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**URBIS**

# **AMENDED CLAUSE 4.6 REQUEST**

Wentworthville Mall

Prepared for

**POLY DEVELOPMENTS AND HOLDINGS**

30 November 2020

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# 1. INTRODUCTION

## 1.1. PRELIMINARY

This amended clause 4.6 variation request (**the variation request**) has been prepared on behalf of Poly Developments and Holdings (**the applicant**) to accompany a development application (**DA**) lodged to Cumberland Council (**Council**) (Ref: DA2020/0415) which seeks consent for a mixed use development (**the proposal**) at 42-44 Dunmore Street and 13 Pritchard Street East, Wentworthville (**the site**).

This request seeks a variation to the height of building development standard that applies to the building referred to as Building T3 located at the rear of the site fronting Pritchard Street East. This part of the site is subject to a 30 metre maximum building height control (**the subject land**) under clause 4.3 of the Holroyd Local Environmental Plan 2013 (**LEP**). This variation request is made under clause 4.6 of the LEP.

Building T3 has a maximum building height of 33.43 metres on the subject land, measured from the existing ground level (at RL 29.72) to the top of the lift overrun (at RL 63.15). The development results in a minor exceedance of 0.43 metres to the maximum height of building development standard of 30 metre (plus an additional 10% bonus (3 metres) achieved for design excellence under clause 6.11 of the LEP).

This variation request is to be read in conjunction with the response to Council's Request for Further Information (**RFI**) prepared by Urbis (dated 22 October 2020) and the amended architectural plans at **Appendix C** of the response to Council's RFI.

## 1.2. HEIGHT OF BUILDING CONTROL

Clause 4.3 (2) of the LEP states that:

*The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

The height of building control for the subject land to which this variation request relates is 30 metres.

Clause 4.3(2) is to be read in conjunction with the objectives of the height of building control at clause 4.3(1) as follows:

- (a) to minimise the visual impact of development and ensure sufficient solar access and privacy for neighbouring properties,*
- (b) to ensure development is consistent with the landform,*
- (c) to provide appropriate scales and intensities of development through height controls.*

Notwithstanding the height of building control under clause 4.3, the proposal utilises the provisions of clause 6.11 of the LEP which applies to the site and provides that the height of a building may exceed the maximum height shown on the Height of Buildings Map by up to 10% if the development exhibits design excellence.

Accordingly, the maximum building height development standard on the subject land is 33 metres.

## 2. SITE AND CONTEXT

### 2.1. SITE DESCRIPTION

The site to which the DA relates is 42-44 Dunmore Street and 13 Pritchard Street East.

The site is located within the Wentworthville town centre in the Cumberland local government area (**LGA**) (former City of Holroyd LGA). Wentworthville is located approximately 3.5 kilometres west of Parramatta Central Business District (CBD) and approximately 26 kilometres west of Sydney CBD.

The key features of the site are summarised in **Table 1** as follows.

Table 1 Site Description

Site Feature	Description
<b>Legal Description</b>	The site comprises two allotments: <ul style="list-style-type: none"><li>▪ Lot 11 DP746514 (42-44 Dunmore Street) (land to which this variation request relates); and</li><li>▪ Lot A DP319230 (13 Pritchard Street East).</li></ul>
<b>Site Area and Boundaries</b>	The site has a consolidated area of 9,605.7 sqm and the following boundaries: <ul style="list-style-type: none"><li>▪ 90 metres (primary frontage) to Dunmore Street (to the north);</li><li>▪ 101 metres (side boundary) to the rear of commercial properties fronting Station Street and Dunmore Street (to the east);</li><li>▪ 100 metres (rear frontage to Pritchard Street East (to the south); and</li><li>▪ 101 metres (staggered side boundary) to the rear and side boundaries of residential and commercial uses fronting Garfield Street and Dunmore Street (to the west).</li></ul>
<b>Existing Improvements</b>	<p>The Wentworthville Mall, a neighbourhood centre in the heart of Wentworthville town centre, is located on 42-44 Dunmore Street. The Mall contains a variety of local services, including an IGA supermarket, bank (with ATM), dentist, pharmacy, and café. Customer parking is provided by a multi-storey car parking deck.</p> <p>The subject lot contains a vacant single-storey weatherboard building with rear garden.</p>

### 2.2. LOCALITY CONTEXT

The surrounding urban context is comprised of low-medium density commercial and residential land uses, generally associated with the Wentworthville town centre.

