



AMENDED CLAUSE 4.6 – BUILDING HEIGHT AND FSR

Demolition of structures, excavation and construction of a mixed use development comprising seven separate buildings with residential accommodation, a childcare centre, neighbourhood shops, public open spaces with associated landscaping and basement car parking

263-271 & 277-281 Pennant Hills Road, Carlingford

Prepared for: Meriton Group Pty Ltd

REF: M210362

DATE: 13 October 2022



Contents

Clause 4.6 Variation – Building Height	2
Clause 4.6 Variation – Floor Space Ratio	28

FIGURES

Figure 1 Extract from Height of Buildings Map [T1=27m, U2=33m]	3
Figure 2 Height Blanket Diagrams.....	5
Figure 3 Section illustrating maximum height non-compliance to Building A.....	5
Figure 4 Section illustrating maximum height non-compliance to Building B (left 33m, right 27m).....	5
Figure 5 Section illustrating maximum height non-compliance to Building C (left) and F (right) (27m).....	6
Figure 6 Section illustrating maximum height non-compliance to Building D1 (left) & D2 (right) (33m).....	6
Figure 7 Section illustrating maximum height non-compliance to Building E (27m)	6
Figure 8 Redistribution of bulk and scale to ground plane and lower level.....	13
Figure 9 Previous design iterations (Perspective)	14
Figure 10 Site Analysis Excerpt.....	15
Figure 11 Wide shot aerial perspective of proposed development with existing surrounds.....	17
Figure 12 Wide shot aerial perspective of proposed development with (potential) future surrounds.....	18
Figure 13 Extract from the Floor Space Ratio Map [T=2.3:1]	30
Figure 14 Potential relocation of floor area to ground floor plane and lower levels	41
Figure 15 Photomontage of proposal viewed from the south of Pennant Hills Road.....	41
Figure 16 Perspective of proposal viewed from the north of Pennant Hills Road.....	42

TABLES

Table 1 Building Height Summary	4
--	---



Clause 4.6 Variation – Building Height



Clause 4.6 Variation Statement – Maximum Height (Clause 4.3)

1. Height of Buildings standard

Clause 4.3 (2) of *Parramatta (former The Hills) Local Environmental Plan 2012* (PHLEP 2012) relates to the maximum height requirements and refers to the Height of Buildings Map. Building height is defined as:

building height (or height of building) means—

(a) *in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*

(b) *in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*

including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

The relevant map [sheet HOB_004] indicates that the subject site contains a dual maximum building height. Specifically, the maximum building height along Pennant Hills Road is 27m, whilst to Shirley Street, the maximum building height is 33m. Of relevance, a building height is not provided within the mapping for the land zoned RE1 Public Recreation.

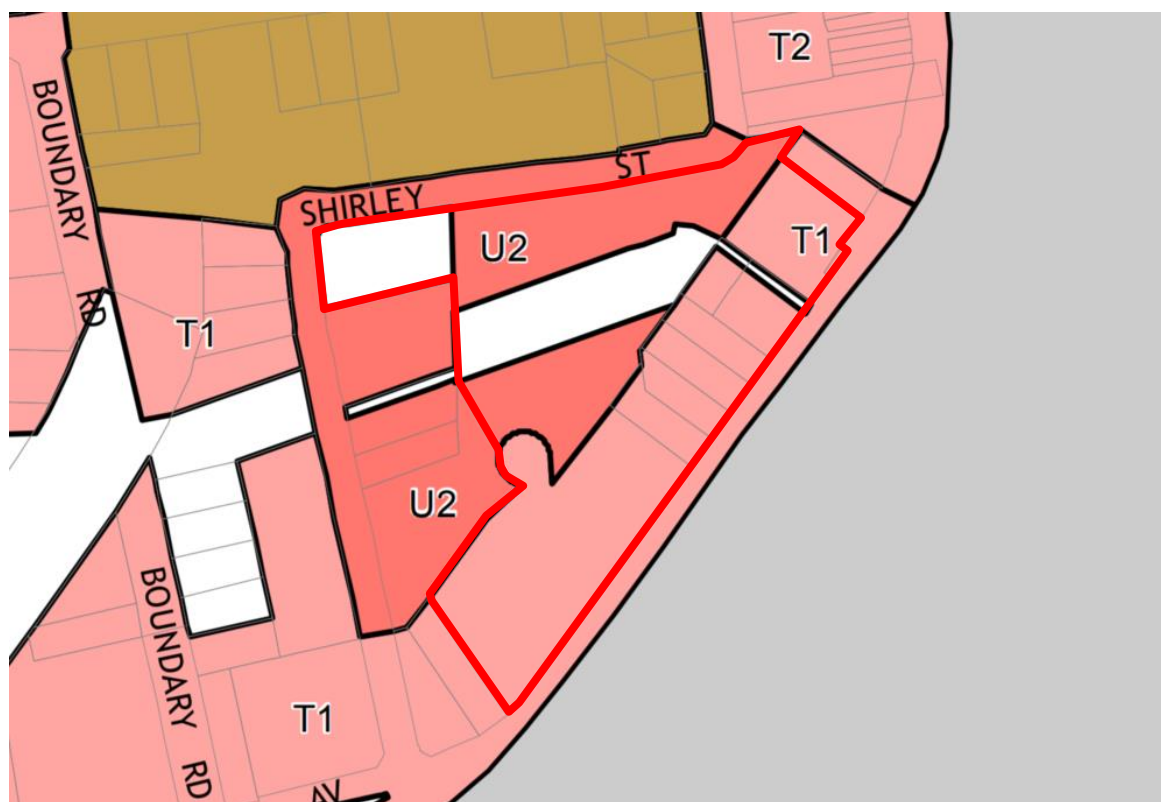


Figure 1 Extract from Height of Buildings Map [T1=27m, U2=33m]

2. Proposed variation to height of buildings development standard

In accordance with the definition of height under PHLEP 2012, the architectural plans indicate that the proposed development has a maximum height of 43.4m to the roof elements within Building E where the 27m standard applies. The proposal is therefore non-compliant with the development standard and seeks a maximum variation of 16.4m or 60.7% to this element. Where the 33m standard applies and in accordance with the definition of height, the proposed development has a maximum height of 39.8m to the roof elements within Building B. The proposal is therefore non-compliant with the development standard and seeks a maximum variation of 6.8m or 20.6% to this element. It is noted that the amended proposal complies with the 33m height limit to Buildings D1 and D2.

Overall, the proposal is non-compliant as detailed in **Table 1** below:

Building	LEP Height Standard	Proposed Height	Extent of non-compliance
<i>Building A</i>	27m	42.75m to lift overrun 40.2m to parapet	15.75m or 58.3% to lift overrun 13.2m or 48.8% to parapet
<i>Building B</i>	27m (where it applies)	39.6m to the lift overrun 36.55m to parapet	12.6m or 46.6% to lift overrun 9.55m or 35.3% to parapet
<i>Building B</i>	33m (where it applies)	39.8m to the roof elements 39m to parapet	6.8m or 20.6% to roof elements 6m or 18.1% to parapet
<i>Building C</i>	27m	32.3m to roof elements 30.9m to parapet	5.3m or 19.6% to roof elements 3.9m or 14.4% to parapet
<i>Building D1</i>	33m	32.35m to lift overrun	Complies
<i>Building D2</i>	33m	32m to lift overrun	Complies
<i>Building E</i>	27m	43.4m to roof elements 42.4m to parapet	16.4m or 60.7% to roof elements 15.4m or 57% to parapet
<i>Building F</i>	27m	41.95m to lift overrun 40.2m to parapet	14.95m or 55.3% to lift overrun 13.2m or 48.8% to parapet

Refer to **Figures 2 to 7** below which demonstrate the extent of non-compliances proposed across the subject site. Within the sectional drawings, the various non-compliances are circled in red.

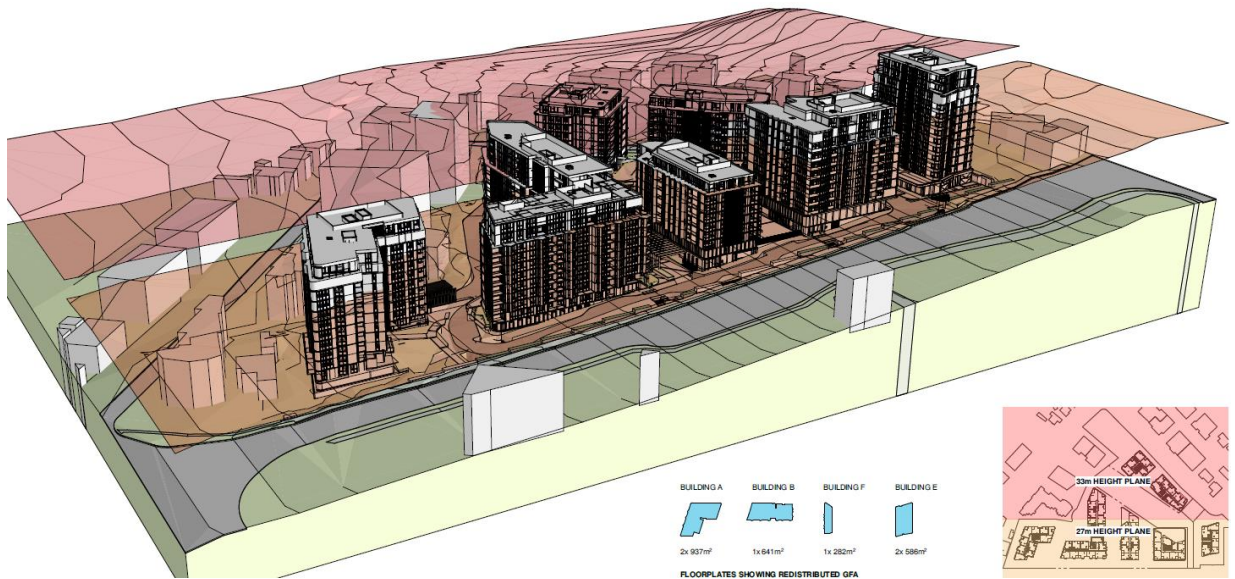


Figure 2 Height Blanket Diagrams



Figure 3 Section illustrating maximum height non-compliance to Building A

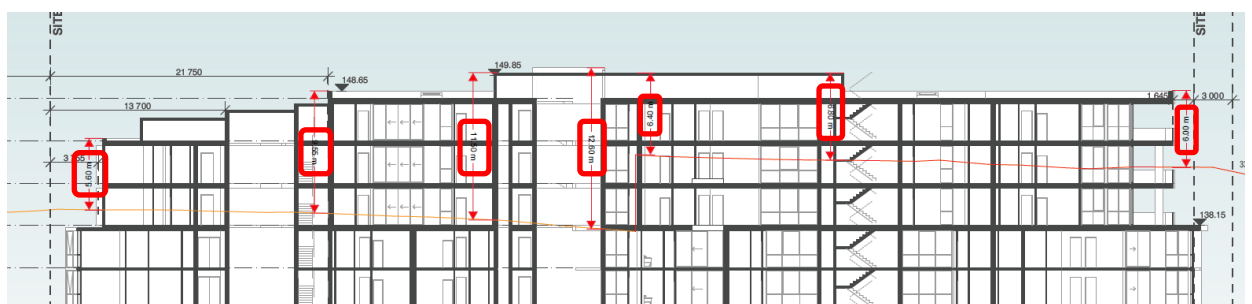


Figure 4 Section illustrating maximum height non-compliance to Building B (left 33m, right 27m)

