

Clause 4.6 – Request to Vary FSR Standard under Newcastle LEP 2012

Construction of Retail Premises Shop Top
Housing and Commercial Premises

711 Hunter Street, Newcastle West

Lot 1 DP 867617

Prepared on behalf of Hunter Street Properties NSW Pty Ltd as
trustee for 711 Hunter Street Unit Trust

Document Control Sheet					
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Acknowledgement of Country

We, ADW Johnson, acknowledge the Traditional Custodians of the land where we live and work, the country of Awabakal, Darkinjung and the Eora Nation.

We recognise their continuous connection to the land and waters of our beautiful regions. We pay our respects to Aboriginal and Torres Strait Islanders Elders past, present and emerging.

Artwork created by Joe Griffin, a proud Aboriginal man, descendant of the Awabakal people.



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1.0 Introduction and Proposed Development

Hunter Street Properties NSW Pty Ltd as trustee for 711 Hunter Street Unit Trust is the Applicant for the proposed development comprising the construction of retail premises, shop top housing and commercial premises at 711 Hunter Street, Newcastle West (Lot 1 DP 867617).

The proposed development has been architecturally designed by Stewart Architecture. A copy of the Architectural Plans is included in **Appendix A** of this report.

The proposed built form includes podium, with a commercial tower and residential tower above. Car parking is provided within the lower podium levels. Ground floor retail uses are proposed which interact with and activate the adjoining streetscape.

The site is located within the Newcastle CBD. It is exceptionally located relative to public transport, goods and services and recreation facilities. For these reasons, the *Newcastle Local Environmental Plan 2012* (NLEP 2012) permits the highest density and building heights.

The proposed development has a floor space ratio (FSR) greater than the standard imposed by the NLEP 2012.

Clause 4.4 of the NLEP 2012 prescribes a maximum FSR of 8:1 for the site (signalling that buildings of this density are appropriate in this location). Clause 7.10 of the NLEP has the effect of reducing the FSR for any development other than a commercial building to 5:1.

Clause 7.5 of the NLEP provides a design bonus of 10% greater than that allowed by Clause 7.10 where design excellence is achieved. The UDRP has confirmed that the proposal is capable of achieving design excellence and therefore the applicable NLEP 2012 FSR control for the site is 5.5:1. The proposed development has a FSR of 6.678:1 and therefore exceeds the maximum FSR prescribed by Clause 7.10 of the NLEP.

Clause 4.6 of NLEP 2012 provides for an appropriate degree of flexibility in applying certain development standards such as FSR. This report sets out the Applicant's written request to vary Clause 7.10 under Clause 4.6 of the NLEP 2012.

This report justifies that the proposed variation sought is appropriate, and should not preclude the consent authority from granting development consent for the proposed development.

2.0 Site and Proposed Development

2.1 Site

The subject site is identified as Lot 1 DP 867617 and has a street address of 711 Hunter Street, Newcastle West.

The site is conveniently located within walking distance to the Honeysuckle Precinct, the Newcastle Light Rail Interchange, Marketown Shopping Centre, National Park, Hunter TAFE's King St campus and University of Newcastle's "New Space" campus, making it ideal for future residential and retail uses.

The site has an overall area of 4,724.3m² and frontage to Hunter Street to the north, National Park Street to the east and King Street to the south. Vehicle access to the site from the south is provided by a service road referred herein as Little King Street. The size of the site and access to three (3) street frontages are unique characteristics within the Newcastle Centre that present opportunities which the architectural design seeks to capture.

The site is located within an emerging high-density precinct, with many of the adjoining and nearby sites containing recently constructed, under construction or approved tower buildings. Development surrounding the site includes:

- The site is adjoined to the west, at the northern side of the site, by a 16-storey commercial development, which includes five (5) levels of above ground parking within a podium structure;
- Adjoining the site to the west, at the southern boundary of the site, is the Army Drill Hall building, an item of local heritage significance;
- To the north of the site are existing low rise commercial buildings and a mixed use commercial and residential development which is approximately 12 storeys high;
- The desired future character identified for land to the north and west of the site is high density development, commensurate with the city centre character of the area;
- To the east of the site, on the opposite side of National Park Street is a currently under construction commercial and residential development with a height of 77.8m;
- Birdwood Park is located to the south-west of the site; and
- Land to the south of the site, on the opposite side of King Street includes the Marketown Shopping Centre and low-rise commercial buildings. Land to the south has a mapped maximum building height of 45m and is mapped MU1 Mixed Use.

An aerial image of the site and surrounds is provided below.



Figure 1: Aerial Image.

The site contains a vacant three-storey commercial building and carpark. Existing development within the site is in a state of disrepair, detracts from the streetscape and is inconsistent with the desired future character identified for the Newcastle City Centre.

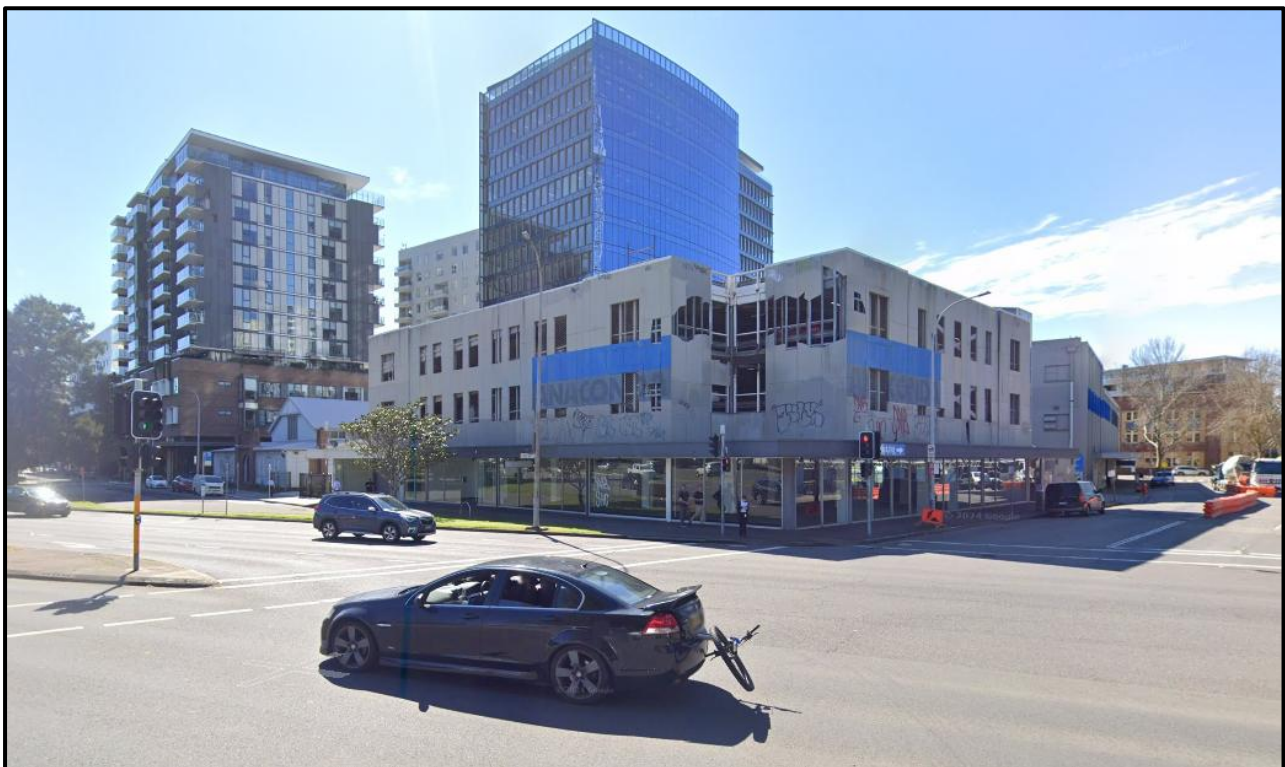


Figure 2: Existing Development.