To the north, the site has a principal frontage to Dunmore Street which acts as one of the primary pedestrian and commuter routes through the Wentworthville town centre. Dunmore Street provides a range of retail, health, and commercial premises, medical services, community facilities, and food and beverage offerings.

To the east, the site adjoins commercial properties fronting Dunmore Street and Station Street. These are generally occupied by a range of retail and commercial uses, including general retail, health, medical services, a bank, a gymnasium, and food and beverage outlets.

To the south, the site has a rear boundary to Pritchard Street East. The opposite side of the street contains single-storey freestanding buildings occupied by various commercial and business uses, including a medical practice, a physiotherapy and rehabilitation centre, and an engineering and surveying business.

To the west, the site adjoins the side boundary of a mixed use development fronting Dunmore Street (comprising a post office at ground floor level and residential accommodation at upper levels) and the Wentworthville fire station.

The site is geographically well-positioned to many transport options. It is less than 300m from Wentworthville train station, which provides connectivity to Parramatta, inner-Sydney, and surrounding suburbs.

### 3. PROPOSED DEVELOPMENT

This amended clause 4.6 variation request has been prepared to accompany a DA which seeks development consent for mixed use development at 42-44 Dunmore Street and 13 Pritchard Street East.

The amended proposal comprises the following:

- Four storey basement car park;
- Two storey podium comprising a mainline supermarket (c. 4,000 sqm GFA), ground and first level retail and commercial tenancies, loading dock access, basement access, and ancillary areas;
- Four residential buildings (T1, T2, T3, and T4), with a total rise (including podium) of 21 storeys;
- New public plaza connecting Dunmore Street and Prichard Street East; and
- Associated communal open space, public domain improvements, and ancillary infrastructure works.

A detailed description of the development is provided in the SEE prepared by Urbis Pty Ltd. The proposal is detailed within the architectural, civil engineering, and landscaping drawings that accompany the SEE.

A summary of the key features of the amended proposal is provided in **Table 2** below.

Table 2 Key Aspects of the Development

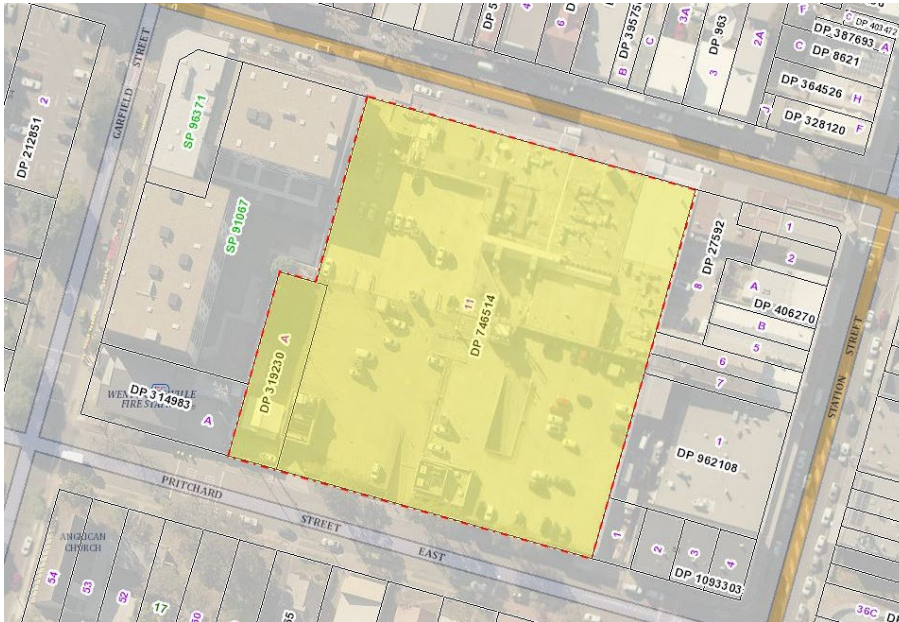
Component	Proposed Development
Land Uses	The proposal comprises 'commercial premises', 'retail premises', and 'residential flat buildings'.
Maximum Height	T1 building height: 70.65 metres (existing ground level RL 27.3m to maximum RL 97.95m) T2 building height: 72.7 metres (existing ground level RL 28.3m to maximum RL 101.00m) T3 building height: 33.43 metres (existing ground level RL 29.72m to maximum RL 63.15m) T4 building height: 32.35 metres (existing ground level RL 30.8m to maximum RL 63.15m)
Gross Floor Area	The proposed gross floor area (GFA) is: <ul style="list-style-type: none"> <li>▪ Ground level retail: 653.6 sqm</li> <li>▪ Supermarket: 4,111 sqm</li> <li>▪ Level 01 retail/commercial: 4,401.8 sqm</li> <li>▪ Residential: 45,799.4 sqm</li> <li>▪ Ground floor commercial (lift lobby / garbage): 184.2 sqm</li> <li>▪ <b>Total: 55,150 sqm</b></li> </ul>
Floor Space Ratio	Measured against the site area of 9,605.7 sqm, the resultant floor space ratio (FSR) is 5.74:1.
Dwelling Mix	<ul style="list-style-type: none"> <li>▪ 93 x one-bedroom</li> <li>▪ 4 x one-bedroom + studio</li> <li>▪ 354 x two-bedroom</li> <li>▪ 72 x three-bedroom</li> <li>▪ <b>Total: 523 apartments</b></li> </ul>
Communal Space	The proposal includes communal space as follows: <ul style="list-style-type: none"> <li>▪ Central plaza / through-site link public domain; and</li> <li>▪ Rooftop communal garden.</li> </ul>
Car Parking	The proposal provides a four-level basement car park.

