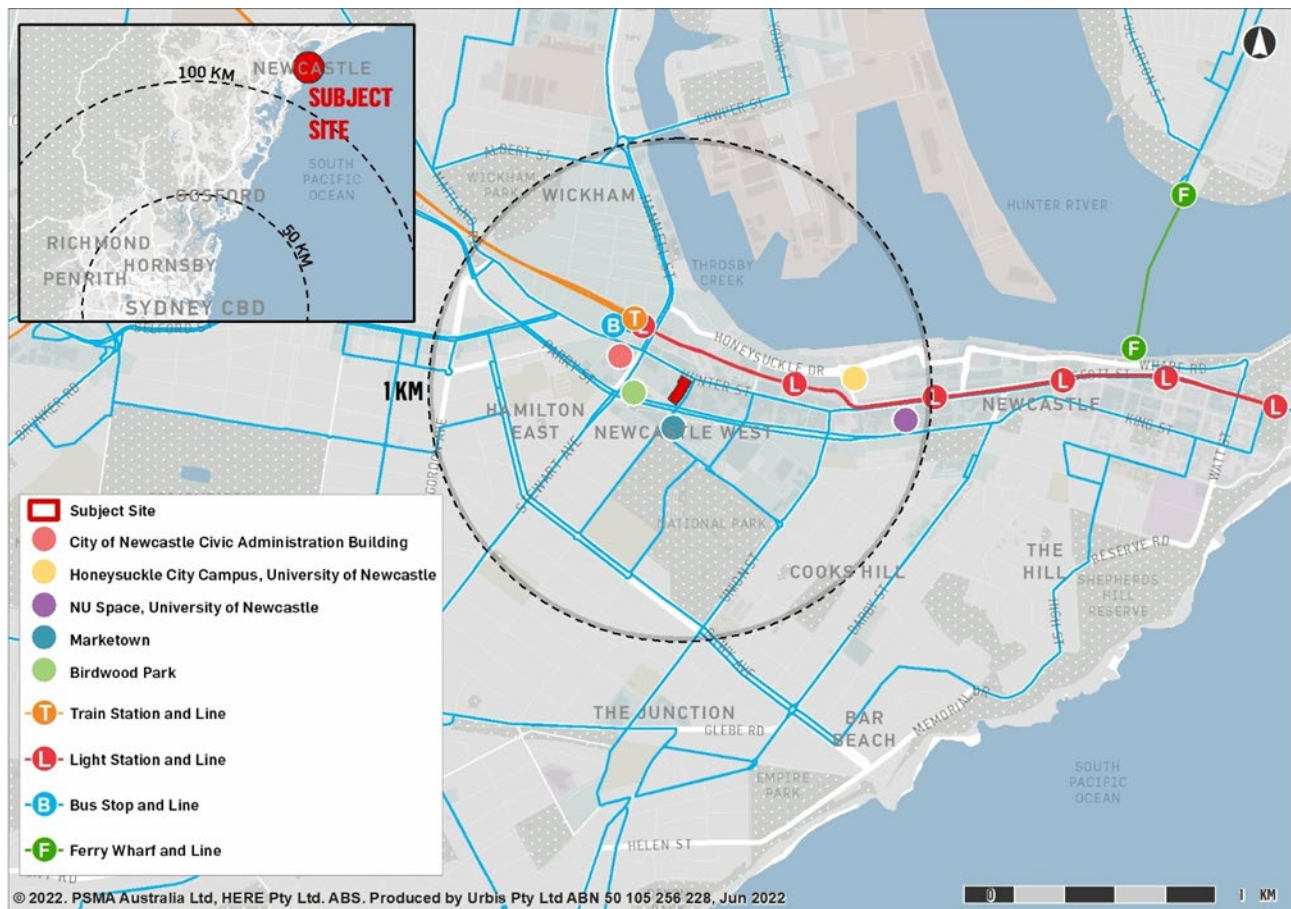
The site is located within an area of Newcastle that is principally of commercial use. Development along both sides of King Street and Hunter Street have a mix of scale accommodating residential, retail and commercial development, with various buildings and uses.

- To the **east** of the site directly is National Park Street. DA2019/00711 was approved by the Land and Environmental Court on the 21 September 2020, for a mixed-use development at 1, 17 and 19 National Park Street and 484 King Street. The approved development comprised the demolition of existing structures, construction of two towers of 22 and 19 stories comprising 193 dwellings, office premises, ground floor retail premises, car parking and associated landscaping. Construction has started on this site, the proposal has removed all street trees along the Eastern side of National Park Street, demolition and ground works are also well underway. Further east of the site is 'Verve' a mixed-use development with 2 residential towers.
- The 'Army Drill Hall' is located to the **south-west** of the site which is a locally listed heritage item. Birdwood Park is also located to the south-west and is an important piece of public domain due to the limited amount of green space in Newcastle City Centre. Development consent (DA2018/00051) was granted for a 14-storey mixed use commercial development to the west and retention of the 'Army Drill Hall.' The approval also included 5 levels of above-ground parking integrated into the fabric of the

building, with access from Little King Street. DA2020/01357 subsequently approved an additional 2 storeys, bringing the overall totally height to RL + 62.920. Construction has largely been completed with scaffolding almost all removed.