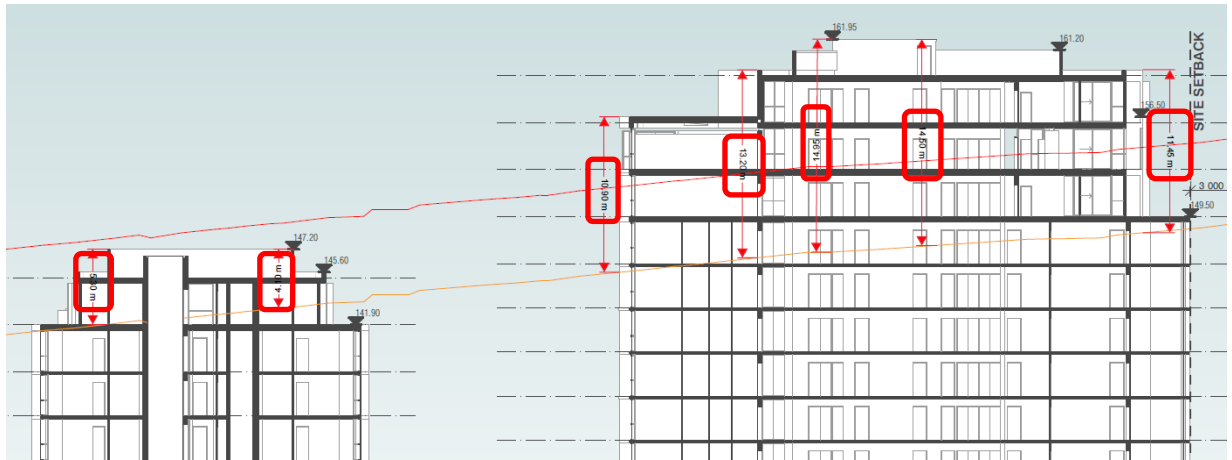


Figure 5 Section illustrating maximum height non-compliance to Building C (left) and F (right) (27m)

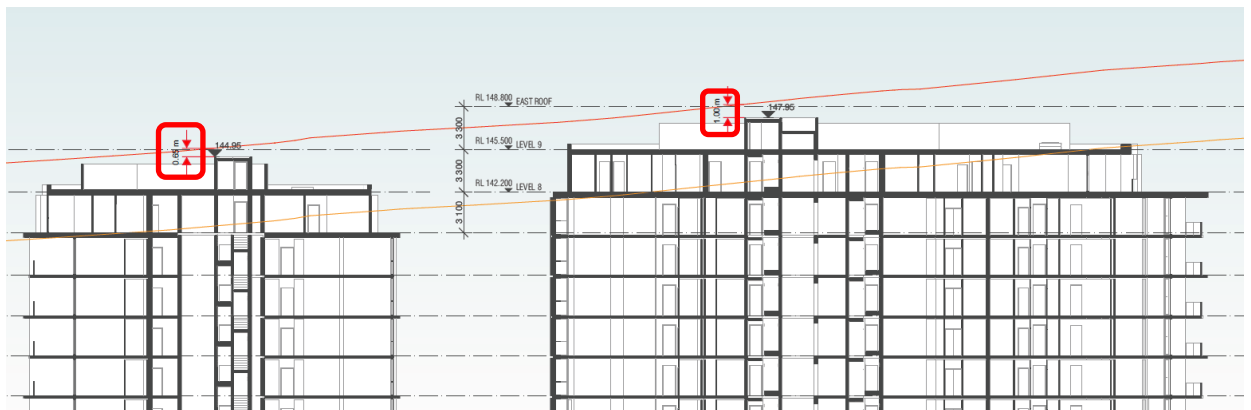


Figure 6 Section illustrating maximum height non-compliance to Building D1 (left) & D2 (right) (33m)

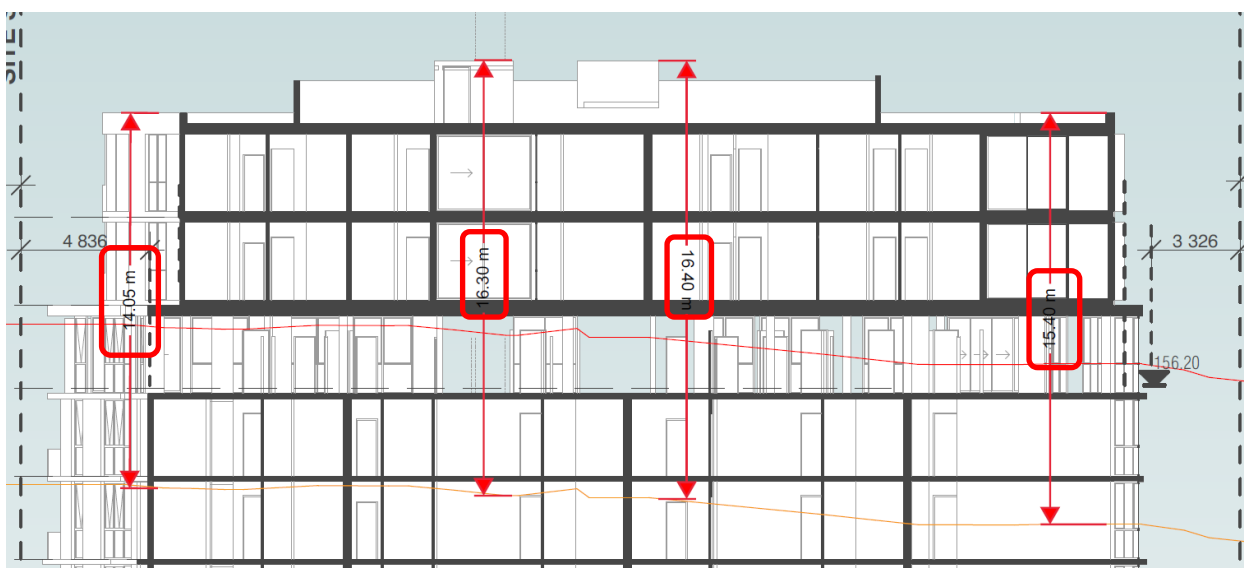


Figure 7 Section illustrating maximum height non-compliance to Building E (27m)

3. Clause 4.6 to PHLEP 2012

The objectives and provisions of clause 4.6 are as follows:

(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 for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—

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

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

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

(a) the consent authority is satisfied that—

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

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

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

(5) In deciding whether to grant concurrence, the Planning Secretary must consider—

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

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

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

(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 E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 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.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(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.

(ca), (cb) (Repealed)

The development standards in Clause 4.3 are not “expressly excluded” from the operation of Clause 4.6.

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of Subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of Subclauses 4.6(3) & (4) in order to demonstrate to the consent authority that the exception sought is consistent with the exercise of “an appropriate degree of flexibility” in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by Subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, Subclause 4.6(6).

Clause 4.6 of the LEP is similar to the long-standing *State Environmental Planning Policy No 1 — Development Standards* (SEPP 1).

From its earliest days it was established that SEPP 1 may be applied to vary development standards even when the variation could not be regarded as minor: *Michael Projects v Randwick Municipal Council* (1982) 46 LGRA 410, 415).

The Court of Appeal considered the issue in *Legal and General Life v North Sydney Municipal Council* (1990) 69 LGRA 201. In that matter North Sydney Council had approved a SEPP 1 objection and the decision was subject to third party legal challenge.

The applicable floor space ratio control was 3.5:1, but — as a consequence of upholding the SEPP 1 objection — the approved floor space ratio was 15:1 (a variation to floor space of 329 per cent). The applicable height control was five storeys whereas the approved height was 17 storeys (a variation of 240 per cent).

The Court approved the following statement by the then Chief Judge of the Land and Environment Court (in *Legal and General Life v North Sydney Council* (1989) 68 LGRA 192, 203):

The discretion vested in councils under SEPP No 1 is wide and, subject to limitations found in the instrument itself and its relation to the Environmental Planning and Assessment Act 1979, is unconfined.

The Court upheld the validity of the Council's decision.





Clause 4.6 of LEP is in similar terms to SEPP 1 in this respect. Relevantly, like SEPP 1, there are no provisions that make necessary for a consent authority to decide whether the variation is minor. This makes the Court of Appeal's decision in *Legal and General Life* equally applicable to clause 4.6. There is no constraint on the degree to which a consent authority may depart from a numerical standard under clause 4.6 (*GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216 at [85]).

It is not necessary to consider case studies in order to address the above issue, as each case ultimately turns on its own facts. However, decisions of the Land and Environment Court are informative, as they demonstrate how the flexibility offered by clause 4.6 works in practice. Some examples are as follows:

- In *GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216, a **height exceedance of 103 per cent** was approved, along with a **floor space ratio exceedance of 44.7 per cent**.
- In *Baker Kavanagh Architects v Sydney City Council* [2014] NSWLEC 1003, the Land and Environment Court granted a development consent for a three-storey shop top housing development in Woolloomooloo. In this decision, the Court approved a **floor space ratio variation of 187 per cent**.
- In *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582, the Court granted a development consent for a residential flat building. In this decision, the Court approved **a floor space ratio variation of 85 per cent** (from 0.65:1 to 1.21:1).
- In *Abrams v Council of the City of Sydney* [2019] NSWLEC 1583, the Court granted development consent for a four-storey mixed use development containing 11 residential apartments and a ground floor commercial tenancy with **a floor space ratio exceedance of 75 per cent** (2.63:1 compared to the permitted 1.5:1).
- In *Moskovich v Waverley Council* [2016] NSWLEC 1015, the Land and Environment Court approved a residential flat building in Bondi with a floor space ratio of 1.5:1. The development standard was 0.9:1. **The floor space ratio exceedance was around 65 per cent**.
- In *Edmondson Grange Pty Ltd v Liverpool City Council* [2020] NSWLEC 1594, the Court granted a development consent for three residential flat buildings. In this decision, the Court approved **a floor space ratio variation of 59 per cent** (from 0.75:1 to 1.19:1).
- In *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386, the Land and Environment Court approved a residential flat building in Randwick with a **55 per cent exceedance of the height limit** (at its highest point) and a **20 per cent exceedance of the floor space ratio control**.
- In *Landco (NSW) Pty Ltd v Camden Council* [2018] NSWLEC 1252, the Land and Environment Court granted development consent for a land subdivision with clause 4.6 variations of between **47-51 per cent on the minimum 450m² lot size** (allowing lots sizes ranging from 220 to 240m²).
- In *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112, the Court granted development consent to a six-storey shop top housing development with a **floor space ratio exceedance of 42 per cent** (3.54:1 compared to the permitted 2.5:1).
- In *Artazan Property Group Pty Ltd v Inner West Council* [2019] NSWLEC 1555, the Court granted development consent for a three-storey building containing a hardware and building supplies use with **a floor space ratio exceedance of 27 per cent** (1.27:1 compared to the permitted 1.0:1).
- In *Season Group Pty Ltd v Council of the City of Sydney* [2016] NSWLEC 1354, the Land and Environment Court granted development consent for a mixed use development on the basis of a clause 4.6 request that sought **a 21 per cent height exceedance over a 18-metre building height standard**.





Of relevance, Parramatta City Council has previously approved developments with considerable variations, demonstrating that Council do not prescribe a limit under Clause 4.6 of the LEP. As such, the variations proposed are not limited in any way and are capable of support for the reasons set out in this request.

It is hereby requested that a variation to this development standard be granted pursuant to Clause 4.6 so as to permit a maximum building height of 43.4m to the portion of the site where the 27m height limit applies, which equates to a numerical variation of 16.4m and a percentage variation of 60.7% noting that the maximum height relates to the proposed roof elements of Building E. The proposal also seeks a maximum building height of 39.8m to the portion of the site where the 33m height limit applies, which equates to a numerical variation of 6.8m and a percentage variation of 20.6%, noting that the maximum height relates to the proposed roof element of Building B.

4. Compliance is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a))

Of relevance to Clause 4.6(3)(a), in *Wehbe V Pittwater Council (2007) NSW LEC 827* Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

“ An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.”

The judgement goes on to state that:

“ The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (paragraph 16), Preston CJ makes reference to *Wehbe* and states:





“...Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.”

Clause 4.6(3)(a) requires that the written request to vary a development standard demonstrate that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case. Requiring strict compliance with the standard is unreasonable or unnecessary because:

- the development is consistent with the standard and zone objectives, even with the proposed variation (refer to Section 7 below);
- there are no additional significant adverse impacts arising from the proposed non-compliance; and
- important planning goals are achieved by the approval of the variation.

On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

5. Sufficient environmental planning grounds (Clause 4.6(3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard. Specifically, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 24) states:

*The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].*

The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 whereby Justice Pain ratified the original decision of Commissioner Pearson. The following planning grounds are submitted to justify contravening the maximum building height:

1. The redistribution of proposed floor space

- a. The height breach is at its greatest where buildings face Pennant Hills Road at its highest elevation, which is created through the distribution of floor area away from the ground plane and Shirley Street. The provision of FSR in this location is the most appropriate response with regards to character and amenity. The greatest height will address the widest frontage which is to a significant arterial road which assists with moderating scale. The building form that addresses the centrally located RE1 zoning provides for compliant height to its northern side, providing for reduced scale to Shirley Street. Despite the non-compliance, the proposed building arrangement will have distinctive benefits to amenity and activation of the public open



space, as is discussed in further detail below. Importantly, the amended proposal has provided height compliant built forms to Buildings D1 and D2 as they address Shirley Street.