## 4. PROPOSED VARIATION TO DEVELOPMENT STANDARD

### 4.1. HEIGHT OF BUILDING DEVELOPMENT STANDARD

The DA site comprises two allotments, legally described as Lot 11 in DP746514 (42-44 Dunmore Street) and Lot A in DP319230 (13 Pritchard Street East). The site is illustrated in **Figure 1** below.

Figure 1 Site Description

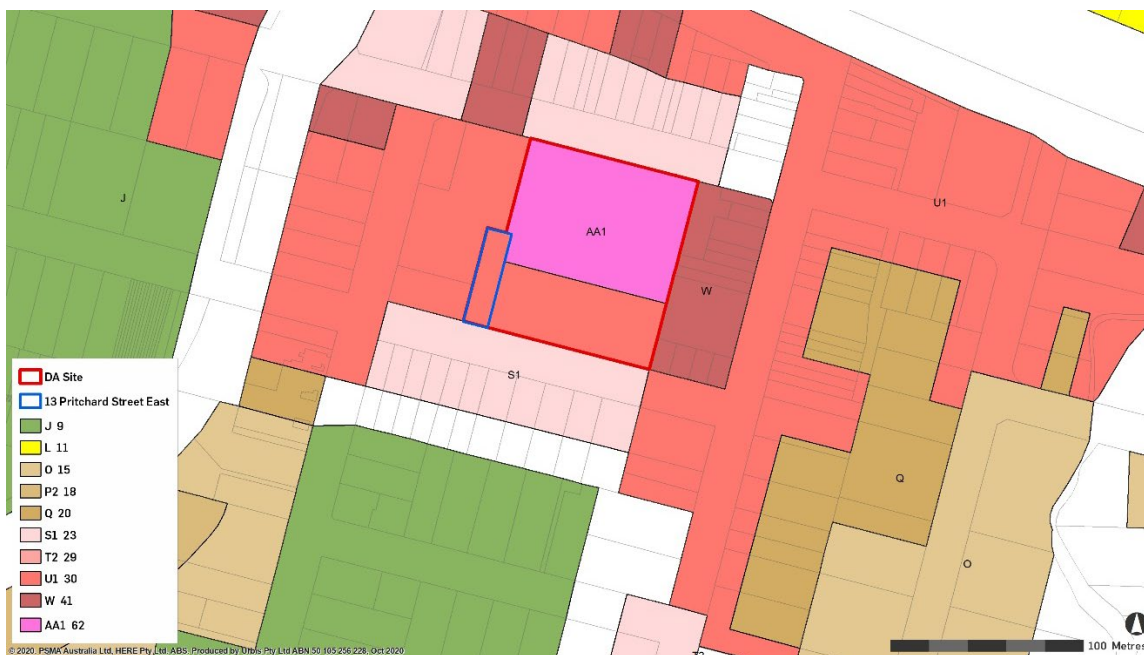


Source: Urbis

The site is subject to varying maximum building height controls, as shown on **Figure 3**, as follows:

- 62 metres (applies to part Lot 11 DP746514 fronting Dunmore Street);
- 30 metres (applies to part Lot 11 DP746514 fronting Pritchard Street and Lot A DP319230).

