

The background of the page features a grayscale photograph of a city skyline, with a prominent skyscraper on the right. Overlaid on this image are numerous white, 3D wireframe outlines of rectangular blocks of varying heights and widths, arranged in a staggered, isometric pattern that suggests a city's building footprint.

## **Clause 4.6 Variation Request**

Floor Space Ratio




Clause 4.4 Newcastle LEP  
2012

**No. 309 King Street, Newcastle West**

Submitted to The City of Newcastle  
On Behalf of the Wests Group

AUGUST 2019

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## 1. INTRODUCTION

This is a formal written request prepared in accordance with Clause 4.6 of the *Newcastle Local Environmental Plan 2012* (NLEP 2012) to support a development application submitted to the City of Newcastle Council for the construction of a new mixed-use development at **No. 309 King Street, Newcastle West** (the subject site).

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

The development standard that this request seeks approval to vary is the Floor Space Ratio (FSR) control in Clause 4.4 of the NLEP 2012. The numeric value of the FSR development standard is 5:1. For the avoidance of doubt, the development standard is not specifically excluded from the operation of Clause 4.6 of NLEP 2012.

This request has been prepared having regard to the Department of Planning and Environment's *Guidelines to Varying Development Standards* (August 2011) and relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal<sup>1</sup>.

In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 ('Initial Action'), Chief Justice Preston provided further clarification on the application of Clause 4.6 and the preconditions which must be satisfied for consent to be granted pursuant to Clause 4.6(4). That is, the consent authority must form two positive opinions of satisfaction under Clause 4.6(4)(a), as summarised below:

- The written request has adequately demonstrated that the matters under Clause 4.6(3) are satisfied, being that compliance with the standard is unreasonable or unnecessary, and there are sufficient environmental planning grounds to justify contravening the development standard. It is not the consent authority's role to directly form an opinion as to whether these matters are satisfied, rather indirectly by the satisfaction that the written request has addressed these matters; and
- The proposed development satisfies Clause 4.6(4)(a)(ii), being the proposed development will be in the public interest because it is consistent with the objectives of the zone and the objectives of the development standard. The consent authority must form this opinion directly, rather than indirectly satisfied that the written request has adequately addressed these matters.

In Sections 3 and 4 of this request we have explained how flexibility is justified in this case in terms of the matters explicitly required by Clause 4.6 to be addressed in a written request from the applicant.

In Sections 5, 6 and 7 we address additional matters that the consent authority is required to be satisfied of when exercising either the discretion afforded by Clause 4.6 or the assumed concurrence of the Secretary.

The following request demonstrates that by exercising the flexibility afforded by Clause 4.6, in the particular circumstances of this application, not only would the variation be in the public interest because it satisfies the relevant objectives of both the B4 Mixed Use zone and the development standard, but it would also result in a better planning outcome.

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<sup>1</sup> Relevant decisions include: *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46; *Wehbe v Pittwater Council* [2007] NSWLEC 827; *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009; *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90; *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248; *Moskovich v Waverley Council* [2016] NSWLEC 1015; *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 and *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118.

## 2. EXTENT OF VARIATION

As shown in Figure 1, the NLEP 2012 prescribes a maximum FSR for the subject site of 5:1.