2. The height control anomaly

- a. As detailed, the floor area is massed within additional height largely located along Pennant Hills Road as opposed to Shirley Street. It is considered that the split height control for the subject site is anomalous in the fact that greater height (of two storeys) is allowed fronting Shirley Street whilst reduced height is expected to face Pennant Hills Road, a major arterial road. There is no urban design reason for this approach to the height limits. The proposal applies a site-specific design choice which seeks to improve the streetscape interface between the subject site and existing developments along Shirley Street, to both the north and west. The amended proposal has been designed to provide a compliant building height along Shirley Street, which creates a successful streetscape interface to the properties to the north. This is a superior outcome given the lower scale of Shirley Street, as the increased building height along Pennant Hills Road will have a far lesser streetscape and amenity impact to the surrounding locality. Furthermore, the height compliant Shirley Street buildings are split to allow for better site permeability, accessibility and solar access to the open space, ultimately distributing height away from the most sensitive part of the site. In this regard, the distribution of floor space and non-compliance along Pennant Hills Road is more reflective of the density desired along a major roadway corridor, contrary to the current LEP building height mapping.

3. Voluntary Planning Agreement

- a. Section 4.15(1)(iia) of the EP&A Act states that any planning agreement (entered into under section 7.4) should be a matter of consideration for a development application. The subject site benefits from an existing voluntary planning agreement (VPA) established under DA1103/2011/JP and applies to any approved, current and future application under Clause 12 of the VPA. Therefore, the existing VPA applies to the proposed development (as modified) and is within the public interest given it will embellish and dedicate the RE1 zoned land, provide public domain upgrades and includes additional monetary contributions. As the original approval established an increase in density and height supported by the public benefit afforded by the VPA, this is similarly maintained by the current application.
- b. The proposal will provide a proportional increase in building height and will deliver the above-mentioned public benefits through the VPA without any adverse impact to the character of the locality or amenity of surrounding development. As discussed, the increase in building height is a purposeful relocation of floor area away from the ground floor plane to provide taller, slender envelopes. This will deliver a public benefit whereby the open spaces will be further enhanced by the proposal. Following this, it would be contrary to deny the variation and require strict compliance as the proponent would be forced to either construct the current approval which will result in an inferior form as set out, and/or lodge a separate application for the

remaining R4 zoned land, seek the consent authority to acquire the RE1 land, and therefore limit the public benefits afforded by the VPA and delivery of the subject application.

4. The variations allow distinct improvements to ground plane and public domain

- a. The relocation of built form away from the ground plane will significantly improve the activation and network of the open spaces, internal roadways and pedestrian access through the site. As identified in the Carlingford Precinct DCP, this is a site-specific objective ('Block 17') in which the open spaces are desired to be highly activated and encourage through-site permeability. The proposal has therefore relocated floor area on the upper levels fronting Pennant Hills Road (thus creating non-compliances) to ensure that significant curtilage is provided around the built forms and to ensure the activation and permeability of the open spaces.
- b. The non-compliant height along Pennant Hills Road is superior to providing this at the ground plane or along Shirley Street. Whilst larger footprints can be provided at ground level through interconnecting all buildings, this is an inferior outcome given the bulk of the development will be adversely increased where it is most prominent (at a pedestrian scale). Furthermore, this will heavily constrain site permeability and accessibility to the central open space and will effectively "privatise" this area. This is demonstrated in **Figure 8** below.

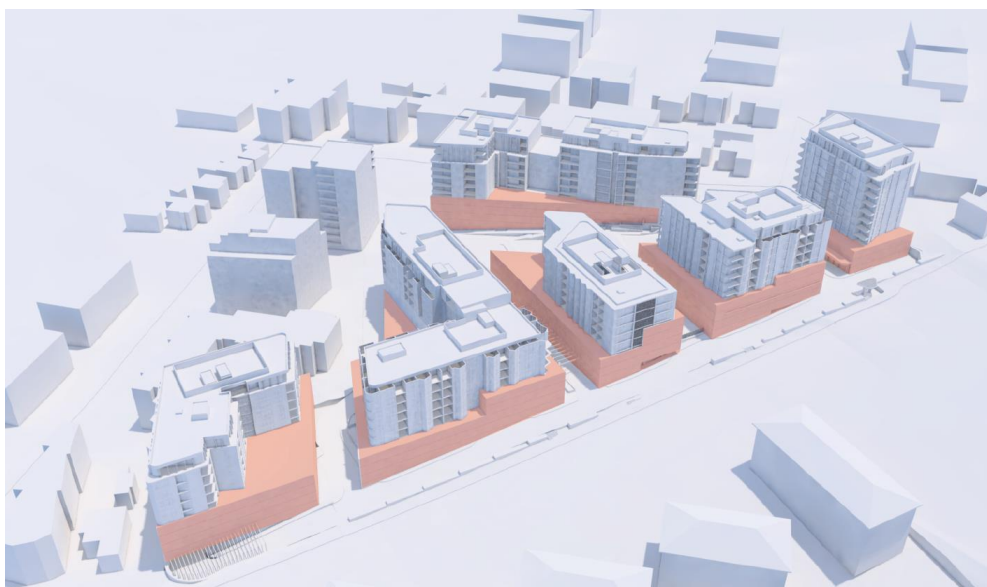


Figure 8 Redistribution of bulk and scale to ground plane and lower level

5. The non-compliances achieve a high level of design excellence, based on site analysis

- a. The proposal delivers a high quality urban and architectural design which clearly exhibits design excellence, despite non-compliance. That is, the proposal has undergone a proponent initiated design competition, in-depth site analysis, numerous iterations and critical internal (and external) consultation and refinement to reach the amended outcome. The arrangement of floor space and subsequent building height non-compliance along Pennant Hills Road has



been informed by the numerous site constraints and design iterations. Based on feedback provided by Council and the DEAP, as well as detailed review by the applicant's design team, redistribution of floor area on the upper levels along Pennant Hills Road results in the most suitable streetscape appearance, whilst protecting the amenity to neighbouring properties. The additional height also results in the "slimming" of tower forms which is beneficial to minimising visual impacts and enhancing occupant amenity, without resulting in forms which are inconsistent or incompatible with the character of the locality.

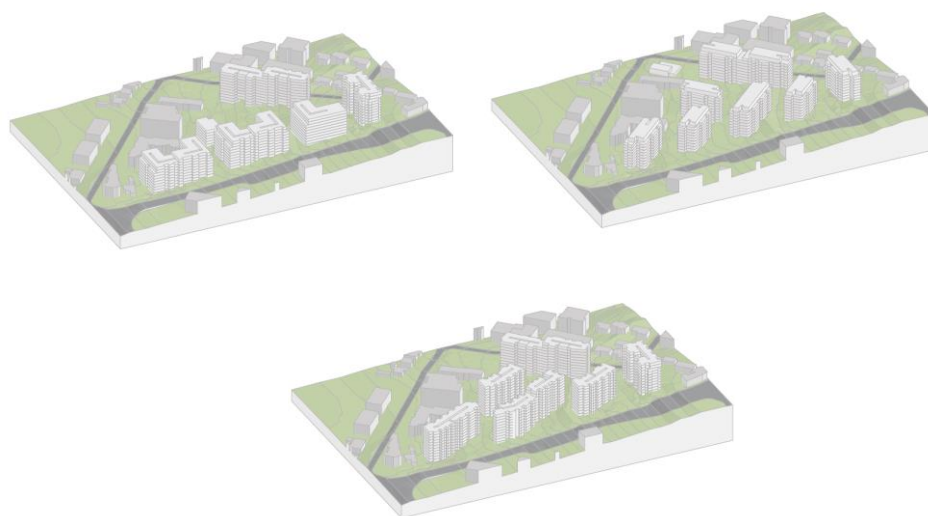


Figure 9 Previous design iterations (Perspective)

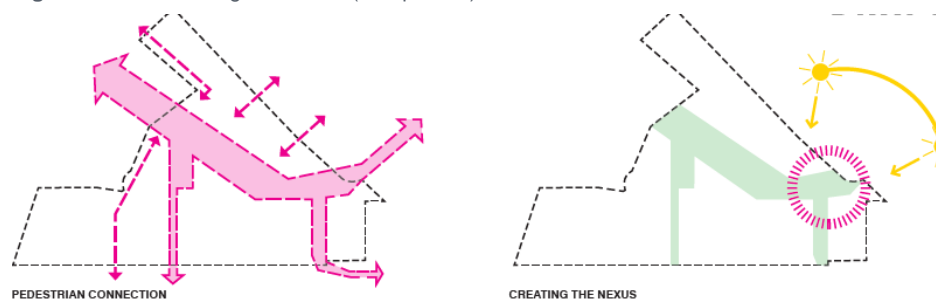




Figure 10 Site Analysis Excerpt

- b. The subject site is identified as a Key Site (Block 17) which seeks to provide a gateway development to the Carlingford Precinct. Importantly, the non-compliant elements of the development are designed with a variety of façade modulations and undulations, parapet roofing, framed elements, balcony articulation and glazed panelling. These have been integrated with the provision of a defined base, middle and upper portions. Where the greatest extent of non-compliances apply, these are generally located within recessed uppermost levels and have been purposefully designed with physical separation between the buildings to improve spatial articulation. This ensures that the non-compliances will not be visually obtrusive or jarring and will provide a landmark development within the Carlingford Precinct.
- c. The amended proposal provides a built form which is generally consistent with the HDCP, ADG and character of the locality. Despite non-compliance, the proposal is compatible with the character of the approved residential flat buildings to the west and numerous residential flat buildings within proximity to the subject site. The non-compliant elements are also predominantly compliant with building setbacks and assist with achieving landscaping, site coverage and open space compliance. The outcome from additional height achieves consistency with the existing and desired building pattern in the locality as envisaged in the locality.

6. The non-compliance is entirely consistent with the character of the locality and is supported by the site's unique strategic location

- a. The desired future character for the key site is detailed within Section 2.2 Key Sites of the DCP which aims to provide landmark buildings, provide street level active uses and human scale in the village centre, provide a substantial number of residential units in close proximity to the train station, and contribute to the local open space network and provide open spaces to act



as place making elements at a neighbourhood scale and the focus for outdoor activity. The proposed height variation directly contributes to and enables the ability to meet these objectives. It does so by promoting density in a suitable location earmarked for such, provides for landmark buildings fronting Pennant Hills Road, emphasises the importance of open space and links to and from it, and provides for activation at the ground plane by introducing some commercial uses. These elements of the proposal are facilitated by the reduction of building footprint and provision of additional building mass within the proposed height.

- b. The variation to building height is consistent with the site's prominent location, considerable allotment size and proximity to public transport and various land uses. Whilst breaching the maximum height, the proposal will allow for an increase in density (already permitted and approved on the site) which is within the public interest, by allowing for density to be provided in a strategically important location that is rich in public transport, and will not have any adverse environmental impacts.
- c. **Figure 11** below provides an aerial perspective demonstrating the relationship between the subject site, neighbouring properties and wider locality as is existing (including neighbouring approvals not yet constructed). Although the proposal provides height variations along Pennant Hills Road, the overall master planning of buildings, open spaces and the provision of high levels of through-site permeability ensures that the development will comfortably nestle within the locality. The development represents an appropriate response to the short to medium term character of the locality through adequate separation of built form and strategic site planning.





Figure 11 Wide shot aerial perspective of proposed development with existing surrounds


- d. The site will also provide a suitable relationship with the surrounding locality pending redevelopment of the properties which are currently underdeveloped relative to the LEP development standards. That is, when considering potential amalgamation and redevelopment of existing dwellings and low-density commercial tenancies, it is inevitable that the bulk and scale of the proposal will merge into the future character of the neighbouring properties (**Figure 12**).