2.2 Proposed Development

The proposal seeks to develop the site for the purpose of a retail premises, commercial premises and shop top housing.

Architectural Plans for the proposed development have been prepared by Stewart Architecture and are enclosed within **Appendix A**.

The proposed development includes the following:

- Construction of a four (4) storey podium to accommodate parking requirements for the proposed development;
- Street activation by providing retail uses within the ground floor at the frontages to Little King Street, Hunter Street and National Park Street;
- Vehicular access to the podium via Little King Street to the south;
- Construction of a commercial tower and residential tower above the podium;
- Landscaped communal open space areas above the podium; and
- Construction of utilities and ancillary infrastructure as required.

A detailed description of the proposed development is provided within the Statement of Environmental Effects to which this Clause 4.6 Variation Request is appended.

3.0 Exceptions to Development Standards

The applicant seeks consent for development that would contravene a development standard imposed by the NLEP 2012 (as detailed in **Section 4.0** and **5.0** of this report).

Under Clause 4.6 of NLEP 2012, development consent may be granted for development even though the development would contravene a development standard. Clause 4.6 of the NLEP 2012 provides as follows:

4.6 Exceptions to development standards

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

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

- (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
- (b) there are sufficient environmental planning grounds to justify the contravention of the development standard.*

Note—

The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

(4) The consent authority must keep a record of its assessment carried out under subclause (3).

(5) (Repealed)

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note—

When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition or Zone R5 Large Lot Residential.

(7) (Repealed)

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

- (a) a development standard for complying development,*

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,

(caa) clause 5.5,

(ca) clause 7.9, clause 7.9A or clause 8.2.

The Land and Environment Court has considered the question of contravention of development standards in a number of cases, both in its former application under *State Environmental Planning Policy No. 1 – Development Standards* and also in the current format as it appears under Clause 4.6.

This submission has been prepared having regard to the latest authority on Clause 4.6, contained in the following NSW Land and Environment Court (Court) judgements:

- 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 90 (Four2Five No 2);
- WZSydney Pty Ltd v Ku ring-gai Municipal Council [2023] NSWLEC 1065;
- Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7;
- Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 118;
- Bringham v Canterbury-Bankstown Council [2018] NSWLEC 1406;
- Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245;
- Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61;
- RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130; and
- Bhat v Hornsby Shire Council [2023] NSWLEC 1424.

This submission has also taken into consideration the “Guide to varying Development Standards” (November 2023) published by the NSW Department of Planning and Environment. Of particular relevance, it is necessary to:

- Establish whether compliance with the standard is unreasonable or unnecessary. The “Wehbe Tests” in this regard can be summarised as follows:
 1. The objectives of the development standard are achieved notwithstanding the non-compliance;
 2. The underlying objective or purpose is not relevant to the development;
 3. The underlying objective or purpose would be defeated or thwarted if compliance was required;
 4. The development standard has been virtually abandoned or destroyed by the Council’s own actions in granting consents departing from the standard; and
 5. The Zoning of the land on which the development is proposed was unreasonable or inappropriate.
- Establish that there are sufficient environmental planning grounds to justify the variation. The grounds must:
 - Be sufficient to justify the contravention; and
 - Focus on the aspect of the development that contravenes the development standard, not the development as a whole.

The Guide sets out a non-exhaustive list of what may be considered as sufficient environmental planning grounds, including:

- Avoiding adverse impacts;
- Dealing with unique site circumstances;
- Achieving consistency with streetscape and existing built form;
- Improving public benefit; and
- Achieving equal or better amenity outcomes.

4.0 The Development Standards & Variation Sought

4.1 The Development Standard

The proposed development will contravene the FSR standard imposed by Clause 7.10 of the NLEP 2012 (Development Standard). Clause 7.10 is a numerical development standard and is capable of variation.

Clause 4.4 of the LMLEP 2012 States:

4.4 Floor space ratio

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

- (a) to provide an appropriate density of development consistent with the established centres hierarchy,
- (b) to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.

(2) The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.

(2A) Despite subclause (2), the maximum floor space ratio for a building on land in any zone in this Plan is to be determined as if the area of the access laneway of a battle-axe lot were not part of the area of the lot.

Note—

See clause 7.10 for the maximum floor space ratio for a building on land in Newcastle City Centre.

The NLEP 2012 Floor Space Ratio Map prescribes a maximum FSR of 8:1m for the subject site (see Figure 3 below).