- Further **west** is City of Newcastle Administration Building fronting Stewart Avenue, Holiday Inn and a recently completed senior living facility fronting Birdwood Park.
- To the **north-west** is Newcastle Interchange providing access to light rail, trains and bus services. The Store site, at 854 Hunter Street, incorporates a recently constructed multi-level car park and commercial building.
- To the **north** of the site 'Aero' mixed-use development with 4 levels of parking and two commercial tenancies fronting Hunter Street which is approximately 14-storeys in height. Hunter Street has a mix of scale accommodating residential, retail and commercial development, with various buildings and uses. Bank Corner, a local heritage listing identified in Schedule 5 of the Newcastle LEP 2012, is located on the corner of Bellevue Street and Hunter Street. Further north is the Honeysuckle Precinct and Newcastle Harbour.
- To the **south** of the site is King Street, and Parry Street. The Parry Street Precinct includes The Edwards, a creative retailer with F&B, Vinyl store, live music and a retro coin-op laundry was the first retailer that acted as a catalyst for other retailers to open. There are now about 7 retailers in the former industrial car yard precinct. Parry Street has played a strong role in the ground plane and retail briefing response for this proposal. Further **south** is the Fearnley Dawes Athletic Centre and Newcastle High School.
- Marketown Shopping Centre is located to the **south-east** of the site, Marketown is a sub-regional centre consisting of two sides (east and west). The east is anchored by Woolworths, Big W and Dan Murphy's and has 28 specialty stores, and has residential apartments located above. The west centre is anchored by Coles and Officeworks and also has 28 specialty stores.

Figure 3 – Site and surrounding locality



Source: Urbis

3. PROPOSED DEVELOPMENT

3.1. OVERVIEW

This Clause 4.6 Variation Request has been prepared to accompany a DA for the staged redevelopment of a mixed-use precinct that has undergone a competitive design competition.

The overall outcome of the proposal aims to develop a mixed-use precinct with high quality tower forms providing a positive relationship to the immediate surrounds and acknowledging the surrounding heritage context. The proposal intends to act as a landmark for Newcastle West with a curated mix of eclectic and creative retail, F&B and commercial opportunities activating the ground and podium levels.

A detailed description of the proposed development is provided in the Statement of Environmental Effects prepared by Urbis Pty Ltd and dated November 2022. The proposal is also detailed within the architectural, engineering and landscape drawings that form part of the DA.

The key features are summarised below:

- Demolition of the existing commercial premises and ancillary structures on-site;
- Construction of a mixed-use precinct forming active ground and podium levels reaching 5 storeys of retail and commercial tenancies including food and beverage tenancies, as labelled on the architectural plans, with two tower forms for residential apartments reaching 26 storeys comprising of 258 apartments;
- Podium level car park for 300 cars incorporated within the podium levels;
- Communal open space for residents located on level 5 and 17;
- Vehicle access to the site via Little King Street;
- Associated landscaping with the public domain improvements;
- A mix of retail, food and beverage and business tenancies will front Hunter and King Street to enhance activation of the ground plane and pedestrian traffic. These will be accompanied by appropriate landscaping features to enhance public domain;
- An urban plaza fronting National Park Street providing opportunities for activation and public art; and
- Construction of ancillary infrastructure and utilities as required.

It is noted that the overall development will form two separate concurrent DAs. Stage 1 will form the northern tower and podium elements and Stage 2 will form the southern tower and podium elements. These separate DA components are explored further below.

3.2. STAGE 1 – NORTHERN TOWER

The northern tower will include commercial and retail tenancies at ground level which will be accessible via National Park Street, Little King Street and Hunter Street. The podium levels will be situated above ground and contain car parking for both visitors and residents, accessed via Little King Street. Level 5 to Level 25 will contain a mixture of residential apartments ranging from 1 bedroom to 3 bedrooms. A numerical breakdown of Stage 1 is shown below:

- 136 apartments including: 35 one bedroom, 74 two bedroom, 26 three bedroom, 1 four bedroom.
- Total GFA: 14,015.23 sqm
- Floor space ratio: 5:58:1
- Total car parking spaces: 165 spaces over 4 podium levels

3.3. STAGE 2 – SOUTHERN TOWER

The southern tower will include commercial and retail tenancies at ground level which will be accessible via National Park Street, Little King Street and Hunter Street. The podium levels will be situated above ground and contain car parking for both visitors and residents, accessed via Little King Street. Level 1 to Level 25 will contain a mixture of residential apartments ranging from 1 bedroom to 3 bedrooms.

- 121 apartments including: 35 one bedroom, 71 two bedroom, 16 three bedroom.
- Total GFA: 12,484.56sqm
- Floor space ratio: 5.64:1
- Total car parking spaces: 135 spaces over 4 podium levels

Both stages will include surrounding landscaping, public domain works and green spaces. The strata and stratum approach are detailed further in this SEE.

The overall built form and design is illustrated in **Figure 4** and **Figure 5** below.

Figure 4 – Perspective looking north-east towards Stage 2 (Southern Tower)



Source: Plus

Figure 5 – Perspective looking south-west towards Stage 1 (Northern Tower)



Source: Plus

4. VARIATION OF FSR STANDARD

This section of the report identifies the development standard which is proposed to be varied, including the extent of the contravention. A detailed justification for the proposed variation is provided in **Section 6** of the report.

4.1. DEVELOPMENT STANDARD

A maximum FSR of 8:1 is applicable to the site under clause 4.4 of NLEP, as illustrated in **Figure 6**.

The 8:1 FSR is permitted for wholly commercial development, which represents a scale significantly more than the proposed development.