Figure 12 Wide shot aerial perspective of proposed development with (potential) future surrounds

- e. Given the site is identified as the largest residential allotment within the Carlingford Precinct, the variations along Pennant Hills Road (which is dispersed amongst five buildings), will create its own inherent streetscape character. That is, the consistency in high quality, architectural design across five buildings spanning a frontage of 277m reduces the visual impact of the non-compliance and ultimately generates its own streetscape character. It is considered that the subject site itself forms a 'micro' streetscape character which significantly lessens the visual impact of the non-compliance as viewed from Pennant Hills Road.
- f. Given the highly trafficked vehicular nature of Pennant Hills Road, in addition to the physical (four lane) width of the roadway, there are inherently lesser pedestrian movements and therefore the physical bulk and scale impacts are lessened. Notwithstanding, pedestrian connections along Pennant Hills Road will be improved through the proposed development, with a specific focus on maximising the connectivity internally within the site which is substantially improved in terms of permeability, access and amenity (namely solar access), only afforded by the proposed height variations. The amended proposal is not considered to have any adverse impacts to the streetscape character of Pennant Hills Road as this is a major corridor and devoid of any established streetscape character, particularly when compared to Shirley Street (which is established). The width of the road corridor and length of the frontage results in a building proportion which is acceptable.
- g. The residential flat buildings and open spaces on the opposite side of Pennant Hills Road do not form an established streetscape character that need to be followed. Furthermore, where the subject site adjoins the properties to the north, this is zoned B2 which envisages a built form which will achieve a compatible transition to the wider locality. The additional building height along this streetscape will therefore be appropriate in light of future redevelopment of the B2 zoned land. Immediately to the south, where the property adjoins two existing low



density buildings, an appropriate development can be provided as demonstrated in the submitted amended architectural package. It is also noted that the height of buildings approximately 500m to the west of the site are permitted a maximum of 57m, in which the proposal is considered acceptable. This will assist in establishing the desired landmark character of the site as viewed from Pennant Hills Road.

7. Orderly and economic use of land

- a. The social benefits of providing additional housing stock within a highly sought after and strategically important location should be given weight in the consideration of the variation request. The site specific approach to planning for this precinct supports its strategic importance. It would be a loss to the community (and contrary to the public interest) to deny the variation and require the removal of apartments with high levels of amenity, located conveniently proximate to public transport. Furthermore, the distribution of FSR within lower levels of the development is considered to be an inferior outcome which will reduce through-site permeability, impact the open spaces, reduce amenity and ultimately increase the bulk and scale of the development at a pedestrian scale.
- b. The extent of non-compliance has been artificially increased through the provision of non-residential uses at ground level which have resulted in the provision of greater floor to ceiling heights. That is, the extent of non-compliance would be reduced if the development strictly provided residential uses at-grade, however, this would be contrary to the public interest as the alternative uses provide economic and social benefits to the immediate locality. Furthermore, these uses will also share a vital role in activating the central public open space as intended by the DCP.

8. Limited environmental impacts

- a. It is considered that there is an absence of any significant material impacts attributed to the breach on the amenity or the environmental values of surrounding properties, the amenity of future building occupants and on the character of the locality. Specifically:
 - i. The extent of the additional height creates no adverse additional overshadowing impacts to adjoining development to the west and south of the subject site when compared to a compliant building envelope and the approved development on the subject site. That is, despite the additional shadowing cast by the non-compliant elements, the proposal will not adversely impact the solar gain of the properties to the west and south, which will achieve greater than 3 hours of solar access. Furthermore, the additional building height which is concentrated towards Pennant Hills Road, will generally cast shadows onto the streetscape. As such, additional overshadowing caused by the non-compliant elements would be insignificant; and

- ii. The height breach does not result in any adverse additional privacy impacts. Where the non-compliance pertains to the glazed openings, these have been designed with increased setbacks to the side boundaries predominately in accordance with the ADG and are orientated to the public domain. Similarly, separation distances between the proposed buildings of the subject site are also consistent with the objectives of the ADG. This ensures that any additional loss of privacy caused by the non-compliant elements would be insignificant;
- iii. The height of building breach does not result in view loss which is not reasonably anticipated within the planning controls and site context. Importantly, there are no significant views enjoyed across the subject site, with any views enjoyed as a result of the site's underdeveloped nature. As such, it is anticipated the extent of view loss caused by the non-compliant element would be insignificant or nil; and
- iv. Conversely, in terms of the Shirley Street character, amenity of the central public open space and through-site permeability and access, the height variations permit numerous benefits which outweigh any negative impacts created by the proposal.

9. Other

- a. The proposed development meets the objectives of the development standard and meets the objectives of the R4 High Density Residential zone (as further detailed in Section 7 below);
- b. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:
 - i. The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilised site for residential uses (1.3(c));
 - ii. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).
- c. The variation to the height of buildings development standard will give better effect to the aims of *State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development* (SEPP 65). In particular:
 - i. The proposed variation will provide more sustainable housing in social and environmental terms and better achieve urban planning policies (clause 2(3)(a)(i));
 - ii. to achieve better built form and aesthetics of buildings and of the streetscapes and the public spaces they define (clause 2(3)(b));
 - iii. to contribute to the provision of a variety of dwelling types to meet population growth (clause 2(3)(f));

- iv. Approval of the proposed variation will support a variety of housing types by providing a well-located and compact development that will be a better choice for families (clause 2(3)(g)).

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development, particularly given the dual building height controls, purposeful distribution of FSR and site characteristics including scale of the site, frontage hierarchy and topography. The site is strategically located close to public transport and has been earmarked for additional density because of these unique locational advantages. The additional height does not significantly impact the amenity of the neighbouring properties (when compared to a compliant development) and has been designed in such a way to ensure the additional height is not visually jarring from the public domain. The proposal is also not inconsistent with the existing development to the west or within the wider locality, particularly towards the Carlingford Light Rail.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

6. The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), (Clause 4.6(4)(a)(i))

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to



justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a) in Section 4 above (and furthermore in terms of meeting the objectives of the development standard, this is addressed in Section 7 below). Clause 4.6(3)(b) is addressed in Section 5 above.

The second opinion of satisfaction, in clause 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under clause 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in Section 7 below.

7. The proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out (Clause 4.6(4)(a)(ii))

Height of Buildings Objectives

The objectives and relevant provisions of Clause 4.3 of PHLEP 2012 are as follows:

- (a) to ensure the height of buildings is compatible with that of adjoining development and the overall streetscape,*
- (b) to minimise the impact of overshadowing, visual impact, and loss of privacy on adjoining properties and open space areas.*

In order to address the requirements of subclause 4.6(4)(a)(ii), each of the relevant objectives of Clause 4.3 are addressed in turn below.

Objective (a) to ensure the height of buildings is compatible with that of adjoining development and the overall streetscape,

It is noted that objective (a) refers to being “compatible” with adjoining development. It is well established that “compatible” does not promote “sameness” in built form but rather requires that development fits comfortably with its urban context. Of relevance to this assessment are the comments of Roseth SC in *Project Venture Developments Pty Ltd v Pittwater Council* [2005] NSWLEC 191:

“22 There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.”

In accordance with the objective, the subject site is located within the Carlingford Precinct under *Part D, Section 12* of HDCP. Specifically, the subject site is identified as a key site known as *Block 17 Janell Crescent*. The desired future character of these key sites is detailed within Section 2.2 Key Sites of the DCP and states:

- Provide landmark buildings denoting the core of an urban village centred around the train station, open space, pedestrian and cycle connections, and community facilities.*
- Provide street level active uses and human scale in the village centre.*
- Provide a substantial number of residential units in close proximity to the train station.*





- *Contribute to the local open space network while ensuring development applies water sensitive urban design principles.*
- *Provide open spaces to act as place making elements at a neighbourhood scale and the focus for outdoor activity in the areas of Janell Crescent.*
- *Provide landmark buildings at key gateways to the Precinct on Pennant Hills Road including the Bunnings site and the service station site.*

The amended proposal has been designed to ensure compatibility with the existing and desired character of the locality, despite the non-compliances. The amended proposal has located the most significant building height along Pennant Hills Road, which is a result of the distribution of FSR. In this regard, the non-compliances pertaining to building height along Pennant Hills Road are predominantly designed within recessed upper levels which have integrated façade undulation and modulation, balcony articulation and fenestration. The proposal will provide a bulk, scale and massing which is proportionate to the overall scale of the site and is responsive to the highly trafficked Pennant Hills Road. The provision of building height along this roadway as opposed to Shirley Street or at the ground plane, limits the perceivable visual and physical impact when considering both the existing and desired character of the locality. The amended proposal will provide a high-quality architectural design which sets an improved streetscape, public open space and wider character as detailed throughout this Variation request.

In accordance with the above, the existing buildings in the locality have been considered. Directly adjoining the site to the west are an eclectic mix of developments comprising lower density buildings, older four storey and more recently approved ten to eleven storey residential flat buildings. Upon redevelopment of the neighbouring properties directly to the south-west, it is reasonably anticipated that a building height of a similar scale will be proposed given the location of this site within a prominent, highly accessible locality. Importantly, the non-compliant building height ensures the delivery of a high quality public open space throughout the site and will ultimately ensure an appropriate relationship to the neighbouring properties as intended by the DCP.

When considering the adjoining properties to the north-east, this contains an existing parking area and two storey commercial premises. Whilst Building E contains the greatest variation, it is reasonably anticipated that the neighbouring properties to the north-east will be amalgamated and redeveloped over time and provide a bulk and scale which will reinforce the character of the proposed development. Importantly, the future redevelopment of these properties will adopt a shop top housing typology with reduced setbacks and arguably a greater visual and physical density, by virtue of the design character. It is also noted that further to the north, the locality also contains higher density nine to ten storey residential flat building developments and commercial zones.

To the north and west on the opposite side of Shirley Street are also an eclectic mix of buildings, including low density residential dwellings, multi-dwelling housing and four to six storey residential flat buildings. As detailed in this Variation request, the amended proposal is entirely compliant to Buildings D1 and D2. This ensures that the development sits comfortably within the established Shirley Street context. It is noted that further to the west and centric to the Carlingford Light Rail are high density developments with a maximum height of 57m (noting this is approximately 14m taller than the tallest proposed development, Building E), whilst further to the north are seven and eight storey residential flat building (along Post Office Street). The significant density of the wider locality is considered to support the proposed variations, which are reflective of the sites strategic location. The proposed non-compliances will therefore nestle suitably within the wider context.

When considering the existing four storey residential flat buildings and open spaces on the opposite side of Pennant Hills Road, the separation of the built forms limits any adverse impact created by the non-compliance. The proposal provides a DCP compliant front setback with appropriate building separation as envisaged by the ADG. Furthermore, the non-compliances of building height to the five buildings fronting Pennant Hills Road have also been designed within recessed floor plates and envelopes to ensure that this will not be visually obtrusive or jarring. This is integrated with façade undulation and modulation, balcony articulation and fenestration with complementary materiality. Given the





highly trafficked, vehicular nature of the roadway, the perceivable impact of the additional building height will not be visually obtrusive. The relocation of the additional height along Pennant Hills Road (within the upper levels of the buildings) is considered to be a superior outcome to reducing the open spaces provided at the ground plane throughout the site. This represents the best outcome with regards to the objectives of the Carlingford Precinct, character of the locality and amenity (per Objective (b)).

Given the above, the burden of strict compliance would result in a significant quantum of apartments which would be an unreasonable and unnecessary outcome given that the bulk and scale of the proposal is consistent with the desired character and is proportionate to the scale of the site. It is considered that the proposal will positively contribute to the existing and future character of the Carlingford Precinct when viewed with the buildings along Pennant Hills Road and Shirley Street, whilst providing a high quality, public open spaces not affected by the non-compliance. Given the transition density of the locality and current eclectic mix of buildings, the proposal has been designed as a contemporary structure. The defined base, articulated middle and recessed upper levels will reduce the sense of perceived bulk and scale and ensure compatibility character of the locality. Overall, the proposed non-compliances have set out to satisfy the primary objective of the Carlingford Precinct DCP as it applies to the site, being the activation of the public open spaces and through site movement. In this regard, the relocation of floor area long Pennant Hills Road ensures the provision of an appropriate curtilage and permeability around the building forms as they relate to pedestrian movement and the public open spaces.