Figure 2 Holroyd LEP 2013 Building Height Controls



Source: Holroyd Local Environmental Plan 2013 [gazetted 14 August 2020]

## 4.2. DESIGN EXCELLENCE CONTROL

Notwithstanding the provisions of clause 4.3, clause 6.11 of the LEP provides as follows:

- (1) *The objective of this clause is to ensure that development to which this clause applies exhibits the highest standard of architectural and urban design as part of the built environment.*
- (2) *This clause applies to development involving the construction of a new building, or external alterations to an existing building that will result in—*
  - (a) *a building that is greater than 30 metres in height on land shown bounded by a blue line and identified as “Area 1” on the Design Excellence Map, or*
- (3) *Development consent must not be granted to development to which this clause applies unless the consent authority considers that the development exhibits design excellence.*
- (4) *In considering whether the development exhibits design excellence, the consent authority must have regard to the following matters—*
  - (a) *whether the development has been endorsed by the Cumberland Design Excellence Panel as exhibiting design excellence,*
  - (b) *whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved,*
  - (c) *whether the form and external appearance of the development will improve the quality and amenity of the public domain,*
  - (d) *whether the development detrimentally impacts on view corridors*
  - (e) *how the development addresses the following matters—*
    - (i) *the suitability of the land for development,*
    - (ii) *existing and proposed uses and use mix,*
    - (iii) *heritage issues and streetscape constraints,*
    - (iv) *the location of any tower proposed, having regard to the need to achieve an acceptable relationship with other towers (existing or proposed) on the same site or on neighbouring sites in terms of separation, setbacks, amenity and urban form,*
    - (v) *bulk, massing and modulation of buildings,*
    - (vi) *street frontage heights,*
    - (vii) *environmental impacts such as sustainable design, overshadowing, wind and reflectivity,*
    - (viii) *the achievement of the principles of ecologically sustainable development,*
    - (ix) *pedestrian, cycle, vehicular and service access and circulation requirements,*
    - (x) *the impact on, and any proposed improvements to, the public domain.*
- (5) *Despite clause 4.3, the height of a building to which this clause applies may exceed the maximum height shown for the land on the Height of Buildings Map by an amount, to be determined by the consent authority, of up to 10% of the amount shown on that map.*

In relation to clause 6.11(1), the development exhibits the highest standard of architectural and urban design as detailed in the accompanying Statement of Environmental Effects prepared by Urbis.

In relation to clause 6.11(2), the site (being Lot 11 DP746514) is identified as “Area 1” on the Design Excellence Map and involves the construction of a building that exceeds 30 metres in height.

In relation to clause 6.11(3) and (4), the development has been endorsed by the Cumberland Design Excellence Panel as exhibiting design excellence (refer to Statement of Environmental Effects).

In relation to clause 6.11(5), the proposal utilises the design excellence provisions and exceeds the building height shown on the Height of Buildings Map (30 metres) by an additional 10% (3 metres).