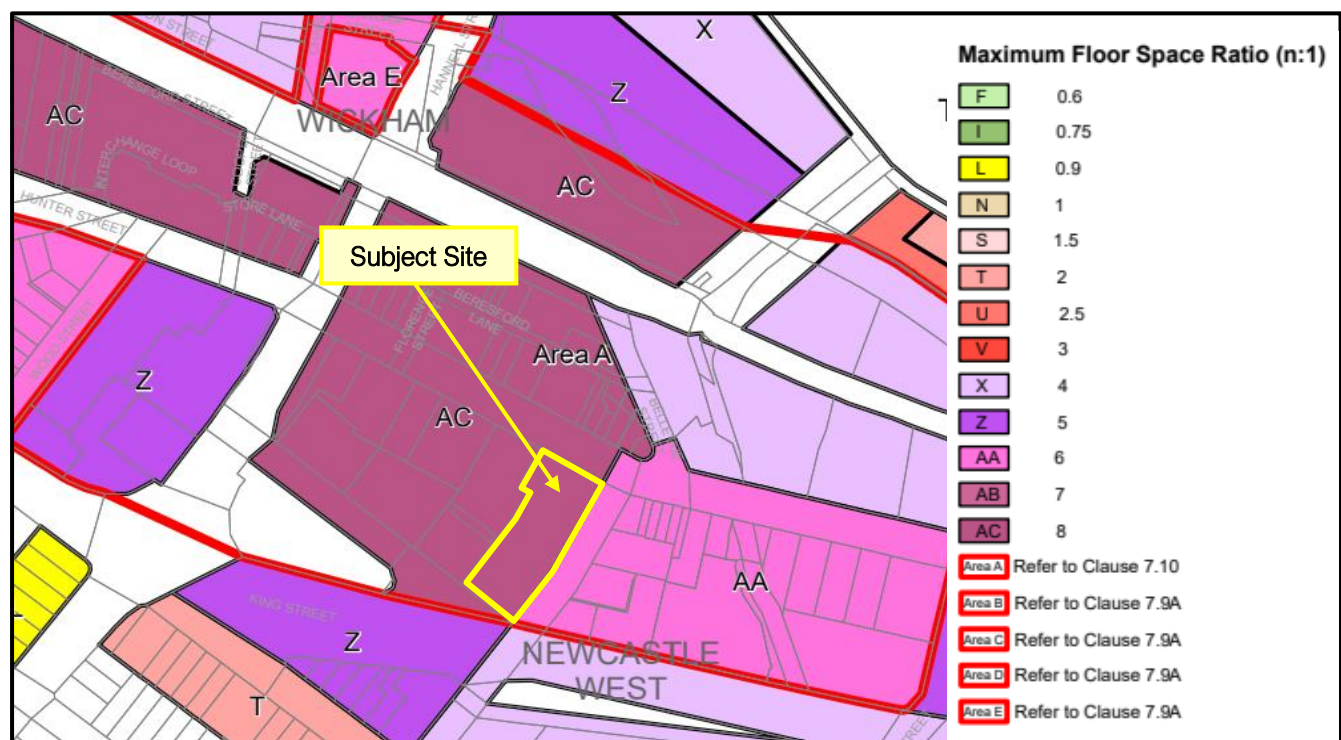


Figure 3: NLEP FSR Map.

The mapped FSR for the site is 8:1.

Clause 7.10 states:

7.10 Floor space ratio for certain development in Area A

- (1) This clause applies to land in “Area A” as shown on the Floor Space Ratio Map.
- (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,
 - (b) where the Floor Space Ratio Map identifies a maximum floor space ratio of 5:1—4:1,
 - (c) where the Floor Space Ratio Map identifies a maximum floor space ratio of 4:1—3:1.
- (3) In this clause—
commercial building means a building used wholly for either or both of the following purposes—
- (a) commercial premises,
 - (b) tourist and visitor accommodation that is not subdivided under a strata scheme.

The site is located in Area A and therefore Clause 7.10 applies. This clause has the effect of reducing the mapped FSR of 8:1 back to 5:1 because the development is not a commercial only building. The development includes residential apartments.

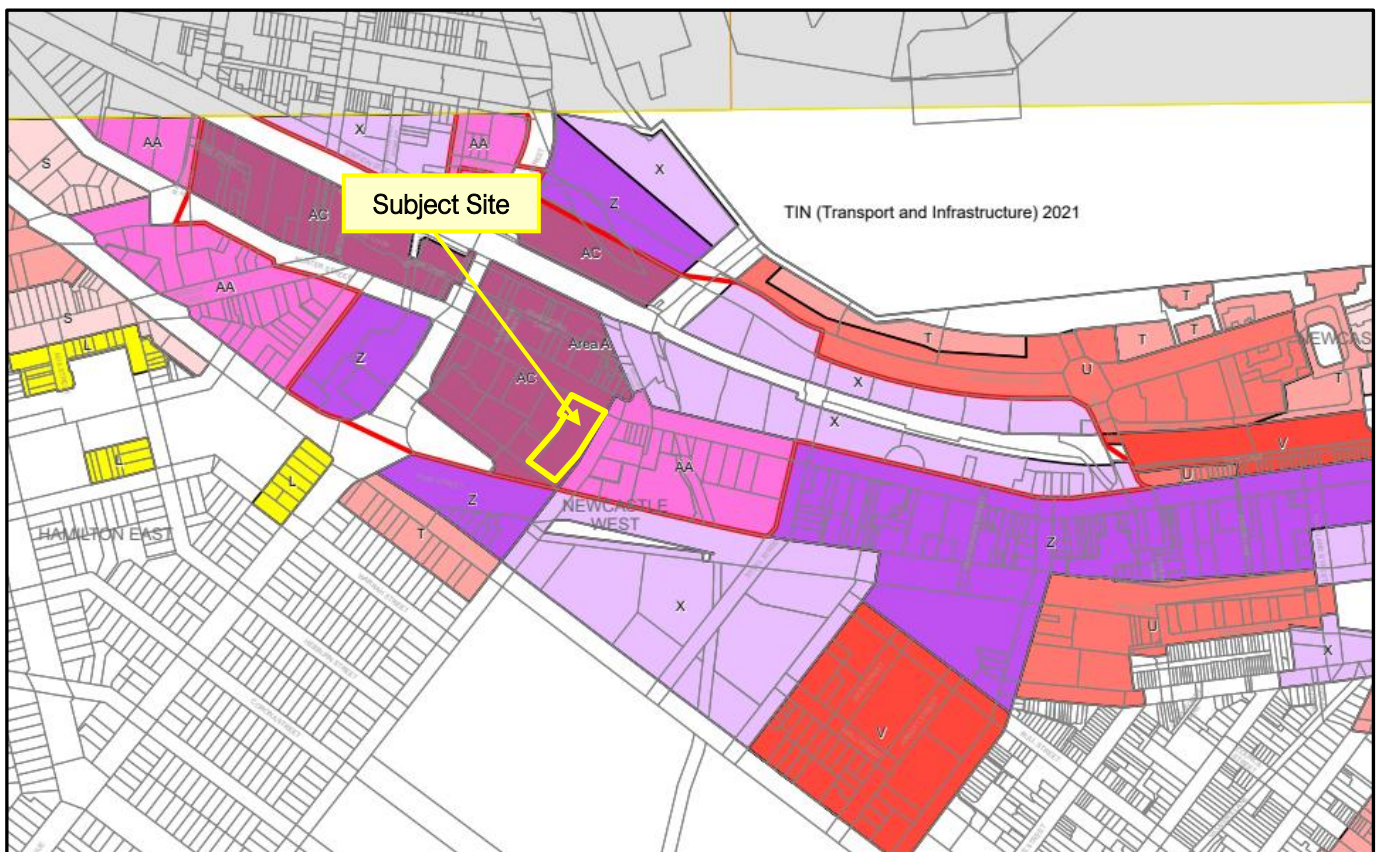


Figure 4: Extract from NLEP 2012 showing Area A in red outline.

Clause 7.5(6) states:

7.5 Design excellence

(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.

Clause 7.5(6) of the NLEP 2012 applies to the proposed development. A number of pre-DA meetings have been held with the Newcastle Urban Design Review Panel (UDRP). The UDRP will review the proposed development as part of the assessment of the Development Application. It has been confirmed that the proposed development can achieve design excellence and therefore a bonus FSR of 0.5:1 is available to the proposal on top of that permitted by Clause 7.10.

Based on the above it is concluded that the relevant FSR standard for the site is 5.5:1, as established by Clauses 4.4, 7.10 and the bonus provisions set in Clause 7.5.