However, the site falls within 'Area A' under clause 7.10 which reads:

2) The maximum floor space ratio for a building other than a commercial building on land with a site area of 1,500 square metres or more is as follows—

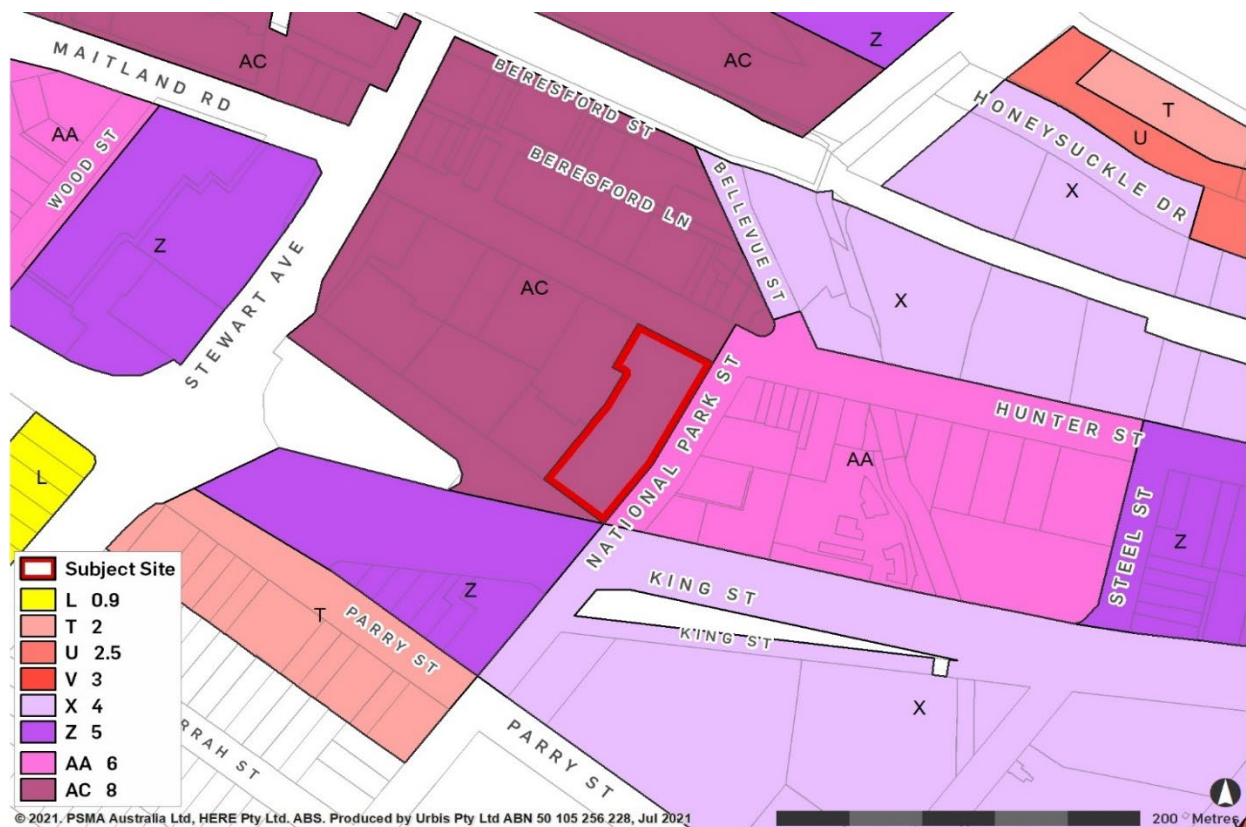
(a) where the Floor Space Ratio Map identifies a maximum floor space ratio of 6:1 (or greater)—5:1,

Therefore, the applicable FSR to the site is 5:1. Subject to achieving design excellence, clause 7.5(6) of the LEP provides for an additional 10% bonus either height or FSR. Subclause (6) reads:

(6) The consent authority may grant consent to the erection or alteration of a building to which this clause applies that has a floor space ratio of not more than 10% greater than that allowed by clause 7.10 or a height of not more than 10% greater than that allowed by clause 4.3, but only if the design of the building or alteration has been reviewed by a design review panel.

The consent authority being may grant an additional 0.5:1 of FSR subject to demonstrating design excellence and the building being reviewed by a design review panel. An overall allowable FSR of 5.5:1 is therefore permitted.

Figure 6 – Floor space ratio map



Source: Urbis

4.2. PROPOSED VARIATION TO CLAUSE 7.10 OF THE NLEP

This clause 4.6 variation request seeks to gain approval for a variation to the maximum FSR as prescribed by clause 7.10 of the NLEP.

NLEP prescribes a maximum FSR for a building other than a commercial building on land with a site area of 1,500 square metres, where the FSR identifies a maximum floor space ratio of 6:1 (or greater) as 5:1. The FSR for Stage 1 is 5.58:1 and Stage 2 is 5.64:1.

A maximum FSR of 8:1 is applicable to the site under clause 4.4. The 8:1 FSR is permitted for wholly commercial development, which represents a scale significantly more than the proposed development.

However, under clause 7.5(6) of the NLEP development that exhibit design excellence are eligible for an additional 10% FSR. This Request relates to Stages 1 and 2. Subclause (6) reads:

(6) The consent authority may grant consent to the erection or alteration of a building to which this clause applies that has a floor space ratio of not more than 10% greater than that allowed by clause 7.10 or a height of not more than 10% greater than that allowed by clause 4.3, but only if the design of the building or alteration has been reviewed by a design review panel.

In our opinion, the DIP has been by established by the consent authority through the Design Competition via the endorsement of the Design Competition Brief and Design Excellence Strategy by CN and GANSW.

The Design Excellence Brief and Strategy were prepared in collaboration with CN, GANSW and CN's Chair of the UDRP – Dr Phillip Pollard. The endorsed Design Excellence Brief and Strategy established the on-going design review framework for the review process, the endorsed review process did not include the input of the UDRP in the review process. The DIP compromises a representative from CN, GANSW and the Proponent.

Therefore, the proposed development is eligible for an additional 10% FSR, subject to achieve, design excellence. Overall, the proposed development exceeds the additional allowable 10% slightly (1.65% for Stage 1 and 2.78% for Stage 2.) This Request has been prepared for an abundance of caution, as explored further in followings sections.