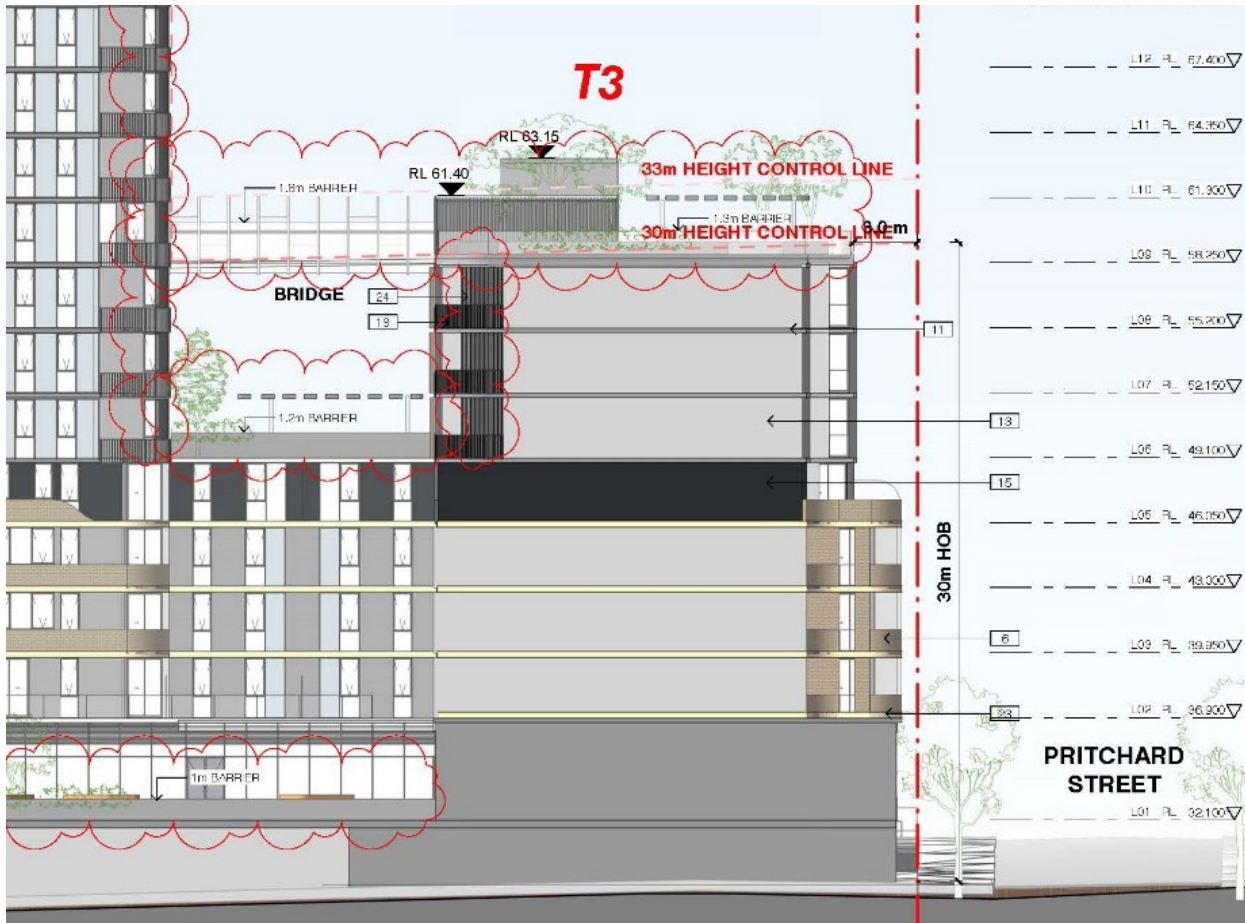


### 4.3. PROPOSED VARIATION TO DEVELOPMENT STANDARD

As detailed on the architectural drawings prepared by PTW that accompanied the response to Council's RFI (dated 22 October 2020), Building T3 presents a maximum building height of 33.43 metres on the subject land, as measured from the existing ground level (at RL 29.72m) to the top of lift overrun (at RL 63.15m).

The minor exceedance with the 33 metre building height control is shown on the extract below (**Figure 3**).

Figure 3 Building Height



Source: Architectural Drawings, PTW (dated 27/11/2020)

The proposal results in a minor exceedance of the maximum building height of 33 metres by 0.43 metres.

The minor non-compliance occurs as a consequence of the undulating topography of the subject land and the location of the lift overrun on the podium roof.

## 5. RELEVANT ASSESSMENT FRAMEWORK

This section outlines the provisions of the environmental planning instrument which applies to the height of building development standard and allows for its variation.

### 5.1. CLAUSE 4.6 OF HOLROYD LEP 2013

Clause 4.6 of the LEP includes provisions that allow for exceptions to development standards in certain circumstances. The objectives prescribed in clause 4.6(1) of the LEP are:

- (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.*

Clause 4.6(2) 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:

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

In accordance with clause 4.6(3), the applicant requests that the height of building development standard be varied.

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:

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*
- (c) any other matters required to be taken into consideration by the 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 DPIE 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 concurrence of the Secretary can be assumed for the purpose of this request as the DA is declared regionally significant development and will be determined by the Sydney Central City Planning Panel.

This variation request demonstrates that compliance with the maximum height of building development standard prescribed for the subject land in clause 4.3 of the LEP 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.

## 6. ASSESSMENT OF CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standard relating to the maximum height of buildings in accordance with clause 4.6 of the LEP.

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

- *Varying development standards: A Guide*, prepared by DPIE (dated August 2011); and
- Relevant planning principles and judgements issued by the Land and Environment Court (**LEC**).

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

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

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

This assessment concludes that the variation request is well founded and that the particular circumstances of the case warrant flexibility in the application of the maximum height of building development standard.

### 6.1. IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED?

The height of building development standards prescribed by clause 4.3 and clause 6.11 are development standard capable of being varied under clause 4.6(2). The proposed variation is not excluded from 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 the LEP.

### 6.2. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

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 development standard are achieved notwithstanding non-compliance***

The objectives of the height of building development standard in clause 4.3 are detailed in **Table 3** below. An assessment of the consistency of the proposed development with each of the objectives is also provided.