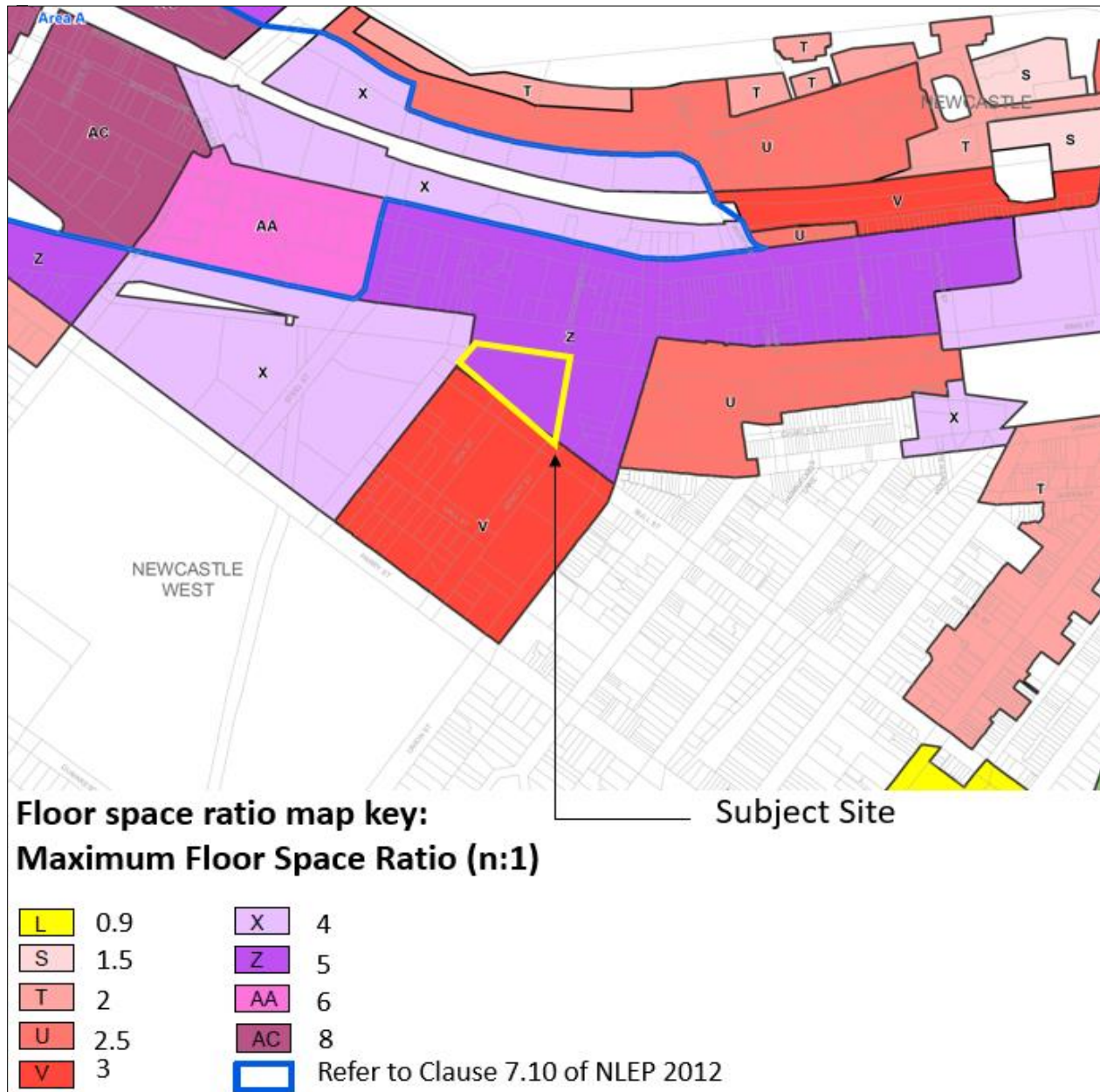


Figure 1: Extract of Floor Space Ratio map (source: NLEP 2012)

The proposed development will involve the construction of 2 x 14-storey buildings with shared basement carparking. The 2 separate 'tower' form buildings, referred to as 'Tower A' and 'Tower B', will be separated from each other and the adjacent 'Wests City' building by pedestrian courtyards or laneways.

The towers would include ground floor business, commercial and retail facilities, high and low care seniors housing and associated support facilities, as well as general residential apartments.

The development proposes a maximum FSR of 5.45:1. This marginally exceeds the applicable FSR of 5:1 prescribed under Clause 4.4. The departure may be expressed as an exceedance of 3,050sqm of Gross Floor Area, or a percentage departure of 9%.



*Figure 2: The elevations for proposed Tower A and Tower B as viewed from the King Street alignment looking south-west. The separation between the proposed two Towers and the adjacent Wests City building (on the left) can be seen in context*

### 3. COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THIS CASE. [CL.4.6 (3)(A)]

#### Achieves the objectives of the standard

Compliance with the FSR development standard is unreasonable or unnecessary in the circumstances of this case because, as explained in Table 1 below, the objectives of the development standard contained in Clause 4.4 of the NLEP 2012 are achieved, notwithstanding non-compliance with the standard.<sup>2</sup>

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34], the Chief Justice held, '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'. Demonstrating that there will be no adverse amenity impacts is therefore one way of showing consistency with the objectives of a development standard.