Clause 4.5 of the NLEP outlines the definition of FSR. All FSR calculations have been undertaken in accordance with Clause 4.5.

4.2 Contravention of the Development Standard

The proposed development has a FSR of 6.678:1. This equates to a proposed variation to the FSR control of 1.178:1 or 21.42% to the relevant development standard.

4.3 Objectives of the Development Standard

There are no listed clause objectives for Clause 7.10. In circumstances such as this, the Guide to Varying Development Standards requires that it is necessary to explore what the underlying purpose of the clause is. This is discussed below.

Given Clause 7.10 relates to the same subject matter as Clause 4.4 by prescribing the applicable FSR development for buildings within the Newcastle City Centre, the objectives of Clause 4.4 are also relevant to understanding the objectives of Clause 7.10.

Clause 4.4 has two standard objectives. Clause 4.4, provides as follows:

4.4 Floor Space Ratio

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

- (a) to provide an appropriate density of development consistent with the established centres hierarchy,*
- (b) to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.*

Clause 7.10 is located in Part 7 of the NLEP 2012 which contains additional local provisions for the Newcastle City Centre. Clause 7.1 contains a number of express objectives relating to Part 7 which are set out below:

7.1 Objectives of Part

The objectives of this Part are as follows:

- a) to promote the economic revitalisation of Newcastle City Centre,*
- b) to strengthen the regional position of Newcastle City Centre as a multi-functional and innovative centre that encourages employment and economic growth,*
- 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,*

- d) *to promote the employment, residential, recreational and tourism opportunities in Newcastle City Centre,*
- e) *to facilitate the development of building design excellence appropriate to a regional city,*
- 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,*
- 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,*
- 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.*

As outlined above the mapped FSR for the site is 8:1. The intended building bulk for the site and this part of the city is designed to be substantial as this is the highest FSR available in the LGA.

Typically, FSR is used as a tool to control building bulk/density. However, in this instance it can be concluded it is attempting to be used to control land use.

If it was deemed necessary to assign varying FSR standards to control the mix of residential and commercial development across the city then the LEP would have included such a provision, however it only applies to Area A as mapped (see **Figure 4**). For areas within the city but outside of Area A on sites where housing and commercial are both permitted there is no limitation such as Clause 7.10. So, what is the purpose of Clause 7.10 relative to mapped Area A? The logical explanation is that it seeks to encourage commercial floor space within the very centre of the city by providing a higher FSR for commercial only developments.

Further corroboration of this can be obtained by considering the guide in the ADG as to the relationship between height and FSR. It is noted that the ADG, in Section 2D, provides guidance on establishing FSR relative to height (for purely residential buildings). See **Figure 5** below, extracted from the ADG. It can be determined by extrapolation that 90m (available height limit for the site) provides for a building of around 30 stories and that a 30-storey building aligns with a FSR of more than 6:1. However in this instance the effect of Clause 7.10 is to reduce the FSR for the subject site back to 5:1. According to the ADG there is no need to have a FSR of 5:1 for the subject site (for a 100% residential building) based on the need to design-in residential amenity considerations.

It can be concluded in consideration of the ADG that a development with a mix of commercial and residential development would likely be able to achieve a greater FSR for the site than 6:1 for the subject site taking into account the mapped available height for the site. (Note: The 10% FSR bonus for design excellence does not change these conclusions because it applies to both height and FSR).

In summary it can be concluded that the purpose of Clause 7.10 is to provide incentives for commercial only development and not to control building bulk/density. Indeed, it is the purpose of Clause 4.4 to control building bulk and density, which other than for the presence of Clause 7.10 would permit a FSR of 8:1 for the subject site.

If the intention of Clause 7.10 is to encourage commercial floorspace into Area A, the additional floorspace it provides for is at the expense of any residential floorspace. This is because any residential floorspace that is included in the building, even only a single dwelling unit, has the effect of reducing the FSR from 8:1 to 5:1, a substantial reduction (37.5%). This is considered contrary to the objectives of the zone which includes to encourage commercial floorspace within mixed use development and to allow for residential development. A reduction in GFA of 37.5% does not promote mixed use including housing within city.

The proposed development for example could achieve compliance with the FSR by removing the commercial tower building altogether. This would be contrary to the actual established purpose of Clause 7.10 to encourage commercial development. Additionally, to access the full FSR for the site of 8:1 as mapped (Clause 4.4) all residential development would have to be removed, contrary to the zone objectives.

The Clause has the effect of a significant FSR penalty for the inclusion of any residential floorspace, particularly for sites mapped at 8:1. Part 2 of the clause shows that sites with mapped FSRs of between 3:1 and 6:1 the penalty for including residential floorspace is not as severe as it is for sites mapped at 8:1. It is unclear as to why sites mapped with 8:1 are reduced to such an extent and this would appear to be unreasonable and as stated inconsistent with the objectives of the zone. See part 2 of the clause below.

(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,
- (b) where the *Floor Space Ratio Map* identifies a maximum floor space ratio of 5:1—4:1,
- (c) where the *Floor Space Ratio Map* identifies a maximum floor space ratio of 4:1—3:1.