Table 3 Assessment of consistency with clause 4.3 objectives

<b>Clause 4.3 Objectives</b>	<b>Assessment</b>
<i>(a) to minimise the visual impact of development and ensure sufficient solar access and privacy for neighbouring properties,</i>	<p>The proposal minimises visual impacts and achieves adequate solar access and privacy to adjoining land by adherence to the required building setbacks and separation distance of the Apartment Design Guide (<b>ADG</b>). As such, the development satisfactorily achieves the objectives of clause 4.3(a).</p> <p>Specifically, the proposal complies with the following objectives of the ADG and design criteria:</p> <ul style="list-style-type: none"> <li>▪ <b>Objective 3B-2</b> – in that overshadowing to neighbouring properties is minimised. The proposal maintains a minimum two hours solar access to neighbouring properties in mid-winter notwithstanding the minor non-compliance to the height of building standard. Extensive design refinement with the Cumberland Design Excellence (<b>CDE</b>) Panel has addressed perceived bulky dimensions of the towers and improve the visual presentation of the development.</li> </ul> <p>Refinement to the design has minimised overshadowing impacts by removing the bridge indicated in the DCP between T3 and T4 and redistributing massing between T1 and T3, and T2 and T4. This has achieved a sensitive urban outcome which has lessened visual impacts and improved solar access and privacy for neighbouring properties to the south and west.</p> <ul style="list-style-type: none"> <li>▪ <b>Objective 3F-1</b> – in that adequate building separation distances are shared to neighbouring land to provide reasonable levels of external and internal visual privacy. Design refinement has resulted in the reconfiguration and remodulation of the residential component to achieve adequate solar access and to maintain to distant views.</li> </ul> <p>The siting of the relevant lift overrun is at the rear of T3 (away from Pritchard Street), located away from neighbouring residential properties while maintaining its functional role within the building.</p> <p>The siting of development satisfies or exceeds the design criteria of the ADG (to the extent reasonable). The building articulation, built form massing, and façade treatment of the podium levels and upper level residential apartments of T3 minimise visual impact to neighbouring land and the public domain, and deliver an appropriate urban scale from the streetscape perspective of Pritchard Street East. The setting back of T3 towards Pritchard Street East reduces solar access impacts to the west.</p> <p>To achieve the objective to ‘minimise’ visual or solar access impacts, there is no burden on the applicant to <u>improve</u> solar access to neighbouring land or avoid additional overshadowing.</p>

Clause 4.3 Objectives	Assessment
	The proposal satisfies the development standard objectives by balancing minimising impacts to adjoining land with consistency of other statutory planning considerations including FSR, building separation, design excellence, communal open space etc.
<i>(b) to ensure development is consistent with the landform,</i>	<p>The proposal is consistent with the landform of the locality in that:</p> <ul style="list-style-type: none"> <li>▪ Notwithstanding the minor non-compliance with the building height control, it is consistent with applicable built form controls and design criteria relevant to landform, including FSR, building separation, floorplates, and building setbacks.</li> <li>▪ The built form of development on the subject land (T3) achieves landform symmetry and consistency with T4 from the perspective of Pritchard Street East. The proposal presents a two level podium and upper level residential apartments.</li> <li>▪ The proposal is consistent with the emerging landform and built form character of the locality as envisaged in the recently gazetted Wentworthville town centre planning proposal.</li> </ul>
<i>(c) to provide appropriate scales and intensities of development through height controls.</i>	<p>The site planning and urban design of the development has been subject to extensive and detailed design refinement with the CDE Panel. Design refinement has specifically focused on reducing perceived building bulk by introducing 'breaks' to long building footprints and creating tower forms (including T3) that appear more elegant and slender and with greater vertical emphasis.</p> <p>This design refinement process has been instrumental in ensuring that the proposal successfully responds to the existing and desired future character of the locality and achieves a high quality urban form and an appropriate scale and intensity.</p> <p>The architectural expression and verticality of the podium of T3 to Pritchard Street East minimises the perception of height and presents a rich building materiality at an appropriate human scale. This contributes to achieving an appropriate scale and intensity of development from the public domain perspective.</p> <p>The siting of the development on the subject land responds in proportion and built form to the wider locality and contributes to an appropriate transition in scale and intensity from the north (towards Dunmore Street) to south (to Prichard Street East).</p> <p>Notwithstanding the minor non-compliance with the building height control, development on the subject land is consistent with the scale and intensity of the future character of the town centre.</p>

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

**Table 4** below assesses the consistency of the proposed development against the objective of clause 6.11.

Table 4 Assessment of consistency with clause 6.11 objectives

Clause 6.11 Objectives	Assessment
<i>(1) The objective of this clause is to ensure that development to which this clause applies exhibits the highest standard of architectural and urban design as part of the built environment.</i>	The DA has been subject to detailed refinement and amended in response to two presentations to the Cumberland Design Excellence Panel. The DA has received design excellence endorsement from the Panel.