In accordance with the above, the non-compliances directly respond to the objectives set by the Key Sites within the Carlingford Precinct in the DCP, as follows:

- The amended proposal achieves a scale of development that is appropriate to its location and proximity to shops, services and public transport. It will provide for a variety in housing choices that is in demand in the locality. The proposed building height is considered to provide an appropriate urban design response to the constraints of the site, being the topography and location of the RE1 zone and is of a scale that is proportionate to the overall site. The location of the height will not have any adverse impact to the operation of the site and character of the locality, and also achieves a visual outcome that will serve and as a landmark along Pennant Hills Road.
- The amended proposal complements the siting, scale and proportions of the subject site, with a strong focus on the provision of public open spaces. The additional building height is purposefully located away from the ground plane in order to contribute to the open space network as envisaged by the DCP.
- The proposed site arrangement and building design ensures that permeability of the site is achieved which encourages activation of open spaces. The open spaces are further bolstered by the provision of alternative uses, including the neighbourhood shops and childcare centre, which will activate this space. As detailed, the proposed site arrangement ensures that the additional building height will achieve the objective of activating the open spaces on the subject site through the provision of generous ground plane spaces.
- The amended proposal will provide a high quality contemporary development which will address Pennant Hills Road and Shirley Street alike. The proposal will provide for a landmark development particularly along Pennant Hills Road in the short to medium term until the time in which the properties to the north and south (and within the locality) are redeveloped in the long term.

Therefore objective (a) is achieved.

Objective (b) to minimise the impact of overshadowing, visual impact, and loss of privacy on adjoining properties and open space areas.

The development has been purposefully designed to minimise the impact on the solar gain of the properties to the west and south of the subject site along Shirley Street and Pennant Hills Road, respectively. Despite non-compliance with the building height development standard, the proposal has been designed with adequate separation to improve solar





gain to the neighbouring properties. Of relevance, the HDCP requires the following which pertains to the solar gain of residential dwellings:

4.13 Solar Access

(a) Buildings must be designed to ensure that adjoining residential buildings, and the major part of their landscape receive at least four hours of sunlight between 9am and 3pm on 21 June.

Although it is noted that the DCP requires the provision of four hours for the neighbouring properties, the proposal will retain 3 hours of solar access to the neighbouring properties and is considered acceptable in this regard. Specifically, the amended shadow diagrams demonstrate that the proposed height non-compliance will not have any adverse impact to the solar gain of the neighbouring properties. That is, the properties to the west will only be impacted during specific times of the day from 8am to 12pm whilst properties to the south from 12pm to 3pm. In all regards, when comparing the additional building height, a compliant envelope and the approved development, the extent of overshadowing created by the non-compliant element is acceptable.

When considering the solar access of the RE1 zoned public open spaces, the amended proposal will result in less overshadowing when compared to the approved development. As detailed, amended proposal is compliant to Buildings D1 and D2 which has the most bearing on the solar access of the RE1 zone. Accordingly, given the proposal will not result in any adverse overshadowing to the neighbouring properties or public open spaces, the proposal is considered acceptable.

With regards to visual privacy, the proposal has been designed with adequate setbacks between the neighbouring properties and between proposed buildings on the subject site. As detailed, the additional building height has been orientated towards Pennant Hills Road and the public open space to direct views to the public domain and away from sensitive residential accommodation (both existing and proposed). When considering the location of the non-compliant building height within Building A and B (as they oppose the western boundary), the areas of non-compliance are designed as recessed built forms with setbacks which satisfy the objective of Part 3F-1 in the ADG. Importantly and when considering the overall envelopes of Buildings A and B, the lower levels provide setbacks considerably greater than the ADG Design Criteria. This is relevant as the additional building height is a result of relocating floor area at upper levels to improve the amenity of future occupants and neighbours. It follows that the extent of non-compliance could potentially be reduced with additional floor area provided at the lower levels of Buildings A and B, however would create greater privacy impacts to the neighbouring properties (and between buildings) as a result of redistributed floor area.

In terms of Building E as it opposes the R4 and B2 zone to the north-east, the proposal will overlook an existing parking area and commercial properties and will not result in any impacts from the short to medium term. In the long term, it is reasonably anticipated that the neighbouring properties will be amalgamated and form a large shop top housing development. Given the neighbouring property shares a southern boundary with the subject site, it is reasonably anticipated that any openings will comprise lower trafficked bedrooms and non-habitable rooms and therefore visual privacy will be maintained in this regard. With regards to the separation between the proposed buildings on site (where they exceed the maximum building height), the proposal is predominately compliant with the ADG Design Criteria. This ensures that the proposal will not result in any inter building overlooking and is therefore acceptable in this regard. Accordingly, when considering the visual privacy impact created by the non-compliant building heights, this is considered to be insignificant.

In terms of visual impact, the orientation of the non-compliant building height along Pennant Hills Road is considered to be the superior site planning and design outcome when taking into account the additional floor area afforded by the RE1 zone. As discussed under objective (a), the extent of non-compliance has been designed to ensure that the development is proportionate to the overall scale of the site and reflective of the R4 High Density Residential zone and Carlingford Precinct DCP. The proposal will provide a high quality contemporary development and coherent streetscape appearances with building elements that complement the topography of the site and are appropriately setback from the





street frontages, neighbouring properties and open spaces. That is, the proposed building height, although being non-compliant along Pennant Hills Road is designed with recessed upper floors and articulated facades. The relationship of the non-compliant building height to Pennant Hills Road limits the perceived nature of the non-compliance. The highly trafficked vehicular nature of Pennant Hills Road, steep incline and overall frontage length ensures that the proposal will not appear as visually obtrusive or jarring.

Further to the above, the Carlingford Precinct DCP seeks to emphasise the importance of the public open space located on the subject site. As detailed, the redistribution of floor area to the upper levels as opposed to the ground plane is considered to be a far superior outcome in terms of visual impact. That is, the amended development will provide a high level of permeability through the site and generous setbacks to the open spaces in order to limit the visual impact of the overall development, with a particular focus on the non-compliant elements. Furthermore, the considerable scale of the site and frontage to Pennant Hills Road establishes a 'micro' streetscape character which ensures that the non-compliant building height will not create any adverse visual impact to the locality.

The burden of insisting on strict compliance would result in the significant reduction of internal amenity and removal of a number of apartments, which would be an unreasonable and unnecessary outcome given the scale of the proposal is compatible with the character of the locality. The proposal is therefore consistent with objective (b), despite the height breach.

Objectives of the Zone

Clause 4.6(4)(a)(ii) requires that the consent authority be satisfied that the development is in the public interest because it is consistent with relevant zone objectives. The objectives of Zone R4, and a response as to how the proposal meets the objective is provided as follows:

- *To provide for the housing needs of the community within a high density residential environment.*

The proposed development will provide for the housing needs of the community through providing a mixture of apartment's typologies within a high density environment. Specifically, the proposal will include the provision of 620 high quality apartments across seven buildings located throughout the site.

- *To provide a variety of housing types within a high density residential environment.*

As above, the proposed development will provide for a variety of apartment types across the seven buildings on-site. This will include 125 x 1 bedroom, 321 x 2 bedroom and 174 x 3/4 bedroom apartments, including 29 adaptable dwellings.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

This proposal is not antipathetic to this objective. It is noted that the proposal will include the provision of a centre-based childcare centre and neighbourhood shops, which will in turn meet the day to day needs of residents on the subject site and surrounding locality.

- *To encourage high density residential development in locations that are close to population centres and public transport routes.*

The proposed high density development is located in close proximity to B2 Zoned land, public open spaces and the Carlingford Light Rail.

The proposed development, including those parts of the building that breach the height of buildings development standard, is not antipathetic to the objectives for the zone and for that reason the proposed variation is acceptable.



8. The concurrence of the Secretary has been obtained (Clause 4.6(4)(b))

The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

9. Whether contravention of the development standard raises any matter of significance for State or Regional environmental planning (Clause 4.6(5)(a))

Contravention of the maximum height development standard proposed by this application does not raise any matter of significance for State or regional environmental planning.

10. The public benefit of maintaining the development standard (Clause 4.6(5)(b))

As detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the maximum building height. As such there is no public benefit in maintaining strict compliance with the development standard. Whilst the proposed building height exceeds the maximum permitted on the site by 16.4m (60.7%) where the 27m height limit applies, and 6.8m (20.6%) where the 33m height limit applies, the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.

11. Conclusion

This written request has been prepared in relation to the proposed variation as it pertains to the 27m and 33m height of buildings development standard contained in Clause 4.3 of PHLEP 2012.

Having regard to all of the above, it is our opinion that compliance with the maximum height development standard is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives. The proposal has also demonstrated sufficient environmental planning grounds to support the breach. Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation supported.

Clause 4.6 Variation – Floor Space Ratio





Clause 4.6 Variation Statement – Floor Space Ratio (Clause 4.4)

1. Floor Space Ratio Standard

Clause 4.4 of the Parramatta (former The Hills) Local Environmental Plan 2012 (PHLEP 2012) prescribes the maximum floor space ratio for the site and refers to the Floor Space Ratio (FSR) Map. The relevant map [sheet FSR_004] indicates the maximum FSR permitted at the subject site is 2.3:1.

Of relevance to this application, the subject site includes RE1 zoned land which does not prescribe a maximum FSR and cannot be relied upon for its inclusion in site area. That is, *Clause 4.5 Calculation of floor space ratio and site area* of the PHLEP 2012 stipulates the following:

*(3) **Site area** In determining the site area of proposed development for the purpose of applying a floor space ratio, the **site area** is taken to be—*

(a) if the proposed development is to be carried out on only one lot, the area of that lot, or

(b) if the proposed development is to be carried out on 2 or more lots, the area of any lot on which the development is proposed to be carried out that has at least one common boundary with another lot on which the development is being carried out.

In addition, subclauses (4)–(7) apply to the calculation of site area for the purposes of applying a floor space ratio to proposed development.

*(4) **Exclusions from site area** The following land must be excluded from the site area—*

(a) land on which the proposed development is prohibited, whether under this Plan or any other law,

(b) community land or a public place (except as provided by subclause (7)).

In accordance with Clause 4.5(4) above, when determining site area for the proposed development for the purpose of applying FSR, the RE1 zone cannot contribute to site area given the proposal is prohibited within this zone. That is despite it being in private ownership and visually, and practically, forming part of the site. As such, the proposal is permitted a maximum GFA of 49,084m².



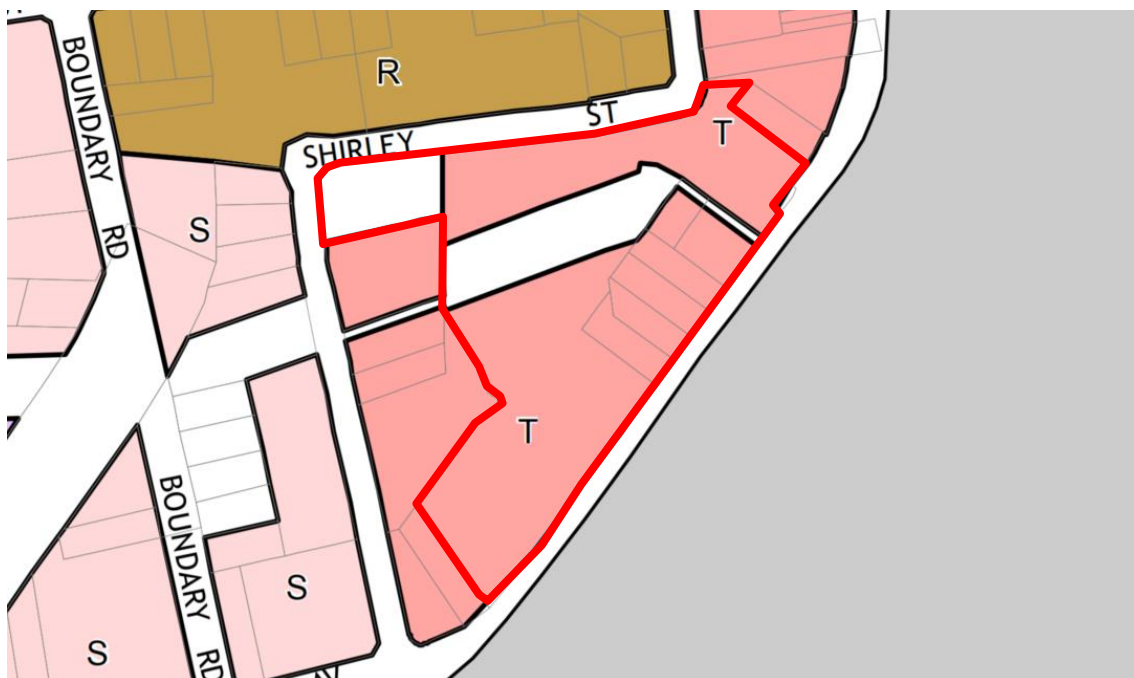


Figure 13 Extract from the Floor Space Ratio Map [T=2.3:1]

2. Proposed variation to FSR Development Standard

The floor space ratio of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area. Gross floor area is defined to mean:

*‘...**gross floor area** means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes—*

- (a) the area of a mezzanine, and*
- (b) habitable rooms in a basement or an attic, and*
- (c) any shop, auditorium, cinema, and the like, in a basement or attic,*
- but excludes—*
- (d) any area for common vertical circulation, such as lifts and stairs, and*
- (e) any basement—*
 - (i) storage, and*
 - (ii) vehicular access, loading areas, garbage and services, and*
- (f) plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and*
- (g) car parking to meet any requirements of the consent authority (including access to that car parking), and*



- (h) any space used for the loading or unloading of goods (including access to it), and*
- (i) terraces and balconies with outer walls less than 1.4 metres high, and*
- (j) voids above a floor at the level of a storey or storey above...*

The architectural plans indicate that the proposed development has a maximum FSR of 3:1 (64,370m²) and is therefore non-compliant. The extent of non-compliance is a maximum of 15,286m², which represents a variation of 31.1%.