A summary of the numerical details of the variation area outlined below.

Table 1 – Numeric Overview of Proposed Variation

Maximum Permitted FSR & GFA (Clause 7.10)	Maximum Permitted FSR & GFA plus 10% bonus provision	Proposed FSR & GFA (August 2023)	Location of Additional GFA	Variation
Stage 1 FSR: 5:1 Site Area: 2,510sqm GFA: 12,550sqm	Stage 1 FSR: 5.5:1 Site Area: 2,510sqm GFA: 13,805sqm	Stage 1 FSR: 5:58:1 Site Area: 2,510sqm GFA: 14,015.23sqm	Ground level – waste storage rooms, waste collection rooms including bulk waste, and general storage including bicycle. Level 01 to 05 – residential storage to meet the ADG including bicycle.	Above 5:1 Base FSR: 1,465.23sqm Above 5.5:1 Design Bonus: 210.23sqm 11.65% total with 10% allowance for the Design Excellence Bonus, therefore 1.65% variation.
Stage 2 FSR: 5:1 Site Area: 2,214sqm GFA: 11,070sqm	Stage 2 FSR: 5.5:1 Site Area: 2,214sqm GFA: 12,177sqm	Stage 2 FSR: 5:64:1 Site Area: 2,214sqm GFA: 12,484.56sqm	Ground level – waste storage rooms, general storage including bicycle, back of house facilities. Level 01 to 05 – residential storage to meet the ADG including bicycle.	Above 5:1 Base FSR: 1,414.56sqm Above 5.5:1 Design Bonus: 307.56sqm 12.78% total with 10% allowance for the Design Excellence Bonus, therefore 2.78% variation.
Combined FSR: 5:1 Site Area: 4,724sqm GFA: 23,620sqm	Combined FSR: 5.5:1 Site Area: 4,724sqm GFA: 25,982sqm	Combined FSR: 5.6:1 Site Area: 4,724sqm GFA: 26,499.79sqm	As above.	Above 5:1 Base FSR: 2,879.79sqm Above 5.5:1 Design Bonus: 517.79sqm 10.87% total with 10% allowance for the Design Excellence Bonus, therefore 0.87% variation.

5. RELEVANT ASSESSMENT FRAMEWORK

Clause 4.6 of Newcastle Local Environmental Plan 2012 (NLEP) includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 of NLEP are:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(a) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a DA that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, clause 4.6(3) requires that the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development by demonstrating:

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

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

Clause 4.6(4)(a) requires the consent authority to be satisfied that the applicant's written request adequately addresses each of the matters listed in clause 4.6(3). The consent authority should also be satisfied that that 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 it is proposed to be carried out.

Clause 4.6(4)(b) requires the concurrence of the Secretary to have been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary consider:

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

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

(e) any other matters required to be taken into consideration by the Secretary before granting concurrence.

The concurrence of the Secretary can be assumed to have been granted for the purpose of this variation request in accordance with the Department of Planning Circular PS 18–003 'Variations to development standards', dated 21 February 2018. This circular is a notice under section 64(1) of the Environmental Planning and Assessment Regulation 2000 and provides for assumed concurrence. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The Secretary can be assumed to have given concurrence if the matter is determined by an independent hearing and assessment panel or a Sydney district or regional planning panel in accordance with the Planning Circular.

This clause 4.6 request demonstrates that compliance with the FSR prescribed for the site in clause 7.10 of NLEP is unreasonable and unnecessary, that there are sufficient environmental planning grounds to justify the requested variation and that the approval of the variation is in the public interest because it is consistent with the development standard and zone objectives.

In accordance with clause 4.6(3), the applicant requests that the building separation development standard be varied (subject to the applicant's position that such a request should not actually be necessary).

6. ASSESSMENT OF CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standards relating to the FSR in accordance with clause 7.10 of NLEP.

Detailed consideration has been given to the following matters within this assessment:

- Varying development standards: A Guide, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court.

The following sections of the report provides detailed responses to the key questions required to be addressed within the above documents and clause 4.6 of the LEP.

6.1. IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED? – CLAUSE 4.6(2)

The FSR prescribed by clause 7.10 of NLEP is a development standard capable of being varied under clause 4.6(2) of NLEP.

The proposed variation is not excluded from the operation of clause 4.6(2) as it does not comprise any of the matters listed within clause 4.6(6) or clause 4.6(8) of NLEP.

6.2. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE? – CLAUSE 4.6(3)(A)

Historically, the most common way to establish a development standard was unreasonable or unnecessary was by satisfying the first method set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method requires the objectives of the standard are achieved despite the non-compliance with the standard.

This was recently re-affirmed by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [16]-[17]. Similarly, in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [34] the Chief Judge held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This Request addresses the first method outlined in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The Request also addresses the third method, that the underlying objective or purpose of the development standard would be undermined, defeated or thwarted if compliance was required with the consequence that compliance is unreasonable (*Initial Action* at [19] and *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]). Again, this method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The Request also seeks to demonstrate the ‘unreasonable and unnecessary’ requirement is met because the burden placed on the community by not permitting the variation would be disproportionate to the non-existent or inconsequential adverse impacts arising from the proposed non-complying development. This disproportion provides sufficient grounds to establish unreasonableness (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

- ***The objectives of the standard are achieved notwithstanding non-compliance with the standard*** (the first method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43])

Clause 7.10 of the NLEP does not have any specified objectives therefore an assessment against the Newcastle City Centre objectives prescribed in clause 7.1 of the NLEP are detailed in **Table 2** below. It is noted that some of the objectives are not relevant for this variation but have been addressed for completeness. An assessment of the consistency of the proposed development with each of the objectives is also provided.