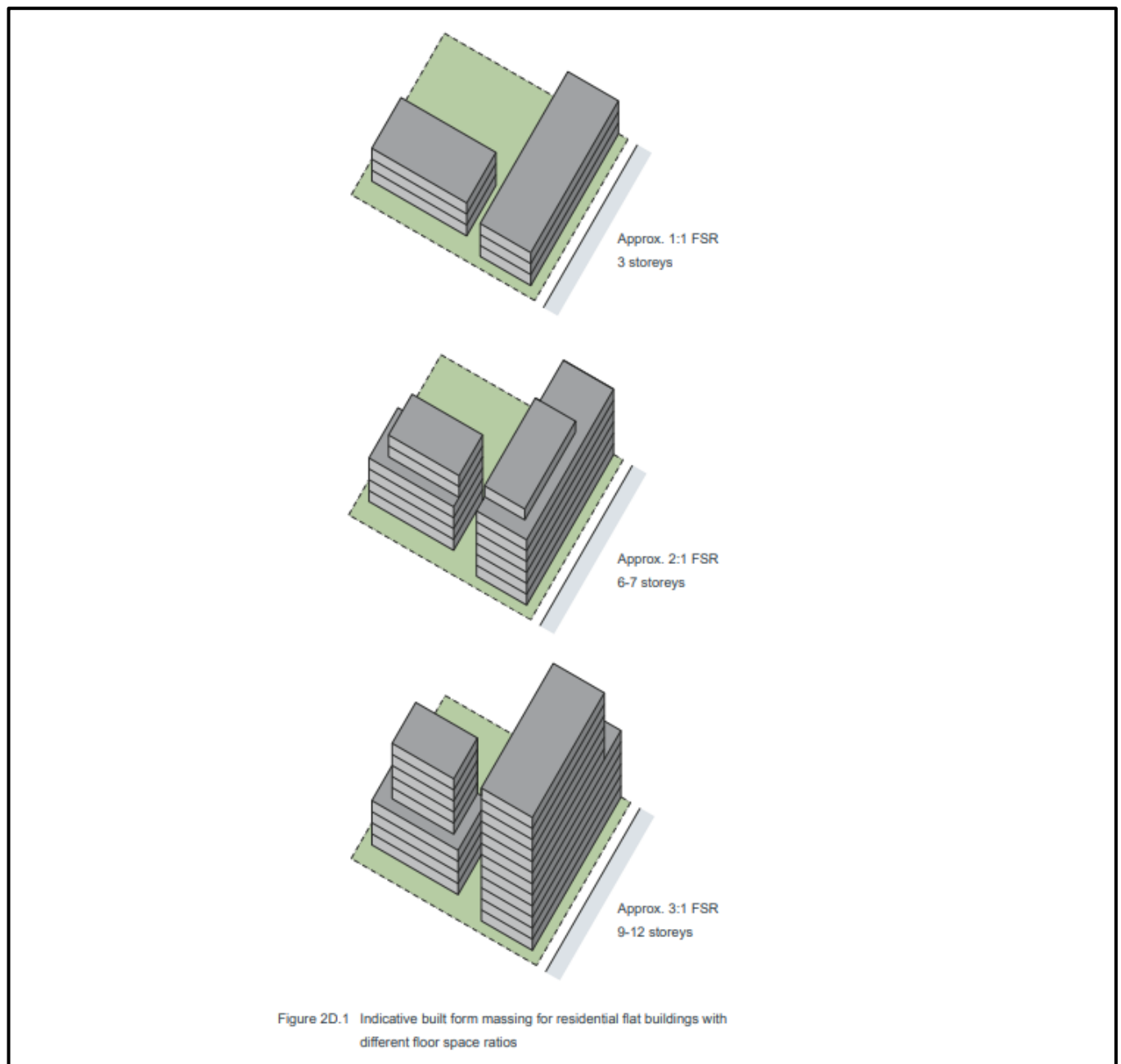


Figure 5: Extract from the ADG – Figure 2D.1.

This Section establishes the planning context that frames the proposed floor space ratio variation request.

5.0 Planning Context

5.1 Strategic Planning

5.1.1 Zoning and Zone Objectives

The site is zoned E2 Commercial Centre under Newcastle LEP 2012, see **Figure 6** below:

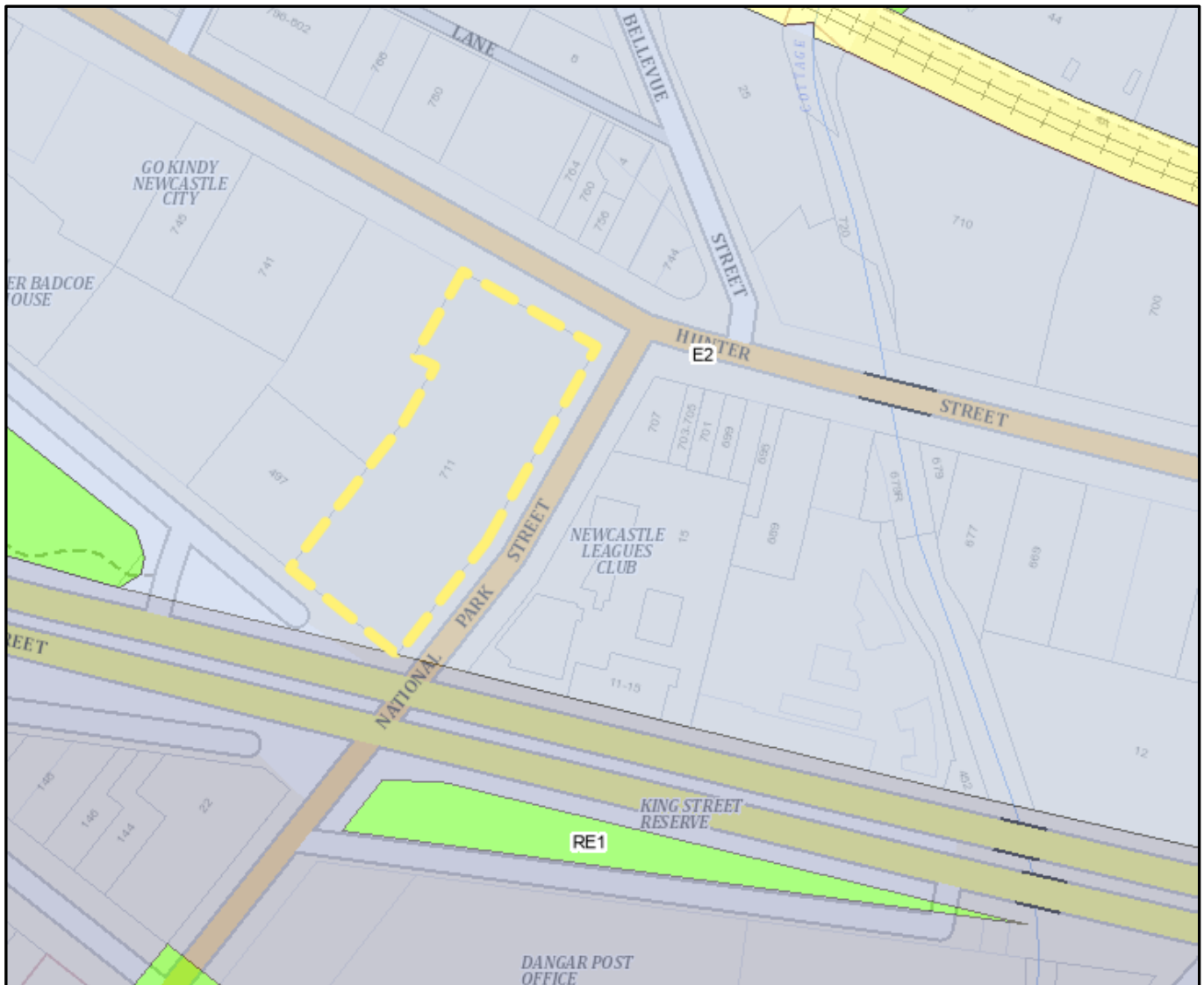


Figure 6: Zone Plan Extract from New South Wales Spatial Viewer.

The objectives of the E2 Zone are:

- To strengthen the role of the commercial centre as the centre of business, retail, community and cultural activity;
- To encourage investment in commercial development that generates employment opportunities and economic growth;
- To encourage development that has a high level of accessibility and amenity, particularly for pedestrians;
- To enable residential development only if it is consistent with the Council's strategic planning for residential development in the area;
- To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces;
- To provide for commercial floor space within mixed use development;

- To strengthen the role of the Newcastle City Centre as the regional business, retail and cultural centre of the Hunter region; and
- To provide for the retention and creation of view corridors.