Table 1: Achievement of Clause 4.4 ('Floor Space Ratio') Objectives

Objective	Discussion
(a) to provide an appropriate density of development consistent with the established centres hierarchy,	<p>Strategically located between two key areas zoned B3 Commercial Core (to the north-east and north-west along King and Hunter Streets), the site is identified as a 'Key Site' under the NLEP and is zoned B4 Mixed Use.</p> <p>The site is also identified as being within the 'Parry Street' character area described in Section 6.01 of the DCP. Section 6.01 has been prepared as an outcome of the <i>Newcastle Urban Renewal Strategy</i>. With respect to the 'Parry Street' character area the DCP aims to encourage higher density residential development in this highly accessible and well-served City Centre location.</p> <p>Consistent with Council's strategic vision for the site and DCP character area, the proposed density will facilitate additional housing opportunities and low intensity commercial uses in a well-served location to support the nearby commercial core. In particular, the proposed density allows for an 'exceptional variation of unit types catering for studios, 1, 2, 2 bedroom plus study, and 3 bedroom units. The addition of Independent living units and a Residential Aged Care Facility extends this further providing an opportunity for a rich mix of</p>

<sup>2</sup> In *Wehbe v Pittwater Council* [2007] NSWLEC 827 Preston CJ identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established. Although the decision concerned SEPP 1, it remains relevant to requests under clause 4.6 as confirmed by Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, notwithstanding that if the first and most commonly applied way is used, it must also be considered in 4.6(4)(a)(ii). The 5 ways in *Wehbe* are: 1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; 2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary; 3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable; 4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; or 5. The zoning of the land is unreasonable or inappropriate.

Objective	Discussion
	<p><i>occupants'</i> (Urban Design Consultative Group Meeting Minutes, 20 June 2018).</p> <p>Importantly, the development has been designed to adequately service the anticipated density, ensuring the additional FSR would have no adverse environmental, amenity or social impacts on the surrounding natural and built environment. For example:</p> <ul style="list-style-type: none"> <li>▪ Over 35% of the site area is proposed as communal open space, well in excess of the 25% stipulated within the <i>Apartment Design Guide</i> (ADG). This is in addition to the 28% site area dedicated as 'publicly-accessible' open space (e.g. laneway, building forecourts). Accordingly, residential amenity is enhanced and there is capacity for generous site landscaping.</li> <li>▪ Adequate essential services and infrastructure are available to the site (e.g. water, sewer, telephone, stormwater, etc.).</li> <li>▪ Overshadowing impacts on surrounding development are predominantly limited to commercial development and considered reasonable and acceptable, as outlined within the SEE.</li> <li>▪ Proposed on-site services would mitigate additional demands on social infrastructure arising from the FSR exceedance e.g. proposed nursing and care services for seniors, on-site medical centre open to the public.</li> <li>▪ The building's bulk and scale do not unreasonably affect views for surrounding development, as outlined within the SEE.</li> <li>▪ Proposed off-street carparking meets the stipulated requirements for all combined landuses, and traffic modelling indicates that the surrounding road network has spare capacity to cater for the proposed development. Regardless, future residents of the building would have excellent access to nearby public transport options, supported and reinforced by the development's strong 'green travel' initiatives, outlined within the <i>Green Travel Plan</i> submitted with the DA.</li> <li>▪ The <i>Statement of Heritage Impact</i> prepared for the development concludes the proposal, inclusive of the proposed FSR, would have '<i>minimal impact on the heritage significance of the Newcastle City Centre Heritage</i></li> </ul>