Table 2 – Assessment of Consistency with Clause 7.1 Objectives

Objectives	Assessment
(a) to promote the economic revitalisation of Newcastle City Centre,	<p>The project will catalyse the urban renewal of a key site in Newcastle West.</p> <p>The proposal represents a significant investment in the Newcastle City Centre and will boost local employment during both the construction and operational phases.</p> <p>The variation to FSR is considered minor and will not prevent the economic revitalisation of Newcastle City Centre.</p>
(b) to strengthen the regional position of Newcastle City Centre as a multi-functional and innovative centre that encourages employment and economic growth,	<p>The proposal is highly consistent with all strategic planning aims and objectives for the Newcastle City Centre and the Hunter region by providing a diversity of housing, and employment opportunities in a well-connected area.</p> <p>The variation to FSR is considered minor and will not prevent the strengthening of Newcastle's regional position or hinder employment and economic growth.</p>
(c) to protect and enhance the positive characteristics, vitality, identity, diversity and sustainability of Newcastle City Centre, and the quality of life of its local population,	<p>The proposal will deliver high-quality residential dwellings in a convenient, accessible and naturally beautiful location. Future residents will be afforded the opportunity to live in a high-amenity location, with all the benefits of modern apartment living. The proposal provides a variety of apartment types to suit the needs and lifestyles of existing and future residents of Newcastle.</p> <p>The variation to FSR is considered minor and will not create adverse impacts that will detrimentally affect the local population, particularly given no additional overshadowing will occur to public spaces as a result of the variation.</p>
(d) to promote the employment, residential, recreational and tourism opportunities in Newcastle City Centre,	<p>The proposal will promote employment, residential and recreational opportunities in Newcastle City Centre through the provision of retail and business premises which will lead to ground plane activation, and the delivery of a variety of apartment types.</p> <p>The variation to FSR is considered minor and will not prevent the promotion of a diverse range of land use opportunities in Newcastle City Centre, nor will it hinder other people's opportunities to</p>

Objectives	Assessment
	<p>promote employment, residential, recreational and tourism opportunities.</p>
<p>(e) to facilitate the development of building design excellence appropriate to a regional city,</p>	<p>This development has undergone an Architectural Design Competition where three competitors put forward their designs in accordance with a robust Design Excellence Brief and Strategy. The Plus Architecture scheme was recommended by the Jury as the winning scheme in the competitive design process.</p> <p>The variation to FSR is considered minor and hinder the proposals' ability to achieve design excellence.</p>
<p>(f) to encourage responsible management, development and conservation of natural and man-made resources and to ensure that Newcastle City Centre achieves sustainable social, economic and environmental outcomes</p>	<p>The proposed development has considered the responsible management, development and conservation of natural and man-made resources.</p> <p>The development includes appropriate mitigation measures to minimise environmental impacts, for example, a basement has not been proposed to minimise the ground disturbance with Aboriginal archaeology in mind and to minimise impacts on the high-water table. The proposal increase EV charging and ESD initiatives.</p> <p>In terms of social and economic impacts, the proposal will deliver a variety of benefits including construction and ongoing opportunities, deliver a range of apartment types, deliver generous public domain offers and at a high level urban transformation of Newcastle's West End and set a high standard for future developments and urban renewal in the area. The proposal incorporates the following ESD initiatives, EV charging, rainwater harvesting and PV cells on the roof.</p> <p>The variation to FSR is considered minor and does not result in any adverse sustainable social, economic and environmental outcomes.</p>
<p>(g) to protect and enhance the environmentally sensitive areas and natural and cultural heritage of Newcastle City Centre for the benefit of present and future generations,</p>	<p>The site is not identified as an environmentally sensitive area. Therefore, the variation does not result in any adverse environmental outcomes.</p> <p>However, the proposed development has been designed with the Connecting with Country Draft Framework in mind. The variation does not result in a decreased ability to respond to the Connecting with Country Draft Framework, nor will it</p>

Objectives	Assessment
	disadvantage present and future generations given the amenity impacts are negligible.
(h) to help create a mixed use place, with activity during the day and throughout the evening, so Newcastle City Centre is safe, attractive, inclusive and efficient for its local population and visitors alike.	<p>The proposed development will contribute to delivering a safe, diverse, inclusive, vibrant and creative city.</p> <p>The variation to FSR is considered minor and will not hinder the ability to create a mixed-use precinct that is safe, attractive, inclusive and efficient.</p>

Furthermore, the objectives of clause 4.4 of the NLEP have also been considered below in Table 3.

Table 3 – Assessment of Consistency with Clause 4.4 Objectives

Objectives	Assessment
(a) to provide an appropriate density of development consistent with the established centres hierarchy,	<p>The proposal is highly consistent with all strategic planning aims and objectives for the Newcastle City Centre and the Hunter region by providing a diversity of housing, and employment opportunities in a well-connected area. A maximum FSR of 8:1 is applicable to the site under clause 4.4. The 8:1 FSR is permitted for wholly commercial development, which represents a scale significantly more than the proposed development.</p> <p>The proposal has been deemed an appropriate density and scale through the Architectural Design Competition.</p> <p>The proposed variation to FSR will not undermine the established centres hierarchy</p>
(b) to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.	<p>The proposal is consistent with the planning controls in its height and building form and mostly consistent in its density, to play its role in defining this important intersection with the Newcastle CBD.</p> <p>The orientation of the tower also recognizes the shift in the urban grid, orientating the northern tower in alignment to the direction of Hunter Street to the east. The expression of layering creates a sculptural building composition and forms which present elegant and slender from various angles around the site.</p> <p>The proposed variation to FSR will not undermine the established centres hierarchy</p>

The objectives of the development standard are achieved, notwithstanding the non-compliance with the standard in the circumstances described in this variation report.