5.1.2 Hunter Regional Plan 2041

The Hunter Regional Plan 2041 (HRP) is a 20-year land use plan that provides an overarching strategic land use framework to guide land use planning priorities and infrastructure funding decisions in the Hunter region over the next 20 years.

The plan aims to unlock sustainable growth opportunities and investments, as well as housing choice and lifestyle opportunities to retain the Hunter's position as a leading regional economy in Australia.

The plan establishes a strong preference for infill development rather than continued greenfield development at the fringes of the city. It focuses on delivering housing and jobs close to strategic centres near transport corridors and open space. The proposed development is entirely consistent with this intent. The subject site is a large and currently an under utilised land parcel positioned within the Newcastle City Centre. Planning controls for the site identify high density residential and retail uses as desirable for the site. The site is ideal for this type of development as it has excellent access to existing and future transport facilities, essential services, and job opportunities.

The site is located within the Greater Newcastle District. Within the Greater Newcastle District, the HRP seeks to create optimal densities in locations with services and infrastructure by promoting renewal opportunities within centres and infill sites, including the redevelopment of larger infill sites. The proposed development is completely consistent with this requirement.

The Newcastle city centre is identified in the plan as the region's metropolitan capital and economically significant to NSW. The Plan identifies that the Newcastle city centre is undergoing significant transformation through infrastructure investment, new housing and jobs. The Newcastle City Centre is the most significant centre in the region's hierarchy, sitting above strategic centres (such as Kotara and Broadmeadow) which provide high levels of essential services, local centres which provide for the daily and weekly needs of the community and neighbourhood centres which are integrated within residential neighbourhoods. The proposed development, inclusive of the proposed variation will establish a built form which is consistent with the metropolitan capital character identified for the area.

Central to the plan is the 15-minute neighbourhood concept. The plan seeks to influence urban settlement patterns to maximise the use of existing infrastructure, reduce travel demands, particularly by car and improve mobility and access to education, jobs, services, open space and community activities. The proposal will provide additional housing which is well located with respect to surrounding facilities and amenities and the proposed development is consistent with the 15-minute neighbourhoods policy. The development also incorporates a retail component which will contribute to the mixed-use character of the area.

The plan identifies that an additional 101,800 dwellings will be required by 2041 to accommodate the expected population growth of the region and providing housing and infrastructure to meet this demand is central to the plan. The proposed development will provide additional housing on a well-located site and will contribute to accommodating the expected future growth of the area.

The site is located within the Greater Newcastle District. Within the Greater Newcastle District, the HRP seeks to create optimal densities in locations with services and infrastructure by promoting renewal opportunities within centres and infill sites, including the redevelopment of larger infill sites. The proposed development is completely consistent with this requirement.

The proposed development is consistent with the objectives and intent of the Hunter Regional Plan 2041.

5.1.3 Greater Newcastle Metropolitan 2036

The Greater Newcastle Metropolitan Plan 2036 sets out strategies and actions that will drive sustainable growth across Cessnock City, Lake Macquarie City, Maitland City, Newcastle City and Port Stephens communities, which together make up Greater Newcastle.

The vision set out for the greater Newcastle area in the plan is:

Australia's newest and emerging economic and lifestyle city, connected with northern NSW and acknowledged globally as:

- Dynamic and entrepreneurial, with a globally competitive economy and the excitement of the inner city and green suburban communities;
- Offering great lifestyles minutes from beaches or bushland, the airport or universities, and from the port to the lake; and
- A national leader in the new economy, with smarter cities and carbon neutral initiatives, and with collaborative governance that makes it a model to others in creating and adapting to change.

The GNMP seeks to concentrate future growth in strategic centres to support economic and population growth and a mix of land uses. These are the largest centres of activity and employment in the region. Reinforcing and encouraging development in strategic centres will help sustain their functions and create jobs closer to home.

The Newcastle City Centre is identified in the plan as the heart and capital of the region. The plan seeks promote the continued growth and renewal of the city centre. The proposed development, inclusive of the building height variation represents a development which is commensurate with the character identified for the area.

The Plan identifies the site as being located within the West End Precinct, where Newcastle City Council is to align local plans to increase commercial and residential floor space surrounding the Newcastle Interchange. The proposed development achieves this by providing a retail and residential tower development within the 800m walking catchment surrounding the Interchange.

It is considered that the proposed development is compatible with the aims and objectives of the Greater Newcastle Metropolitan Plan 2036.

5.1.4 Newcastle 2040 – Community Strategic Plan

The *Newcastle 2030 – Community Strategic Plan* (CSP) sets out a shared community vision and was developed as a guide to inform policies and actions throughout the City of Newcastle Local Government Area (LGA).

The CSP aims to ensure that neighbourhoods within the Newcastle LGA are safe and thriving, with diverse and equitable housing and social and urban infrastructure that supports local living.

The proposed development is consistent with the CSP. It will provide an attractive mixed-use development in proximity to existing public and active transport networks. Further, the ground floor activation contributes to Newcastle West's emerging vibrant, safe and active public spaces.

It is considered that the proposed development is compatible with the provisions of *Newcastle 2040 – Community Strategic Plan*.

5.1.5 Newcastle Local Strategic Planning Statement

The *Local Strategic Planning Statement* has been adopted by CoN as a means of providing direction to future development patterns throughout the City of Newcastle. The comprehensive land use strategy aims to guide the future growth and development of Newcastle.

The Strategy implements the land use directions from the Community Strategic Plan and underpins the NLEP 2012, providing a land use planning platform to move towards a smarter, more liveable and sustainable Newcastle. The Planning Priorities relevant to the proposed development are outlined below.

Planning Priority 8 – Plan for growth and change in Catalyst Areas, Strategic Centres, Urban Renewal Corridors and Housing Release Areas

Planning Priority 8 seeks to Plan for growth and change in Catalyst Areas, Strategic Centres, Urban Renewal Corridors and Housing Release Areas. The proposed development will deliver a retail and residential development within Newcastle West which will provide opportunities for employment and create an additional local resident population which will increase the viability of commercial operations, public transport facilities and public infrastructure in the area.

Planning Priority 10 – Development responds to the desired local character of our communities

Planning Priority 10 aims to protect communities from new development that is not compatible with the desired local character of the area.

The proposed development is consistent with the scale and nature of development identified in strategic planning policies as desirable for the site.

The proposed development is consistent with the aims and relevant planning priorities of the Newcastle Local Strategic Planning Statement.

5.1.6 Newcastle Housing Strategy 2021

The Newcastle Housing Strategy identifies catalyst areas, such as the Newcastle CDB as the best areas to accommodate additional housing. The proposed development is consistent with the strategy, providing for housing and contributions to housing choice in a key location.

6.0 Justification of Variation

6.1 Objectives of the Development Standard – WEHBE LIMB 1

The underlying purpose of Clause 7.10 was discussed in detail in **Section 4.3** of this report. In summary this purpose is to provide incentives to developments that only contain commercial floorspace or penalties for the inclusion of any residential floorspace, within that part of the city mapped as Area A. For sites mapped with an FSR of 8:1 (unlike sites mapped at lesser FSRs) and development that includes any residential floorspace the clause has the effect of significantly reducing the available FSR by 3:1 back to 5:1.