Objective	Discussion
	<p><i>Conservation Area and nearby heritage items' (p53).</i></p> <ul style="list-style-type: none"> <li>▪ The building continues to display 'design excellence', with its bulk and scale fully supported by the Urban Design Consultative Group, as outlined below in this Table.</li> </ul> <p>In summary, notwithstanding the minor exceedance in FSR proposed for this key site, the density of development is considered appropriate and beneficial to the locality and will help support the viability of the nearby commercial core.</p>
<p><i>(b) to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.</i></p>	<p>Consistent with the desired built form of the area, the application proposes the demolition of the existing building and car park and the construction of a new 14-storey mixed-use development on this large key site.</p> <p>The building's design is a result of an extensive and collaborative design evolution process which sought to balance competing outcomes on this 'Key Site'. For example, the triangular shape and large size of the land competed with a desire to achieve consistent building heights and setbacks across the site for maximum amenity outcomes, resulting in an increase in floorplate sizes and subsequently, FSR. Early alternative design options, such as multiple narrower towers, were considered but were found to result in an overall poorer amenity outcome. As confirmed by the UDCG, the resultant proposal <i>'presents a well-considered built form which responds to its context and takes into account the existing controls for the site'</i> (p2 of Meeting Minutes).</p> <p>Importantly, the proposed building achieves the 'design excellence' required for this CBD Key Site, addressing criteria provided in Clause 7.5(3) of the NLEP. An architectural design competition waiver has been issued by the NSW Government Architect, on the basis that <i>'design excellence will be achieved ...such as where concept drawings are submitted for a manifestly outstanding building, and the architect has a reputation for delivering buildings of the highest quality'</i> (Government Architect letter dated 14 August 2018). The UDCG further supported the final design of the building, subject to the resolution of some minor issues, unrelated to FSR, which are addressed within the SEE.</p> <p>It is noted that the proposed built form generally conforms with height and setback controls contained in the NLEP and NDCP. In addition,</p>

Objective	Discussion
	<p>podium and tower levels are appropriately separated in compliance with ADG requirements to reduce the buildings' appearance of bulk and scale at street level, maintain appropriate visual privacy and solar access, and to facilitate extensive landscaping and pedestrian connectivity. The laneway in particular would provide an attractive and high-quality contribution to the public domain, as indicated in the plans and renders submitted with the DA.</p> <p>Overall, the increased density and proposed built form is considered appropriate in the circumstances, including the established centres hierarchy, providing a positive contribution to the site's 'Key' corner location and the evolving character of the DCP character area. Through addressing the additional assessment criteria provided in Clause 7.5(3) of the NLEP, it is evident that the objectives of the development standard have been achieved notwithstanding non - compliance with the development standard.</p>



Figure 3: The podium and tower levels are appropriately separated in compliance with ADG requirements to reduce the buildings' appearance of bulk and scale at street level, maintain appropriate visual privacy and solar access, and to facilitate extensive landscaping and pedestrian connectivity. The laneway between the adjacent Wests City building on the east provides an attractive and high-quality contribution to the public domain.

#### **4. THERE ARE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE STANDARD. [CL. 4.6(3)(B)]**

In *Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 2018*, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, 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.

The SEE prepared for this DA provides a holistic environmental planning assessment of the proposed development and concludes that subject to adopting a range of reasonable mitigation measures, there are sufficient environmental planning grounds to support the development.

Some additional specific environmental grounds to justify the breach of the standard are summarised as follows:

- Consistent with Council's strategic vision for the DCP character area, the proposed density will facilitate additional and diverse housing opportunities and low intensity commercial uses in a well-serviced location to support the nearby commercial core. Importantly, this increased density is supported by a range of services and facilities proposed within the site itself, as well as improved pedestrian connectivity through the site to existing established shops, services and facilities throughout the nearby CBD.
- The proposed density, bulk and scale is appropriate on this large corner site. Notably, the proposed built form generally conforms with height, setback and separation distance controls contained in the NLEP, NDCP and ADG. The increased density and proposed built form is considered appropriate in the circumstances, providing a positive contribution to the site's prominent corner location and the evolving character of the DCP character area.
- The NSW Government Architect has confirmed through its design competition waiver that the building delivers 'design excellence', having regard to the design excellence considerations provided in Clause 7.5(3) of the NLEP. This finding was further confirmed via the support of the Newcastle Urban Design Consultative Group who provided full support for the building's built form and scale. Importantly, all matters outlined in Clause 7.5(3) of the NLEP are addressed in detail throughout the SEE. As required by the NSW Government Architect, the design review panel will remain in place through the development assessment, certification and construction phases to ensure the design excellence considerations provided in Clause 7.5(3) of the NLEP are maintained.
- The proposed variation is minor and will not result in any unreasonable environmental or social impacts on the surrounding natural and built environment. In particular, the additional built form avoids unreasonable overshadowing, privacy and view loss impacts for residents living in nearby apartment buildings.
- The proposed exceedance is partly a result of the inclusion within the GFA calculation of 19 car parking spaces proposed in excess of DCP requirements. The 19 additional car spaces result in an additional GFA of approximately 247sqm. Importantly, the additional car spaces are located at basement level and therefore do not contribute to the overall bulk or scale of the proposed two towers.