- **The underlying object or purpose would be undermined, if compliance was required with the consequence that compliance is unreasonable** (the third method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43] as applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24])

Not relied upon.

- **The burden placed on the community (by requiring strict compliance with the FSR standard) would be disproportionate to the (non-existent or inconsequential) adverse consequences attributable to the proposed non-compliant development** (cf *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

The proposed FSR variation does not result in any unreasonable burden to the community. As outlined below:

- There are no unreasonable impacts because of the non-compliance.
- The proposed variation does not result in any adverse amenity impacts from an overshadowing perspective to nearby public spaces including Birdwood Park.
- The proposed variation does not result in any additional height above the NLEP height limit; therefore, the resultant additional bulk and scale is negligible and will not result in overshadowing impacts to public spaces.
- The proposal will not result in any adverse impacts to surrounding heritage items and the community will still be able to appreciate the heritage items. A Statement of Heritage Impact (SoHI) has been prepared by AMAC Archaeological and provides an assessment against the relevant guidelines including the controls prescribed under 6.02.07 of the NDCP. The SoHI concludes that the proposed development respects the design of old and new neighbouring buildings in the design alignment of the podium, with regard to the smaller mid-century buildings and the more recent podiums on the newer neighbouring buildings.
- The former Army Drill Hall is unaffected by the development due to a generous setback of the development to the western boundary.
- The proposal does not impact any identified view corridors in the NDCP.

As explored above, this Request has been prepared for an abundance of cautious and is to cover off on an interpretation issue with granting the additional 10% design excellence bonuses.

6.3. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD? – CLAUSE 4.6(3)(B)

The Land & Environment Court judgment in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, assists in considering the sufficient environmental planning grounds. Preston J observed:

“...in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and

...there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development”

There is an absence of environmental harm arising from the contravention and positive planning benefits arising from the proposed development as outlined in detail above. These include:

- Clause 4.4 of Newcastle Local Environmental Plan 2012 identifies the site as having a maximum FSR of 8:1 which the proposed development is well under. In addition, the design excellence incentives under Clause 7.5 of NLEP allows for an additional 10% which would increase the FSR to 8.8:1. However, Clause 7.10(2) of NLEP clarifies that the maximum FSR for a mixed-use building is 5:1 (or 5.5:1 inclusive of the 10% design excellence bonus).

- The FSR for Stage 1 is 5.58:1 and Stage 2 is 5.64:1, which represents a very minor variation of 1.6% for Stage 1 and 2.78% for Stage 2.
- The key reason for seeking flexibility with the FSR development standard is two-fold, and aligned with the specific objectives of the development standard, which ensure that the building density, bulk and scale makes a positive contribution towards the desired built form in Newcastle City Centre.
- Firstly, the mapped FSR standard for the site under Clause 4.4 incentivises the potential for a much larger floor plate and floor space outcome on the site for a commercial office development. However, the LEP does not provide any relief or flexibility whereby there is a mix of both residential and commercial/retail floor space as part of the one development, such as a pro-rated approach with the outcome for mixed use being a binary outcome from an FSR perspective (i.e. either the 5:1 for mixed use or 8:1 for commercial).
- This is distinct from other similar 'incentive' floor space provisions in other City Centres such as the City of Sydney's 'accommodation' floor space system which is pro-rated dependent on the specific mix of land uses). In some ways, this has the potential to actually disincentive additional employment floor space as part of a mixed-use development given the lack of flexibility between Clause 4.4 and Clause 7.10.
- Importantly, the gross floor area (GFA) of the residential component of the project alone would be below the maximum FSR of 5:1, noting that the commercial/retail components of 613.84sqm (Stage 1) and 529.43sqm (Stage 2) would be a large component of the area that exceeds the development standard.
- Secondly, the site has been the subject of a competitive design process, whereby the endorsed competition brief identified significant environmental constraints with basement car parking on the site due to mine subsidence, contamination, a high-water table and flood risk which recommended the provision of above-ground car parking in an innovative, sleeved manner.
- The winning design (which has been supported by the Design Integrity Panel and Council's UDRP) supported the preferred parking arrangement, and applauded the design's high-quality response to the ground plane, activation and public benefits associated with the quality of publicly accessible space and pedestrian connectivity through the site. However, the provision of waste collection and storage cages in the car park areas which would typically be excluded from GFA in a basement scenario have been included in these circumstances.
- The proposed minor variations to the development standard do give rise to any unreasonable built form impacts, and the development maintains a positive contribution towards the desired built form for this key site.
- The design is a result of iterative detailed engagement and input from various CN teams including planning, waste, engineering, and heritage; and the Chair of CN's UDRP. The Design Excellence Brief and Strategy were prepared in collaboration with CN, GANSW and CN's Chair of the Urban Design Review Panel (UDRP) – Dr Phillip Pollard.
- The proposed scheme would also be compliant with the prescribed FSR (including the design excellence bonus) if the areas typically excluded in the definition of GFA under NLEP for waste collection and storage where in a basement typology. However, as the site specific circumstances have required a podium solution due to mine subsidence, water table and Aboriginal archaeology considerations, the provision of above ground waste rooms and storage, which are to be included in the GFA calculations, results in a non-compliant scheme. The additional floor space is isolated to waste and storage uses not residential floor space. This additional GFA is contained within the proposed podium and does not attribute any additional discernible bulk and scale. The proposed podium size is required to accommodate the parking requirements prescribed in the Newcastle Development Control Plan 2012.
- The endorsed Design Excellence Brief and Strategy established the on-going design review framework for the review process, and the additional 10% was deemed appropriate throughout the robust consultation process.
- The proposal delivers a significant public benefit by the redistribution of floor space from the ground plane to the tower to provide generous and publicly accessible spaces with through site links creating greater permeability of the site.
- The variation to FSR does not result in non-compliances to the ADG visual privacy guidelines and does not result in unreasonable tower setbacks or street wall heights inconsistent with NDCP objectives. The

design is sympathetic to the surrounding context and does not overwhelm the public domain creating unreasonable impacts.