It is not clear from a planning perspective why sites with mapped FSRs of 6:1 and less only require a reduction of 1:1 for the inclusion of residential GFA whereas sites mapped at 8:1 are reduced by 3 times this amount.

The site is located in that part of the city where the highest density is sought within the whole of the LGA, with the mapped permissible FSR under Clause 4.4 being 8:1. As discussed in **Section 4.3** of this report Clause 7.10 has an unreasonable penalty for the inclusion of any residential floor space for areas mapped with an 8:1 FSR, compared with areas mapped with FSRs of 6:1 or less.

In accordance with Wehbe (Limb 1) compliance with the relevant development standard is unnecessary because compliance with the standard has been met notwithstanding the variation proposed. This is addressed in detail below.

- Clause 7.1 (a) – to promote the economic revitalisation of Newcastle City Centre.

The proposed additional floor space beyond the standard set by Clause 7.10 will make a greater contribution to the economic revitalisation of the Newcastle City Centre while still being less than the maximum mapped FSR for the site.

Accordingly, the proposed development is consistent with this objective.

- Clause 7.1 (b) to strengthen the regional position of Newcastle City Centre as a multi-functional and innovative centre that encourages employment and economic growth.

The proposed additional floorspace beyond the standard set by Clause 7.10 will make a greater contribution to strengthening the regional position of Newcastle City Centre by encouraging additional employment opportunity and growth.

Accordingly, the proposed variation is consistent with this objective.

- Clause 7.1(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.

The proposed additional floorspace beyond the standard set by Clause 7.10 does not detract from protecting and enhancing the positive characteristics, vitality, identity, diversity and sustainability of the Newcastle City Centre and the quality of its local population. This is because the proposed development remains less than the maximum anticipated density for the site of 8:1 as provided for under Clause 4.4.

The additional floorspace will improve the sustainability of the Newcastle City Centre by providing for appropriate density in proximity to infrastructure, services and amenities consistent with ESD principles.

Accordingly, the proposed variation is consistent with this objective.

- Clause 7.1(d) to promote the employment, residential, recreational and tourism opportunities in Newcastle City Centre.

The proposed additional floorspace beyond the standard set by Clause 7.10 will promote employment and residential opportunities in Newcastle City Centre.

Accordingly, the proposed variation is consistent with this objective.

- Clause 7.1(e) to facilitate the development of building design excellence appropriate to a regional city.

The proposed additional floorspace beyond the standard set by Clause 7.10 will contribute to design excellence within the city, this is because the proposed FSR is closer to the desired building density for the site of 8:1 as provided for under Clause 4.4. At the same time the proposed development maintains an appropriate response to the design elements contained within the Residential Apartment Design Guide (ADG) as addressed in the Architects submitted ADG report.

The proposed additional FSR has been considered by Councils Urban Design Review Panel and the panel has determined that the proposal achieves design excellence. The additional FSR has contributed to achieving a high-quality design outcome.

Accordingly, the proposed variation is consistent with this objective.

- Clause 7.1(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.

The proposed additional floorspace beyond the standard set by Clause 7.10 will contribute to a more sustainable city by locating an appropriate density of development in proximity to existing public transport and connectivity, access to infrastructure and goods and services.

Accordingly, the proposed variation is consistent with this objective.

- Clause 7.1(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.

The proposed additional floorspace beyond the standard set by Clause 7.10 does not prevent this objective from being achieved.

Accordingly, the proposed variation is consistent with this objective.

- Clause 7.1(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.

The proposed additional floorspace beyond the standard set by Clause 7.10 contributes to a mixed-use place and the relevant benefits as stated by the objective. The proposed GFA includes both commercial and residential floorspace. The additional FSR is not supporting a singular use only.

Accordingly, the proposed variation is consistent with this objective.

6.2 Underlying Objective would be defeated or thwarted – WEHBE LIMB3

The underlying purpose of Clause 7.10 was discussed in detail in **Section 4.3** of this report. In summary this purpose is to provide incentives to development that only contain commercial floorspace or penalties for the inclusion of any residential floorspace, within that part of the city mapped as Area A. For sites mapped with an FSR of 8:1 (unlike sites mapped at lesser FSRs) and development that includes any residential floorspace the clause has the effect of significantly reducing the available FSR by 3:1 back to 5:1 (a 37.5% reduction).

It is not clear and unreasoned that sites with mapped FSRs of 6:1 and less only require a reduction of 1:1 for the inclusion of residential GFA whereas sites mapped at 8:1 are reduced by 3 times this amount.

In accordance with WEHBE Limb 3 it is considered that the underlying objective or purpose would be defeated or thwarted in this instance if compliance was required by reducing the floorspace for the following reasons:

- The reduction of floor space, back to 5:1 (or 5.5:1 after the bonus for design excellence), whether it be a reduction in commercial GFA or residential GFA would have the unreasonable counter effect to promoting the economic revitalisation of the Newcastle City Centre as provided for under the objectives (Clause 7.1(a)). If the residential GFA is reduced the impact of less population living in the city will be reduced economic activity. If the Commercial GFA is reduced the impact will be less opportunity for employment.

Reductions in GFA and the resulting reduction in the contribution to the economic activity of the Newcastle City Centre is also inconsistent with the objectives of the E2 Commercial Zone, in particular:

“to strengthen the role of the commercial centre as the centre of business, retail community and cultural activity”

“to encourage investment in commercial development that generates employment opportunities and economic growth”

“to provide for commercial floor space with mixed use development”

“to strengthen the role of the Newcastle City Centre as the regional business, retail and cultural centre of the Hunter Region”

(The site is located in that part of the city where the highest density is sought within the whole of the LGA, with the mapped permissible FSR under Clause 4.4 being 8:1. As discussed in Section 4.3 of this report Clause 7.10 has an unreasonable penalty for the inclusion of any residential floor space for areas mapped with an 8:1 FSR, compared with areas mapped with FSRs of 6:1 or less.

- The reduction of floor space, back to 5:1 (or 5.5:1 after the bonus for design excellence), whether it be a reduction in commercial GFA or residential GFA would have the unreasonable counter effect to strengthening the regional position of Newcastle City Centre as a multi-functional and innovative centre that encourages employment and economic growth as provided for under the objectives (Clause 7.1(b)). If the residential GFA is reduced the impact of less population living in the city will be reduced economic activity. If the Commercial GFA or Residential GFA is reduced or removed to achieve compliance the impact would result in reduced multifunctional activity, reduced opportunity for innovation and would not encourage employment or economic growth.