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

The objectives of the height of building development standard would be thwarted by a compliant scheme (within a built form of 30 metres height) for the following reasons:

- A reduction in the building height to achieve strict compliance with the building height control would compromise the efficiency and amenity of the development given that it would require reduced floor-to-ceiling heights or even the removal of an entire storey of built form to accommodate the lift overrun. The removal of an entire storey would compromise the achievement of design excellence for the site.
- A scheme that achieved strict compliance with the 33 metre building height control would require some redistribution of GFA across the subject lot and result in a built form that extends horizontally across a greater portion of the lot as compared to the proposed building which extends vertically and presents as a slender, more elegant form.
- A compliant scheme that utilises the maximum allowable GFA would result in a building with an increased footprint, long elevations without building breaks, and increased massing and physical bulk orientated towards the adjoining properties to the west. This would create a dominant building form from the perspective of adjoining land, thus increasing visual impact and minimising privacy. A better design outcome in terms of visual and solar access amenity is achieved by redistributing GFA into a slender, well-proportioned tower form and extending the building vertically (as compared to horizontally).
- A compliant scheme extending horizontally across the subject lot would reduce the area of landscaped open space terrace associated with the retail and commercial tenancies at Level 01. This would have the effect of reducing the amenity for visitors and customers of the retail and commercial tenancies.
- Strict compliance with the building height control would result in an irregular and asymmetrical built form which would not be able to achieve a high quality architectural form or building design.
- Through the extensive design excellence review process, the proposal has been assessed against the criteria of clause 6.11 and is considered to exhibit a high standard of architectural and urban design as part of the built environment. It is reasonable to assume that in making its decision, the CDE Panel's endorsement has applied the design excellence criteria in clause 6.11 to the subject land. This demonstrates that a superior planning outcome will be achieved by the proposal compared to one that otherwise would be constrained by strict compliance with the 33 metre building height standard.

Taking into account the above and the particular circumstances of the proposal and the subject lot it is neither reasonable nor necessary to require compliance with the height of building development standard.

The proposed minor non-compliance with the height of building control demonstrates a superior planning outcome compared to a compliant scheme and better achieves the objectives of the development standard.

## **6.3. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?**

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 sufficient environmental planning grounds to justify contravening the building height development standard for the following reasons:

- The variation is numerically insignificant and the impacts resulting from the minor variation affect only supporting features of the podium (being the lift overrun) which have limited external impact.
- The component of the building exceeding the maximum building height control is located within the centre of Building T3 and has negligible visual impacts from the public domain or streetscape.
- The proposed development achieves a superior planning outcome compared to a 'compliant' scheme and better achieves the objectives of the height standard.
- The minor variation does not diminish the development potential of adjacent land to the west.
- The proposal does not meet the maximum permitted FSR control that applies to the subject land (3:1), demonstrating that, notwithstanding the minor non-compliance with the building height control, it is highly consistent with what could be reasonably expect in terms of site layout design and land use intensity of the site. The minor variation to the height of building control does not result in any additional floor area or intensity of development within the site compared to what is currently envisaged for the site.

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

Based on the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the minor non-compliance with the height of building development standard in this instance.

## 6.4. HAS THE WRITTEN REQUEST ADEQUATELY ADDRESSED THE MATTERS IN SUB-CLAUSE (3)?

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 addressed in this variation request, including detailed consideration of whether compliance with the 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 subject lot, to justify the proposed variation to the development standard.

## 6.5. IS THE DEVELOPMENT IN THE PUBLIC INTEREST?

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 building height development standard and design excellence control is demonstrated in **Tables 3** and **4** above. The proposal is also consistent with the land use objectives that apply to the site under the LEP. The subject land is zoned B2 (Local Centre). The proposed development is consistent with the relevant land use zone objectives as outlined in **Table 5** below.