- The proposed variation does not result in any additional height above the NLEP height limit; therefore, the resultant additional bulk and scale is negligible and not overshadowing or view sharing issues are anticipated.
- The proposal will not result in any adverse impacts to surrounding heritage items and enhances view lines to the Army Drill Hall from National Park Street.
- The proposal is highly consistent with all strategic planning aims and objectives for the Newcastle City Centre and the Hunter region by providing a diversity of housing, and employment opportunities in a well-connected area.
- The additional GFA does not result in an increase in traffic and parking demand, which would create adverse impacts to the surrounding street network.
- The non-compliance will not hinder the development's ability to satisfy the objectives of the Newcastle City Centre.

Based on the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed FSR non-compliance in this instance.

6.4. HAS THE WRITTEN REQUEST ADEQUATELY ADDRESSED THE MATTERS IN SUB-CLAUSE (3)? – CLAUSE 4.6(4)(A)(I)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

Each of the sub-clause (3) matters are comprehensively addressed in this written request, including detailed consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. The written request also provides sufficient environmental planning grounds, including matters specific to the proposal and the site, to justify the proposed variation to the development standard.

6.5. IS THE PROPOSED DEVELOPMENT IN THE PUBLIC INTEREST? – CLAUSE 4.6(4)(B)(II)

Clause 4.6(4)(a)(ii) states development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the proposal will be in the public interest because it is consistent with the objectives of the development standard and the objectives for the zone.

The consistency of the development with the objectives of the Newcastle City Centre and development standard is demonstrated in **Table 2** and **3** above. The proposal is also consistent with the land use objectives that apply to the site under NLEP. The site is located within the E2 Commercial Centre zone. The proposed development is consistent with the relevant land use zone objectives as outlined in **Table 4** below.

Table 4 – Assessment of Compliance with Land Use Zone Objectives

Objective	Assessment
To strengthen the role of the commercial centre as the centre of business, retail, community, and cultural activity	<p>The proposed towers will redevelop the site to deliver a mixed-use precinct that will provide retail, commercial, residential and community land uses all within the one site. The precinct will provide a positive public open space that will activate the ground plane and respond sympathetically to the surrounding land uses.</p> <p>The ground plane and podium also provide opportunities for retail and business premises</p>

Objective	Assessment
	<p>which will lead to ground plane activation and contribute to the revitalisation of Hunter Street, National Park Street and King Street.</p> <p>The variation to the FSR clause is considered minor and will not hinder the delivery of a range of land uses to serve the needs of the local and wider community.</p>
<p>To encourage investment in commercial development that generates employment opportunities and economic growth.</p>	<p>The project will catalyse the urban renewal of a key site in Newcastle West.</p> <p>The proposal represents a significant investment in the Newcastle City Centre and will boost the local economy during both the construction and operational phases. In particular, the project will also offer a range of retail and commercial opportunities including cafes, shops and a roof top bar.</p> <p>The variation to the FSR clause is considered minor and will not prevent the strengthening of Newcastle's regional position or hinder employment and economic growth.</p>
<p>To encourage development that has a high level of accessibility and amenity, particularly for pedestrians.</p>	<p>The site is located in close proximity to the Newcastle Interchange, which has multiple modes of transportation including trains, buses, light rail and ferry connections.</p> <p>The proposal will deliver high-quality residential dwellings in a convenient, accessible and naturally beautiful location.</p> <p>The proposal encourages active transport for business and retail users through the provision of bicycle parking spaces and end of trip facilities.</p> <p>The variation to the FSR clause will not discourage public transport patronage or active modes of transport.</p>
<p>To enable residential development only if it is consistent with the Council's strategic planning for residential development in the area.</p>	<p>The development will deliver a residential community integrated with a mixed-use precinct - retail, commercial and open space. The precinct will improve amenities in the area, retail demand whilst also connecting residents to community land on the ground plane.</p>
<p>To ensure that new development provides diverse and active street frontages to attract pedestrian</p>	<p>The precinct proposed will provide opportunities for regional businesses within the Newcastle City Centre through the provision of non-residential floor</p>

Objective	Assessment
<p>traffic and to contribute to vibrant, diverse and functional streets and public spaces.</p>	<p>space. Bell Ringer Property Group, a retail consultant, has been engaged to provide expert input into the curation and makeup of the ground floor plan. The business and retail spaces are underpinned by following design principles: Design for all users, contextual, diversity of experience, flexibility, compression and laying, authentic materials, celebrate project storey and history, and connected.</p> <p>The variation to the FSR clause is considered minor and will not prevent the strengthening of Newcastle's regional position or hinder employment and economic growth.</p>
<p>To provide for commercial floor space within mixed use development.</p>	<p>A significant amount of non-residential floor space (business and retail) will be provided for the development. The non-residential floor space has been proposed to front the new urban plaza and street frontages to encourage pedestrian activation.</p> <p>The variation to FSR is considered minor and will not hinder the delivery of a range of land uses to serve the needs of the local and wider community.</p>
<p>To strengthen the role of the Newcastle City Centre as the regional business, retail and cultural centre of the Hunter region.</p>	<p>The precinct proposed will provide opportunities for regional businesses within the Newcastle City Centre through the provision of non-residential floor space. Bell Ringer Property Group, a retail consultant, has been engaged to provide expert input into the curation and makeup of the ground floor plan. The business and retail spaces are underpinned by following design principles: Design for all users, contextual, diversity of experience, flexibility, compression and laying, authentic materials, celebrate project storey and history, and connected.</p> <p>The variation to the FSR clause is considered minor and will not prevent the strengthening of Newcastle's regional position or hinder employment and economic growth</p>
<p>To provide for the retention and creation of view corridors.</p>	<p>The NDCP does not identify any nearby view corridors. The proposal does not impact any identified view corridors in the NDCP.</p> <p>Nevertheless, the proposed development has accounted for the spectacular views that span around the site, including the Newcastle beach and ocean (south-east), Hunter River (north) and</p>