The extent of this variation was previously permitted by the approved development on the site, which is an active consent. That is, the approved development under DA1103/2011/JP relied upon the floor area afforded by the RE1 zone, which has no FSR standard as shown in **Figure 13**. While this application seeks to provide a gross floor area that has been approved and established on the site, a variation request is necessary under this application.

The maximum FSR under Clause 4.4 is a “development standard” to which exceptions can be granted pursuant to Clause 4.6 of the LEP.

3. Clause 4.6 of PHLEP 2012

The objectives and provisions of Clause 4.6 are as follows:

(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 for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—

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

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

(a) the consent authority is satisfied that—

- (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
- (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*





- (b) *the concurrence of the Planning Secretary has been obtained.*
- (5) *In deciding whether to grant concurrence, the Planning Secretary must consider—*
 - (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*
- (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 E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 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.*
- (7) *After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- (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.*
 - (ca), (cb) *(Repealed)*

The development standards in Clause 4.4 are not “expressly excluded” from the operation of Clause 4.6.

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of Subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of Subclauses 4.6(3) & (4) in order to demonstrate to the consent authority that the exception sought is consistent with the exercise of “an appropriate degree of flexibility” in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by Subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, Subclause 4.6(6).

Clause 4.6 of the LEP is similar to the long-standing *State Environmental Planning Policy No 1 — Development Standards* (SEPP 1).





From its earliest days it was established that SEPP 1 may be applied to vary development standards even when the variation could not be regarded as minor: *Michael Projects v Randwick Municipal Council* (1982) 46 LGRA 410, 415).

The Court of Appeal considered the issue in *Legal and General Life v North Sydney Municipal Council* (1990) 69 LGRA 201. In that matter North Sydney Council had approved a SEPP 1 objection and the decision was subject to third party legal challenge.

The applicable floor space ratio control was 3.5:1, but — as a consequence of upholding the SEPP 1 objection — the approved floor space ratio was 15:1 (**a variation to floor space of 329 per cent**). The applicable height control was five storeys whereas the approved height was 17 storeys (**a variation of 240 per cent**).

The Court approved the following statement by the then Chief Judge of the Land and Environment Court (in *Legal and General Life v North Sydney Council* (1989) 68 LGRA 192, 203):

The discretion vested in councils under SEPP No 1 is wide and, subject to limitations found in the instrument itself and its relation to the Environmental Planning and Assessment Act 1979, is unconfin ed.

The Court upheld the validity of the Council's decision.

Clause 4.6 of LEP is in similar terms to SEPP 1 in this respect. Relevantly, like SEPP 1, there are no provisions that make necessary for a consent authority to decide whether the variation is minor. This makes the Court of Appeal's decision in *Legal and General Life* equally applicable to clause 4.6. There is no constraint on the degree to which a consent authority may depart from a numerical standard under clause 4.6 (*GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216 at [85]).

It is not necessary to consider case studies in order to address the above issue, as each case ultimately turns on its own facts. However, decisions of the Land and Environment Court are informative, as they demonstrate how the flexibility offered by clause 4.6 works in practice. Some examples are as follows:

- In *GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216, **a height exceedance of 103 per cent** was approved, along with a **floor space ratio exceedance of 44.7 per cent**.
- In *Baker Kavanagh Architects v Sydney City Council* [2014] NSWLEC 1003, the Land and Environment Court granted a development consent for a three-storey shop top housing development in Woolloomooloo. In this decision, the Court approved a **floor space ratio variation of 187 per cent**.
- In *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582, the Court granted a development consent for a residential flat building. In this decision, the Court approved a floor space ratio variation of 85 per cent (from 0.65:1 to 1.21:1).
- In *Abrams v Council of the City of Sydney* [2019] NSWLEC 1583, the Court granted development consent for a four-storey mixed use development containing 11 residential apartments and a ground floor commercial tenancy with **a floor space ratio exceedance of 75 per cent** (2.63:1 compared to the permitted 1.5:1).
- In *Moskovich v Waverley Council* [2016] NSWLEC 1015, the Land and Environment Court approved a residential flat building in Bondi with a floor space ratio of 1.5:1. The development standard was 0.9:1. **The floor space ratio exceedance was around 65 per cent.**
- In *Edmondson Grange Pty Ltd v Liverpool City Council* [2020] NSWLEC 1594, the Court granted a development consent for three residential flat buildings. In this decision, the Court approved a **floor space ratio variation of 59 per cent** (from 0.75:1 to 1.19:1).





- In *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386, the Land and Environment Court approved a residential flat building in Randwick with a **55 per cent exceedance of the height limit** (at its highest point) and a **20 per cent exceedance of the floor space ratio control**.
- In *Landco (NSW) Pty Ltd v Camden Council* [2018] NSWLEC 1252, the Land and Environment Court granted development consent for a land subdivision with clause 4.6 variations of between **47-51 per cent on the minimum 450m² lot size** (allowing lots sizes ranging from 220 to 240m²).
- In *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112, the Court granted development consent to a six-storey shop top housing development with a **floor space ratio exceedance of 42 per cent** (3.54:1 compared to the permitted 2.5:1).
- In *Artazan Property Group Pty Ltd v Inner West Council* [2019] NSWLEC 1555, the Court granted development consent for a three-storey building containing a hardware and building supplies use with a **floor space ratio exceedance of 27 per cent** (1.27:1 compared to the permitted 1.0:1).
- In *Season Group Pty Ltd v Council of the City of Sydney* [2016] NSWLEC 1354, the Land and Environment Court granted development consent for a mixed use development on the basis of a clause 4.6 request that sought a **21 per cent height exceedance over a 18-metre building height standard**.

Of relevance, Parramatta City Council has previously approved developments with considerable variations, demonstrating that Council do not prescribe a limit under Clause 4.6 of the LEP. As such, the variations proposed are not limited in any way and are capable of support for the reasons set out in this request.

It is hereby requested that a variation to this development standard be granted pursuant to Clause 4.6 so as to permit a maximum floor space ratio of 3:1 which equates to a numerical variation of 0.7:1 and represents a variation of 31.1%.

4. Compliance is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a))

In *Wehbe V Pittwater Council* (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. This list is not exhaustive. It states, inter alia:

“An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.”

The judgement goes on to state that:

“The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on numbers 1, 3 and 4 for the purposes of this Clause 4.6 variation [our underline]):

- 1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;**





2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*
5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 16), Preston CJ refers to *Wehbe* and states:

"...Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary."

Clause 4.6(3)(a) requires that the written request to vary a development standard demonstrate that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case. Requiring strict compliance with the standard is unreasonable or unnecessary because:

- The development is consistent with the standard and zone objectives, even with the proposed variation (refer to Section 7 below);
- The development will provide an increase in density and if compliance is required, the object would be thwarted;
- Strict compliance is unreasonable or unnecessary as the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard. Specific to the subject site, the consent authority approved DA1103/2011/JP with a departure from the FSR development standard. In this regard, it is considered that the FSR standard which applies to the subject site has been abandoned and/or destroyed by the consent authority, given the extent of variation approved. Therefore, the proposal seeks approval for an overall FSR consistent with DA1103/2011/JP. Following this, it is relevant to note that DA1103/2011/JP is an active consent. As the approved consent on the site has not yet lapsed, abandonment of the standard remains applicable to the proposed development. That is, the approved development can be constructed and establishes the density on the site. As such, given the proposal seeks to maintain the density as approved, strict compliance is unreasonable and unnecessary as the standard has been abandoned and/or destroyed;
- there are no additional significant adverse impacts arising from the proposed non-compliance; and
- important planning goals are achieved by the approval of the variation.

On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

5. Sufficient Environmental Planning Grounds (Clause 4.6 (3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard. Specifically, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 24) states:





*The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].*

The assessment of this numerical non-compliance is also guided by the recent decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 whereby Justice Pain ratified the decision of Commissioner Pearson. The following planning grounds are submitted to justify contravening the maximum FSR:

1. Previous Approval

- a. The previous approval on the subject site (DA1103/2011/JP) relied upon the land zoned Open Space 6(a) (now RE1) under the previous BHLEP 2005 for the purposes of calculating FSR and to demonstrate compliance with the 2.3:1 standard. Specifically, DA1103/2011/JP contained a site area of 23,482m² (when including the RE1 land) and was approved with a FSR of 2.26:1. Whilst the applicant agrees that this may not be a technically correct approach, it supports the merit of maintaining this method of calculation to deliver a development with a bulk and scale which is proportionate to the overall site area as originally approved. It is noted that the difference in permitted GFA is a result of Nos. 263-273 Pennant Hills Road being included in this application, as they were previously excluded under DA1103/2011/JP. Applying the same methodology of site calculation to the approved development, the proposal would comply with the FSR control.
- b. In the Land and Environmental Court Judgement, *Abrams v The Council of the City of Sydney (No 2)* [2018] NSWLEC 85 (8 June 2018) (*Abrams v CoS*), Robson J reinforced that a previous development consent is a relevant “instrument” which requires consideration under the EP&A Act. That is, a previous development application approved on a site should be considered for a new development application. Paragraphs 35-38 of *Abrams v CoS* is reproduced below:

‘...35. In MLC Properties at 58-9, Lloyd J said:

*A notice of determination of a development application is clearly an “instrument” as that word is ordinarily understood. It is a formal document having the capacity to affect legal rights and obligations. An instrument is not ordinarily limited to a document of a legislative character. It is at least arguable that the definition in s 3 is an inclusive one. The ordinary meaning of “instrument” may be incorporated into the definition by the words “includes an instrument ...”. In *Sutherland Shire Council v Moir* (1981) 49 LGRA 105, Kearney J held that a deposited plan was an “instrument” within the meaning of s 339(2) of the Local*

Government Act 1919 (NSW). There is, moreover, a suggestion by Cole J in Sloane v McDonald Industries (Sales) Pty Ltd (1989) 17 NSWLR 86 at 101 that a form prescribed by a regulation is an instrument within the meaning of s 3. Although there is some force in Mr Craig's submission, it is to be noted that the Interpretation Act defines "make", in relation to an instrument, as including "issue" and "grant" (s 21). I am, accordingly, not persuaded that Wechsler was wrongly decided. In other words, I am not prepared to depart from the findings of Talbot J in Wechsler, namely, that a notice of determination issued in the prescribed form under s 92(1) of the Environmental Planning and Assessment Act is an instrument as defined in s 3 of the Interpretation Act. Accordingly, I should apply s 32(2) of the Interpretation Act to the development consent here.

36. I accept his Honour's reasoning and find in accordance with the agreed position of the parties that a development consent is an "instrument".