Reduction in multi-functional activity and employment and economic growth is also inconsistent with the objectives of the E2 Commercial Zone, in particular:

“to strengthen the role of the commercial centre as the centre of business, retail community and cultural activity”

“to encourage investment in commercial development that generates employment opportunities and economic growth”

“to provide for commercial floor space with mixed use development”

“to strengthen the role of the Newcastle City Centre as the regional business, retail and cultural centre of the Hunter Region”

(The site is located in that part of the city where the highest density is sought within the whole of the LGA, with the mapped permissible FSR under Clause 4.4 being 8:1. As discussed in Section 4.3 of this report Clause 7.10 has an unreasonable penalty for the inclusion of any residential floor space for areas mapped with an 8:1 FSR, compared with areas mapped with FSRs of 6:1 or less.

- The reduction of floor space, back to 5:1 (or 5.5:1 after the bonus for design excellence), whether it be a reduction in commercial GFA or residential GFA would have the unreasonable counter effect to promoting the employment and residential opportunities in Newcastle City Centre as provided for under the objectives (Clause 7.1(d)).

Reduction in employment and residential opportunities is also inconsistent with the objectives of the E2 Commercial Zone, in particular:

“to strengthen the role of the commercial centre as the centre of business, retail community and cultural activity”

“to encourage investment in commercial development that generates employment opportunities and economic growth”

“to provide for commercial floor space with mixed use development”

“to strengthen the role of the Newcastle City Centre as the regional business, retail and cultural centre of the Hunter Region”

(The site is located in that part of the city where the highest density is sought within the whole of the LGA, with the mapped permissible FSR under Clause 4.4 being 8:1. As discussed in Section 4.3 of this report Clause 7.10 has an unreasonable penalty for the inclusion of any residential floor space for areas mapped with an 8:1 FSR, compared with areas mapped with FSRs of 6:1 or less.

- The reduction of floor space, back to 5:1 (or 5.5:1 after the bonus for design excellence), whether it be a reduction (or removal altogether) in commercial GFA or residential GFA would have the unreasonable counter effect to creating 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 as provided for under the objectives (Clause 7.1(h)).

The introduction of any amount of residential floorspace to help create the mixed-use place is in effect discouraged by Clause 7.10, unreasonably so for those sites mapped with FSR of 8:1 and in this regard the Clause works against the objectives.

The E2 Commercial zone objectives also seek to encourage that commercial floorspace to be within mixed use development:

“to provide for commercial floor space with mixed use development”

(The site is located in that part of the city where the highest density is sought within the whole of the LGA, with the mapped permissible FSR under Clause 4.4 being 8:1. As discussed in Section 4.3 of this report Clause 7.10 has an unreasonable penalty for the inclusion of any residential floor space for areas mapped with an 8:1 FSR, compared with areas mapped with FSRs of 6:1 or less.

6.3 Justification on Environmental Planning Grounds

As outlined in **Section 3.0**, there needs to be sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6(3)(b)).

The Guide to Varying Development Standards advises that the term 'environmental planning grounds', while not defined in the EP&A Act or the Standard Instrument, refers to grounds that relate to the subject matter, scope and purpose of the EP&A Act, including the objects of the Act. It advises that the scope of environmental planning grounds is wide as exemplified by the court decisions in this area.

The proposed variation for additional FSR is justified on environmental planning grounds for the following reasons:

- The provision of additional floor space will contribute to achieving a density of development that is aligned to strategic objectives for the CBD which is identified in the city centre hierarchy as the desired location for significant density.

The site has a mapped FSR under Clause 4.4 of 8:1, this is the highest available FSR in the LGA. As discussed in **Section 4.3** of this report it is considered that the reduction in GFA required by Clause 7.10 for the inclusion of any residential floorspace from 8:1 to 5:1 is excessive by comparison to those areas mapped with FSRs of 6:1 and less (3 times more is the reduction). Such a significant reduction is considered to be counteractive to established centers hierarchy and to achieving significant density. In **Section 4.3** of this report a consistent and proportional method for calculating reduced FSR where residential floor space is included has been calculated for the area mapped with FSR of 8:1.

The proposed additional FSR allows the development to better respond to the anticipated density of development for the site mapped at 8:1 in accordance with Clause 4.4 and still remains consistent with the objective of Clause 7.10 to reduce FSR for development other than commercial development.

Achieving closer to the desired density of the site mapped at 8:1 is consistent with Object (g) of the *Act to promote good design and amenity of the built environment*. Good design includes a consistency with the desired density of development for the locality and resulting consistency with streetscape and overall cityscape. The Councils Urban Design Review Panel has assessed the proposed additional GFA and has advised that the development achieves design excellence.

- The proposed additional floor area promotes Object (b) of the Act *–to facilitate ecologically sustainable development by integrating relevant economic, environmental, and social considerations in decision-making about environmental planning and assessment* in the following manner:

A reduction in floorspace whether it be commercial, residential or both to achieve compliance with Clause 7.10 would have the effect of not promoting the principals of ecologically sustainable development. This is because it would unreasonably reduce the density of development able to take advantage of the existing resources expended on infrastructure in the city, including transport, utilities and recreation. In addition, there would be less density to support increasing the economic viability of goods and services within the CBD. A site mapped with a FSR of 8:1, the highest in the LGA is a clear signal that it has an important role to play in making these contributions.

As discussed in Section 4.3 of this report the reduction in GFA by 37.5% for the subject site, for inclusion of any residential floorspace, is considered unreasonable when considering the objectives of Part 7.1 and the zone objectives, including objectives to provide commercial floorspace as part of a mixed-use development. A more equitable and proportionate FSR has been calculated based on how Clause 7.10 addresses areas mapped 6:1 or less. The provided a FSR of 7:1 for the subject site if residential development was included. The proposed development has a FSR of 6.678:1 which is less than this.

6.3.1 Summary of Environmental Planning Justification

Compliance with Clause 7.10 is considered unnecessary when compared against the objectives of Clause 7.1 and unreasonable considering that compliance would thwart achieving mixed use development and would unreasonably restrict density in a location that has a stated desire for it.

The proposed variation will promote the objects of the Act.

The additional FSR proposed does not compromise achieving design excellence, Councils Urban Design Review panel has considered the proposal at a number of meetings and has determined that it exhibits design excellence, including consideration of the requirements of the ADG.

The additional FSR will contribute to development that will be more consistent with the mapped FSR for the site of 8:1 (under Clause 4.4) (and thereby be more consistent with the desired streetscape and future character of the area) yet respect the objective of reducing FSR to a reasonable level where noncommercial space is included in accordance with Clause 7.10. To this end a consistent and proportional reduction has been calculated using the same approach adopted in Clause 7.10 for areas with mapped FSR of 6:1 or less. This calculation derives an appropriate FSR of 7:1, the proposed development has a FSR of 6.678:1.

7.0 Conclusion

The Applicant considers that the consent authority can be satisfied that this request adequately addresses the matters required to be demonstrated by Clause 4.6(3), being:

- a) Compliance with the development standard is unnecessary and unreasonable in the circumstances; and
- b) There are sufficient environmental planning grounds to justify contravening the development standard.

Appendix A



Appendix A

Architectural Plans (Stewart Architecture)

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