Table 5 Assessment of compliance with land use zone objectives

Zone B2 (Local Centre) Objective	Assessment
<i>To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.</i>	<p>The proposal integrates a mixture of retail, business, and community uses that serve the needs of people who live in, work in, and visit the local area. These uses are compatible given their complementary functions and are typical of development in Zone B2 Local Centre.</p> <p>Specifically, the proposal will deliver the following:</p> <ul style="list-style-type: none"> <li>▪ A new full line supermarket (c. 4,000sqm);</li> <li>▪ Approximately 4,400sqm commercial floor space; and</li> <li>▪ A high quality public domain and vibrant town centre.</li> </ul>

<b>Zone B2 (Local Centre) Objective</b>	<b>Assessment</b>
<i>To encourage employment opportunities in accessible locations.</i>	Many and varied employment opportunities (direct and indirect jobs) will be generated during marketing, construction, fit-out, and operation of the development.
<i>To maximise public transport patronage and encourage walking and cycling.</i>	The site is a highly accessible location within Wentworthville town centre. The proposal will maximise public transport patronage and encourage walking and cycling through the new plaza and central public domain, and the provision of bicycle parking within secure locations at grade within the development.
<i>To permit residential development that is complementary to, and well-integrated with, commercial uses.</i>	The proposal has been designed to integrate ground and podium level retail and commercial land uses with the upper level residential apartment buildings. The residential land uses are compatible and complementary to these retail and commercial uses and will not result in any unacceptable land use conflicts. Operating conditions for the retail and commercial tenancies will mitigate any potential conflicts.

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

- The proposal achieves and is consistent with the objectives of the development standard as provided in clause 4.3 and clause 6.11 of the LEP, as outlined in **Section 7.2** of this variation request.
- The proposal is consistent with the objectives of the B2 Local Centre Zone, as outlined above.
- The proposal achieves a superior planning outcome compared to a 'compliant' scheme and better achieves the objectives of the relevant development standard (as described in **Section 6.2** above).
- Strict compliance with the building height standard is an unnecessary hindrance to the ability to deliver a vibrant mixed-use development and establish an urban landmark for the town centre.

Accordingly, it is considered that, notwithstanding the proposed variation to the building height development standard, the proposed development is in the public interest.

## **6.6. HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED?**

The concurrence of the Secretary can be assumed to have been granted in accordance with the DPIE Circular *PS 18–003 'Variations to development standards'*, dated 21 February 2018. The DA is declared regionally significant development and will be determined by the Sydney Central City Planning Panel.

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

The minor non-compliance with the height of building development standard 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 building height development standard and the land use zone objectives notwithstanding the technical minor non-compliance.

Overall it is considered that the strict maintenance of the height of building development standard in this instance is not in the public interest for the reasons detailed above in **Section 6.5**. There is no material impact or benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard.



***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 height of building development standard contained within clause 4.3 of the LEP (utilising the 10% design excellence bonus provisions of clause 6.11) is unreasonable and unnecessary in the circumstances of the subject development. In addition, there are sufficient environmental planning grounds to justify the proposed variation to clause 4.3.

In this regard, it is reasonable and appropriate to vary the height of building development standard to the extent proposed. For the reasons set out in this variation request, strict compliance with the numerical standard in this circumstances is both unreasonable and unnecessary, there are sufficient environmental planning grounds to justify the contravention, and it is in the public interest to do so.

In summary:

- The proposal satisfies the objectives of the building height standard notwithstanding the minor non-compliance such that to require compliance with the height of building standard on this site would be unnecessary. A compliant scheme would result in an irregular built form. The minor proposed variation to the height development standard will result in a development that is compatible with the existing site context and is consistent with the desired future character of the site and locality.
- The proposal minimises visual impacts and achieves adequate solar access and privacy to adjoining land by adherence to the required building setbacks and separation distance of the ADG.
- The proposal is consistent with the scale and intensity of the emerging future character of the locality in that it generally complies with the newly gazetted controls for the Wentworthville town centre.
- The application of clause 4.6 to vary a development standard is not numerically limited. The consent authority has broad discretion under clause 4.6(2) and clause 4.6(4)(a)(i) of the LEP to determine variations of any numeric value above a development standard with the concurrence of the Secretary. This is confirmed in the published planning system circular PS 17-006 'Variations to development standards'.
- In addition, no provision of clause 4.6(8) restricts the variation sought in this application. The consent authority can therefore be satisfied that this variation request can be lawfully approved pursuant to clause 4.6 of HLEP 2013.

For the reasons outlined above, the clause 4.6 request is well-founded. Compliance with 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 building height development standard should be applied.