## 5. THE PROPOSAL WILL BE IN THE PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES OF THE STANDARD AND THE OBJECTIVES OF THE ZONE. [CL.4.6(4)(A)(II)]

In section 3 (above), it was demonstrated that the proposal is consistent<sup>3</sup> with the objectives of the development standard. The proposal is also consistent with the objectives of the B4 Mixed Use zone as explained in Table 2 (below).

Table 2: Consistency with Zone Objectives.

Objective	Discussion
To provide a mixture of compatible land uses.	The proposal provides for a compatible mix of retail, commercial, business, and higher density seniors and general residential housing opportunities that will serve the needs of the local and wider community.
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.	<p>The proposal integrates ground floor business and retail facilities, high and low care seniors housing and associated support facilities, as well as general residential apartments, in a highly accessible location.</p> <p>The site is located in close proximity to various public transport nodes and a wide range of commercial and social services, recreational opportunities and community facilities to maximise opportunities for public transport patronage and to encourage walking and cycling. Importantly, the development proposes strong 'green travel' initiatives, such as the issue of free Opal cards with \$10 credit to residents, and the provision of showers and lockers in close proximity to a secure bicycle storage room.</p> <p>The proposed public domain improvements including the pedestrian laneway connection with the important Memorial will enhance social cohesion and assist with safe pedestrian permeability and accessibility through the site to surrounding areas. Facilities within the proposed development, including the proposed medical centre and cafe, will assist in meeting the day to day needs of future residents, thereby further reducing the need to travel by car.</p>
To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.	The proposal provides compatible and business supporting land uses, including additional housing opportunities, to help support the viability of the surrounding Centre and its individual businesses.

<sup>3</sup> In *Dem Gillespies v Warringah Council* [2002] LGERA 147 and *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC the term 'consistent' was interpreted to mean 'compatible' or 'capable of existing together in harmony'

Objective	Discussion
	The proposed public facilities and amenities (e.g. 1989 Newcastle Earthquake Memorial, commercial development) will accommodate the needs of the building's future residents as well as bring the general public into the site. The demographic diversity of the proposal and the generous landscaped spaces and shared facilities that blur the boundaries between the site and the surrounding streetscape transform the site to a vibrant social hub in the heart of Newcastle.

As can be seen from Table 1 and Table 2, the proposal is consistent with the objectives of the standard and the objectives of the zone and is therefore considered to be in the public interest.

**6. CONTRAVENTION OF THE DEVELOPMENT STANDARD DOES NOT  
RAISE ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL  
ENVIRONMENTAL PLANNING. [CL. 4.6(5)(A)]**

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application.

## **7. THERE IS NO PUBLIC BENEFIT OF MAINTAINING THE STANDARD. [CL. 4.6(5)(B)]**

The redevelopment of the site will facilitate a diverse mix of additional housing opportunities, as well as commercial, business and retail floorspace, to support the viability of the Newcastle City Centre.

The demographic diversity of the proposal and the generous landscaped spaces and shared facilities that blur the boundaries between the site and the surrounding streetscape transform the location to a vibrant social hub in the heart of Newcastle. Importantly, the communal roof area provides high-quality outdoor recreational space, without creating additional bulk or adversely impacting the amenity of nearby development.

Overall, the proposal aligns with Council's strategic vision to support the evolving character of the area into a high-density residential and mixed-use precinct. As demonstrated within this submission, the FSR exceedance would not result in any adverse amenity, environmental or social impacts, and the building would continue to maintain 'design excellence'.

Accordingly, there is no public benefit<sup>4</sup> in maintaining strict compliance with the FSR development standard given that there are no unreasonable adverse impacts that will result from the variation to the standard and hence there are very minor disadvantages.

We therefore conclude that the benefits of the proposal outweigh any disadvantage and as such the proposal will have an overall public benefit.

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<sup>4</sup> *Ex Gratia P/L v Dungog Council* (NSWLEC 148) established that the question that needs to be answered to establish whether there is a public benefit is "whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development".

## 8. CONCLUSION

This Clause 4.6 variation request demonstrates, as required by Clause 4.6 of the *Newcastle Local Environmental Plan 2012*, that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention;
- The development achieves the objectives of the development standard and is consistent with the objectives of the B4 Mixed Use zone, notwithstanding the variation;
- The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard; and
- The variation does not raise any matter of State or Regional Significance.

On this basis, therefore, it is considered appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.