Objective	Assessment
	<p>Birdwood Park (south-west). The development has been designed to maximise view potential. Re-orientation of the tower forms has allowed for views to be maximised for the residential component whilst providing corridors for the surrounding developments due to the design of the tower shape.</p> <p>Level 17 includes a chef grade internal kitchen, an outdoor kitchen, northern views over the water and a multi-purpose design to allow for events, functions, and a place to work during the day. This communal area will ensure residents from all floors and access the views.</p> <p>The urban plaza also provides the opportunity to visually link National Park Street to the local heritage item, the Army Drill Hall.</p>

6.6. HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED? – CLAUSE 4.6(4)(B) AND CLAUSE 4.6(5)

The Secretary can be assumed to have concurred to the variation under 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*.

The Secretary can be assumed to have given concurrence as the matter will be determined by Hunter and Central Coast Planning Panel in accordance with the Planning Circular.

The matters for consideration under clause 4.6(5) are considered below.

- **Clause 4.6(5)(a) – does contravention of the development standard raise any matter of significance for State or regional environmental planning?**

The proposed non-compliance with the FSR will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

- **Clause 4.6(5)(b) - is there a public benefit of maintaining the planning control standard?**

The proposed development achieves the objectives of the FSR development standard and the E2 Commercial Centre zone objectives notwithstanding the technical non-compliance. There is no public benefit in maintain the planning control standard given the significant public benefit the proposal provides.

Overall, the non-compliance will not hinder the development's ability to satisfy the objectives of the Newcastle City Centre. The proposed FSR variation is a result of utilising the 10% design excellence bonus available through clause 7.5 of the NLEP.

- **Clause 4.6(5)(c) – are there any other matters required to be taken into consideration by the Secretary before granting concurrence?**

Concurrence can be assumed, however, there are no known additional matters that need to be considered within the assessment of the clause 4.6 variation request prior to granting concurrence, should it be required.

7. CONCLUSION

For the reasons set out in this written request, strict compliance with the FSR contained within clause 7.10 of NLEP is unreasonable and unnecessary in the circumstances of the case. Further, there are sufficient environmental planning grounds to justify the proposed variation and it is in the public interest to do so.

It is reasonable and appropriate to vary the FSR to the extent proposed for the reasons detailed within this submission and as summarised below:

- The gross floor area (GFA) of the residential component of the project alone would be below the maximum FSR of 5:1, noting that the commercial/retail components of 613.84sqm (Stage 1) and 529.43sqm (Stage 2) would be a large component of the area that exceeds the development standard. However, Clause 7.10 inextricably limits flexibility whereby there is a mix of both residential and commercial/retail floor space as part of the one development, such as a pro-rated approach with the outcome for mixed use being a binary outcome from an FSR perspective (i.e. either the 5:1 for mixed use or 8:1 for commercial).
- Further, the proposed scheme would also be compliant with the prescribed FSR (including the design excellence bonus) if the areas typically excluded in the definition of GFA under NLEP for waste collection and storage were in a basement typology. However, as the site specific circumstances have required a podium solution due to mine subsidence, water table and Aboriginal archaeology considerations, the provision of above ground waste rooms and storage, which are to be included in the GFA calculations, results in a non-compliant scheme.
- The additional floor space is isolated to waste and storage uses not residential floor space. This additional GFA is contained within the proposed podium and does not attribute any additional discernible bulk and scale. The proposed podium size is required to accommodate the parking requirements prescribed in the Newcastle Development Control Plan 2012.
- The scheme has been through a Design Excellence process. The Plus Architecture scheme was recommended by the Jury as the winning scheme in the competitive design process. The design is a result of iterative detailed engagement and input from various CN teams including planning, waste, engineering, and heritage; and the Chair of CN's UDRP.
- Under clause 4.4 of the LEP an 8:1 FSR is permitted for wholly commercial development, which represents a scale significantly more than the proposed development. The bulk and scale of the proposal has been carefully resolved to respond to the surrounding context and represents an appropriate design response. The proposed development provides an FSR consistent with clause 7.5(6).
- The proposal delivers a significant public benefit by the redistribution of floor space from the ground plane to the tower to provide generous and publicly accessible spaces with through site links creating greater permeability of the site.
- The variation to FSR does not result in non-compliance to the Apartment Design Guidelines (**ADG**) visual privacy guidelines and does not result in unreasonable tower setbacks or street wall heights inconsistent with Newcastle Development Controls 2012 (**NDCP**) objectives. The design is sympathetic to the surrounding context and does not overwhelm the public domain.
- The proposed variation does not result in any unreasonable amenity impacts to adjoining properties or public spaces including Birdwood Park.
- The proposed variation does not result in any additional height above the NLEP height limit; therefore, the resultant additional bulk and scale is negligible.
- The proposal will not result in any adverse impacts to surrounding heritage items and enhances view lines to the Army Drill Hall from National Park Street.

For the reasons outlined above, the clause 4.6 request is well-founded. The development standard is unnecessary and unreasonable in the circumstances, and there are sufficient environmental planning grounds that warrant contravention of the standard. In the circumstances of this case, flexibility in the application of the FSR should be applied.

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