37. Section 39(4) of the LEC Act requires the Court on appeal to have regard to "any instrument" made under a relevant Act. It is clear that "any instrument" does not mean "every instrument". Such a reading of s 39(4) would give the section an absurdly wide operation. As Mr Pickles, senior counsel for Council, observed, there are many instruments made under Acts relevant to the assessment of development applications which would clearly have minimal or no relevance to the exercise of the Court's powers on appeal.

38. I find therefore that s 39(4) only applies to relevant instruments made under a relevant Act. In the current circumstances, the prior consents pass this hurdle because they are relevant to the question of whether the FSR development standard had been "abandoned"...'

- c. In the context of the above, DA1103/2011/JP is a relevant and specific consideration in assessing the merits of the current application, and establishing the acceptable density of development on the subject site. The current proposal provides a proportional increase in floor area when including the allotments previously excluded and is therefore consistent with the density established by the previous approval.
- d. Following this, whilst the proponent has the ability construct the development as approved under DA1103/2011/JP, there are several concessions when compared to the current application, namely, the inferior urban, architectural and public domain outcomes. In this regard, the proposed variation request will provide distinct public benefits, consistent with the density already established by DA1103/2011/JP.
- e. The proposed development will deliver numerous benefits when compared to the previously approved, as detailed below:
 - The proposal will accommodate non-residential uses which will support future residents and the general public, not envisaged within the approved development;
 - The proposal will significantly improve the internal road and pedestrian access layout, including through-site links;



- The provision of open spaces and relationship of built form to these spaces will be substantially improved;
- The proposal rationalises the location, site planning and design of the buildings across the entire site;
- The proposal improves the relationship to the public domain; and
- The proposal improves compliance with the Apartment Design Guide, including floor to ceiling heights and building separation.

2. Voluntary Planning Agreement

- Section 4.15(1)(ia) of the EP&A Act states that any planning agreement (entered into under section 7.4) is a matter of consideration for a development application. The subject site benefits from an existing voluntary planning agreement (VPA) established under DA1103/2011/JP and applies to any approved, current and future application under Clause 12 of the VPA. Therefore, the existing VPA applies to the proposed development (as modified) and is within the public interest given it will embellish and dedicate the RE1 zoned land, provide public domain upgrades and includes additional monetary contributions. As the original approval established an increase in density supported by the public benefit afforded by the VPA, this is similarly maintained by the current application.
- The proposal will provide a proportional increase in density and will deliver the above-mentioned public benefits through the VPA without any adverse impact the character of the locality or amenity of surrounding development. In fact, it would be contrary to deny the variation and require strict compliance as the proponent would be forced to either construct the current approval which will result in an inferior form as set out above, and/or lodge a separate application for the remaining R4 zoned land, seek the consent authority to acquire the RE1 land, and therefore limit the public benefits afforded by the VPA and delivery of the subject application. Therefore, to ensure that public interest is achieved, the gross floor area established by the approved development must be considered.

3. The RE1 zone forms part of the visual and physical character of the site

- Whilst the RE1 land is not included for the purpose of FSR calculation under Clause 4.5 of PHLEP 2012, this land, both visually and practically, forms part of its overall scale and character. For this reason, it is considered that the RE1 land contributes to the form and density of development which can be reasonably anticipated on the subject site, given its significant area and dimensions, frontage characteristics, single ownership structure and highly accessible location. This is consistent with the development as approved under DA1103/2011/JP, although with a significantly improved urban and architectural character.
- The amended proposal therefore provides an overall form and density which would be expected, visually and contextually, if the site was not burdened by the privately held RE1 zone, as



previously approved. That is, the bulk, scale and character of the development is not unlike what would be expected if the land (which is zoned RE1) was designed as a green open space forming part of a master planned development. Despite non-compliance, the proposal focuses on enhancing the public open spaces, character of the development and amenity of surrounding locality despite the increase in density.

4. Site Characteristics, Location and Accessibility

- a. Regardless of the planning grounds identified in 1 to 3 above, the variation to FSR is entirely reasonable when considering the scale of the site, its prominent location, highly accessible nature and single ownership structure. That is, the site is capable of the increase in density in that it will deliver a distinct public benefit by providing high quality residential accommodation on a highly accessible site, for which the planning controls promote a significant increase in development density. The site's proximity to the Carlingford light rail, business zoned land and public open spaces, in conjunction with its considerable size and frontages, permits an increase in density without any adverse impact on the character or amenity of the locality. There would be no public benefit realised by requiring strict compliance as the FSR is dispersed across the site and relates appropriately to the character of Pennant Hills Road.
- b. The site's frontage to Pennant Hills Road allows for the delivery of landmark built form following the wide frontage to the road corridor in a manner that positively relates to the significant road width and intensity of this arterial road, and does not provide for any significant adverse amenity impacts. The distribution of FSR on the site sensitively addresses the northern boundary to Shirley Street, providing for additional mass and height on the less sensitive part of the site fronting Pennant Hills Road.
- c. The floor space non-compliance is carefully considered and reflects the transitioning nature of the locality and objectives of the Carlingford Precinct. The proposed floor space will deliver additional residential and non-residential uses within proximity to varying business zones, public open spaces and public transport options. The FSR variation does not bring with it a density of development that is greater than what is anticipated and permitted for the site, when considered against DA1103/2011/JP. This is due to the unique characteristics of the site which Clause 4.4 and Clause 4.5 of the LEP do not anticipate.
- d. Importantly, the site is anticipated to undergo significant change as it is the largest, single owned residential allotment in the Carlingford Precinct. Therefore, despite numerical non-compliance, the proposal will retain its place within the desired hierarchy of built form throughout the locality as it supported by its characteristics. As originally approved, the proposed development adopts a similar typology (albeit significantly improved) which has been increased as a result of the allotments acquired as part of this development.



5. The proposal demonstrably achieves design excellence

- a. The urban and architectural design of the proposal, including building massing and envelopes, represents a significant improvement when compared to the DCP concept masterplan and approved development on the site. It is beneficial to pursue the built form of the subject proposal compared with the previously approved scheme which is inferior in design quality and public benefit.
- b. As shown in the Design Report prepared by *FK*, the building envelope is entirely compatible with the streetscape character of the locality (both existing and future). Whilst non-compliant with FSR, the proposal achieves an urban design outcome which will significantly improve the character of the locality and public open spaces through the distribution of additional floor area along the higher elevated portion of Pennant Hills Road. Importantly, the provision of additional residential accommodation on these levels achieves the highest level of amenity for future occupants through outlook, ventilation and solar access, without any adverse impacts to the surrounding locality.
- c. When viewed by the casual observer, the additional GFA will not be visually or physically obtrusive by virtue of the scale, frontage widths, and delivery public domain improvements, including open spaces, internal roadways and through-site links. That is, building envelope, bulk and scale of the development is proportionate to the overall site area and is appropriately located to mitigate impact and achieve design excellence. It would be contrary to the objectives of the Carlingford Precinct to deny the provision a well-articulated urban form which is consistent with the bulk and scale of the locality, despite the non-compliance.
- d. To ensure design excellence is achieved, the proposed variation to FSR will not have any impact on the site coverage, communal open space and deep soil area calculations. That is, the amended proposal is predominantly compliant with regards to the Apartment Design Guide and Carlingford Precinct DCP. The proposal will deliver high quality public open spaces to align with the Precinct objectives, whilst minimising impact on the streetscape and therefore achieve design excellence.

6. The distribution of additional floor area does not result in any adverse impacts to the character of the locality

- a. The non-compliant FSR is purposefully focused towards Pennant Hills Road within the upper levels. The additional GFA is situated away from natural ground level in order to maintain a significant curtilage around the buildings on the subject site where they interact with the public open space, various communal areas and vehicular and pedestrian access. Importantly, the non-compliant floor area is setback appropriately from Pennant Hills Road (per the DCP) and incorporates appropriate building separation (in accord with the ADG) as to mitigate impact. The amended proposal provides open spaces and access points beyond what is anticipated by the LEP and DCP despite the variation. Importantly, relocation of floor area to natural ground





will heavily constrain the site permeability and accessibility and effectively “privatise” the open spaces.

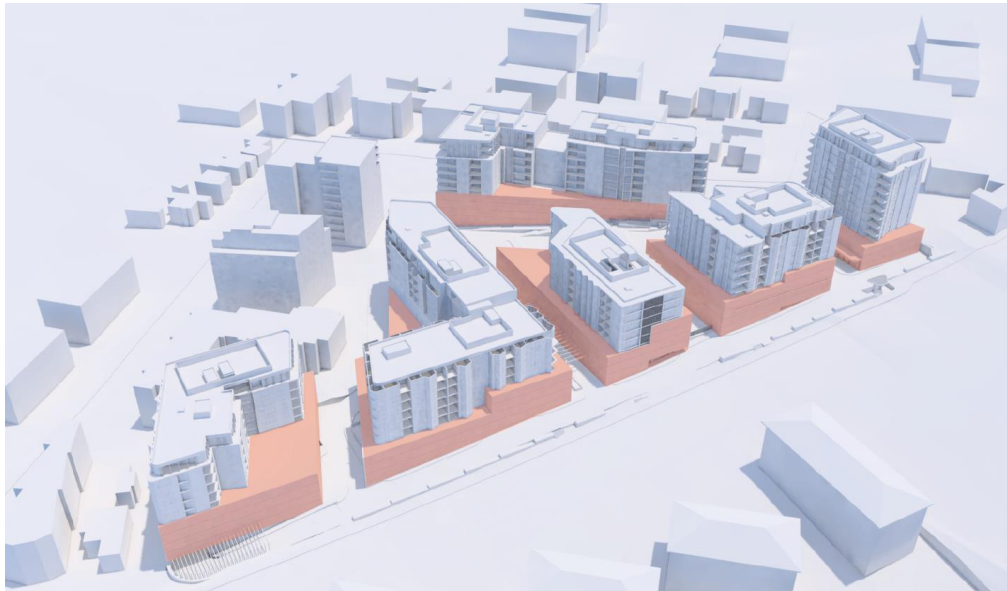


Figure 14 Potential relocation of floor area to ground floor plane and lower levels which would be inferior

- b. As demonstrated in **Figures 15** and **16** below, the additional FSR is located on the upper levels fronting a highly trafficked roadway away from Shirley Street and the ground plane, as to align with the future development envisaged in the locality and objectives of the Carlingford Precinct. The variation does not bring with it a form of development on the site that is noticeably larger than anticipated by the site characteristics and integrates a high degree of articulation through a defined base, middle and top with a variety of landscaping.



Figure 15 Photomontage of proposal viewed from the south on Pennant Hills Road





Figure 16 Perspective of proposal viewed from the north of Pennant Hills Road

- c. The proposal is also compatible with the recently approved, and currently under construction, ten to eleven storey developments to the west along Shirley Street and further to the west around the Carlingford Light Rail. Along the Shirley Street boundary, the proposal provides a built form as envisaged by the LEP and is not affected by the non-compliant floor area. To the south of the subject site on the opposite side of Pennant Hills Road, the older four storey residential flat buildings are vastly different to the proposed contemporary development which assists in mitigating the extent of FSR non-compliance. That is, the differentiation in built form (in addition to the nature of Pennant Hills Road) skews the extent of non-compliance.

7. Orderly and Economic Use of Land

- a. The proposal provides for the orderly and economic use of the land when considering the highly accessible location, overall scale and unique characteristics of the site. These characteristics support the proposed variation and it would be entirely contrary to the “public interest” to remove a considerable quantum of residential apartments to only achieve numerical compliance, given the approved development (DA1103/2011/JP) already permits an increase in density, as is proposed. That is, the site is capable of supporting the uplift in density without any adverse impact to the character of the locality, public domain or amenity of surrounding properties. It is also prevalent to note that strict compliance would also compromise the significant public benefits afforded by the VPA.
- b. Further to the above, there are clear social benefits of providing additional residential accommodation, including adaptable dwellings, within a highly sought after and strategic location and should be given substantial weight in the consideration of the variation request. The proposed development achieves an environmental planning outcome by providing additional

housing within a high density zone, in close proximity to public transport and various land uses without having an adverse impact on the amenity of adjoining properties and being compatible with the character and built form of the locality.

8. Minimal Environmental Impacts

- a. It is considered that there is an absence of any significant material impacts of the proposed non-compliance on the amenity of the environmental values of the locality, the amenity of future building occupants and on area character. Specifically, the extent of non-compliance with the FSR development standard:
 - i. The FSR breach creates no significant additional overshadowing when compared to a compliant building envelope. When considering the solar gain of the neighbouring properties, the proposal will maintain in excess of three hours of solar access to ensure the non-compliant FSR will have no bearing on the amenity of the neighbouring properties. The amended shadow diagrams demonstrate that the building envelope (when considering the additional FSR) is no greater than a compliant envelope or the approved development. That is, the properties directly to the west of the subject site and on the opposite side of Pennant Hills Road to the south will not be adversely impacted by the proposal. As such and when considering the overshadowing against the backdrop of the applicable planning controls, the extent of overshadowing is created by the additional FSR is insignificant;
 - ii. The FSR breach does not result in any significant additional privacy impacts. That is, the building has been designed to ensure primary living areas are orientated to look over the adjacent street frontages and public open space to ensure overlooking is minimised as far as practicable. Where residential accommodation opposes the neighbouring properties, this is provided with predominately compliant building separation as envisaged by the ADG Design Criteria. This also applies to the separation distances between the proposed buildings on the subject site. As such, when considered against the backdrop of the applicable planning controls, the extent of privacy impacts created by the additional FSR is considered to be insignificant or nil;
 - iii. The additional FSR does not create any significant additional view loss because no significant views are enjoyed across the subject site currently; and
 - iv. The additional FSR is consistent with that already approved and established on the subject site, although with a substantially better environmental, design and planning outcomes provided as part of this application.

9. Other

- a. The proposed development meets the objectives of the development standard and meets the objectives of the R4 High Density Residential zone (as further detailed in Section 7 below);



- b. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:
 - i. The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilised site for residential uses (1.3(c));
 - ii. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).
- c. The variation to the height of buildings development standard will give better effect to the aims of *State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development* (SEPP 65). In particular:
 - i. The proposed variation will provide more sustainable housing in social and environmental terms and better achieve urban planning policies (clause 2(3)(a)(i));
 - ii. to achieve better built form and aesthetics of buildings and of the streetscapes and the public spaces they define (clause 2(3)(b));
 - iii. to contribute to the provision of a variety of dwelling types to meet population growth (clause 2(3)(f); and
 - iv. Approval of the proposed variation will support a variety of housing types by providing a well-located and compact development that will be a better choice for families (clause 2(3)(g)).

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development. Specifically, the subject site contains a previous approval and RE1 Public Recreation zone in which the proposed development is prohibited and therefore the site area afforded by this zone must be excluded per Clause 4.5 of the PHLEP 2012. Despite this, it is considered the location and characteristics of the site are capable of accommodating an increase in density (already permitted and established on the site) which is demonstrably within the public interest. Insistence on strict compliance with the FSR control will result in the removal of a considerable number of residential apartments which will reduce the provision of accommodation within close proximity to numerous land uses and public transport and is a disproportionate outcome given limited the impacts of the proposal. This will also force the developer to deliver the previously approved, substantially inferior development and risk the benefits made under the modified VPA.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height





development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

6. The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), Clause 4.6(4)(a)

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a) in Section 4 above (and furthermore in terms of meeting the objectives of the development standard this is addressed in 7a below). Clause 4.6(3)(b) is addressed in Section 5 above.

The second opinion of satisfaction, in clause 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under clause 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in Section 7 below.

7. The proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out (Clause 4.6(4)(a)(ii))

Objectives of Development Standard

The objectives of Clause 4.4 per the PHLEP 2012 are as follows:





(a) to ensure development is compatible with the bulk, scale and character of existing and future surrounding development,

(b) to provide for a built form that is compatible with the role of town and major centres.

In order to address the requirements of Subclause 4.6(4)(a)(ii), the objectives of Clause 4.4 are addressed in turn below. It is noted that *Objective (b)* is not relevant to the proposal as the subject site is not within a town or major centre. However, given the DCP identifies this as a Key Site 'Block 17: Janell Crescent' this has been addressed for completeness.

Objective (a) to ensure development is compatible with the bulk, scale and character of existing and future surrounding development,

It is noted that objective (a) refers to being "compatible" with adjoining development. It is well established that "compatible" does not promote "sameness" in built form but rather requires that development fits comfortably with its urban context. Of relevance to this assessment are the comments of Roseth SC in *Project Venture Developments Pty Ltd v Pittwater Council* [2005] NSWLEC 191:

"22 There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve."

In accordance with the objective, the subject site is located within the Carlingford Precinct under *Part D, Section 12* of The Hills DCP 2021. Specifically, the subject site is identified as a key site known as *Block 17 Janell Crescent*. The desired future character of these key sites is detailed within Section 2.2 Key Sites of the DCP and states:

- *Provide landmark buildings denoting the core of an urban village centred around the train station, open space, pedestrian and cycle connections, and community facilities.*
- *Provide street level active uses and human scale in the village centre.*
- *Provide a substantial number of residential units in close proximity to the train station.*
- *Contribute to the local open space network while ensuring development applies water sensitive urban design principles.*
- *Provide open spaces to act as place making elements at a neighbourhood scale and the focus for outdoor activity in the areas of Janell Crescent.*
- *Provide landmark buildings at key gateways to the Precinct on Pennant Hills Road including the Bunnings site and the service station site.*

The amended proposal has been designed to ensure compatibility existing and desired future character of the locality, despite non-compliance. The proposal has been designed with a FSR which has been permitted and established by the development as approved under DA1103/2011/JP, with a proportionate increase to account for the additional allotments. Importantly, DA1103/2011/JP is an active consent which establishes the bulk and scale of development on the site. That is, the location, perceivable site area and frontage characteristics support the increase in density without any adverse impacts to the locality. The proposal delivers a massing that takes into account the scale of the site and sets an improved streetscape, public open space and wider character.

In addition to the above, the existing buildings in the locality have been considered as part of the proposed application. Directly adjoining the site to the west are an eclectic mix of developments comprising lower density developments, older four storey and more recently approved ten to eleven storey residential flat buildings. Where the development adjoins





the properties to the south-west, the non-compliant FSR will not be readily apparent as this is situated along Pennant Hills Road and is proportionate to the scale of the site. Importantly, the proposal is consistent with the scale of the approved residential flat buildings and delivers high quality public open spaces throughout the site to ensure an appropriate relationship to these properties. When considering the adjoining properties to the north-east, this contains an existing parking area and two storey commercial premises. It is reasonably anticipated that these will be amalgamated with the properties further afield and redeveloped over time and provide a bulk and scale which will reinforce the character of the proposed development. It is imperative to note that further to the north-east, the locality also contains higher density nine to ten storey residential flat building developments.

To the north and west on the opposite side of Shirley Street are an eclectic mix of buildings, including low density residential dwellings, multi-dwelling housing and four to six storey residential flat buildings, in which the amended proposal is consistent. The bulk and scale of the development has been orientated to Pennant Hills Road to ensure the non-compliance will not be readily perceivable or visually obtrusive along Shirley Street. It is also noted that further to the west and centric to the Carlingford Light Rail are high density developments with a maximum height of 57m and FSR of 4:1 and 5:1.

In accordance with the above, the proposal provides an appropriate transition to the properties to the west, north and north-east by virtue of building articulation, provision of open spaces and specified siting of additional FSR along Pennant Hills Road. When considering the existing four storey residential flat buildings and open spaces on the opposite side of Pennant Hills Road, the separation of the built forms limits any adverse impact created by the non-compliance. That is, the amended proposal provides a DCP compliant front setback with appropriate building separation as envisaged by the ADG. This ensures that despite technical non-compliance, the built form will not be visually obtrusive or jarring. Furthermore, the proposal locates the additional FSR away from the ground floor plane and within the upper levels of the development. This represents the best outcome with regards to the objectives of the Carlingford Precinct, character of the locality and amenity.

Given the above, the burden of strict compliance would result in the removal of numerous apartments which would be an unreasonable and unnecessary outcome given that the bulk and scale of the proposal is consistent with the desired character, location, scale and dimensions of the subject site. It is considered that the amended proposal will positively contribute to the existing and future character of the Carlingford Precinct when viewed with the buildings along Pennant Hills Road and Shirley Street, whilst providing high quality public open spaces not affected by the non-compliance. Given the transition density of the locality and current eclectic mix of buildings, the proposal has been designed as a contemporary structure. The defined base, articulated middle and recessed upper levels will reduce the sense of perceived bulk and scale and ensure compatibility character of the locality.

In accordance with the above, the proposal directly responds to the objectives set by the Key Sites within the Carlingford Precinct in the DCP, as follows:

- The amended proposal is of a scale that is appropriate to its location and proximity to shops, services and public transport. It will provide for a variety in housing choices that is in demand in the locality. As discussed, the amended building envelope is considered to provide an appropriate urban design response to the constraints of the site, being the topography and location of the RE1 zone, and is of a scale that is proportionate to the overall site. The proposal achieves a visual outcome that is architecturally unique, interesting and functional, and will serve and as a landmark along Pennant Hills Road. It has a contemporary appearance and purpose that has been designed to conceal the non-compliant FSR and ensure a compatible streetscape character and relationship to neighbouring properties
- The amended proposal complements the siting, scale and proportions of the subject site, with a strong focus on the provision of public open spaces. The additional FSR is located away from the ground plane in order to contribute to the open space network as envisaged by the DCP.





- Further to the above, the revised site arrangement and building design ensures that permeability of the site is achieved which encourages activation of the open spaces. This is further bolstered by the provision of alternative uses, including the neighbourhood shops and a childcare centre, which will activate these spaces. As detailed, the proposed site arrangement ensures that the additional FSR will achieve the objective of activating the open spaces on the subject site through the provision of generous ground plane spaces.
- As identified, the proposal will provide a high quality contemporary development which will address Pennant Hills Road and Shirley Street alike. The proposal will provide for a landmark development along Pennant Hills Road.

Therefore objective (a) is achieved.

Objective (b) to provide for a built form that is compatible with the role of town and major centres.

As detailed, the subject site is not located within a town or major centre per the DCP. However, the subject site is located within *Block 17: Jannell Crescent* per the Carlingford Precinct DCP in which the development has been designed to provide a built form as is envisaged on the subject site. This is described in detail within Objective (a) above, whereby the proposal provides a high quality, contemporary gateway development. As described, the amended proposal will provide a development which is proportionate to the scale of the site and includes residential and non-residential uses in close proximity to public transport options and various land uses. The proposal does not rely upon the RE1 zoned land as the development is reflective of the site's unique characteristics and highly accessible location. Accordingly, although the subject site is not identified as within town or major centre, the proposal will provide a high quality gateway site as envisaged by the DCP.

As such, the proposal is acceptable with regards to Objective (b).

7b. Objectives of the Zone

Clause 4.6(4)(a)(ii) also requires that the consent authority be satisfied that the development is in the public interest because it is consistent with relevant zone objectives. The objectives of Zone R4, and a response as to how the proposal meets the objective is provided as follows:

- *To provide for the housing needs of the community within a high density residential environment.*

The proposed development will provide for the housing needs of the community through providing a mixture of apartment typologies within a high density environment. Specifically, the proposal will include the provision of 620 high quality apartments across seven buildings located throughout the site. The additional FSR provides an appropriate increase of housing which will meet the needs of the community.

- *To provide a variety of housing types within a high density residential environment.*

As above, the proposed development will provide for a variety of apartment types across the seven buildings on-site. This will include 125 x 1 bedroom, 321 x 2 bedroom and 174 x 3/4 bedroom apartments, including 29 adaptable dwellings.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

This proposal is not antipathetic to this objective. It is noted that the proposal will include the provision of a centre-based childcare centre and neighbourhood shops, which will in turn meet the day to day needs of residents on the subject site and surrounding locality. As discussed, the additional FSR improves the provision of facilities across the subject site, including the supermarket as desired through the Planning Proposal.

- *To encourage high density residential development in locations that are close to population centres and public transport routes.*





The proposed high density development is located in close proximity to B2 Zoned land, public open spaces and the Carlingford Light Rail. The additional FSR will improve the provision of dwellings close proximity to numerous public transport options.

As such, the proposed development is consistent with the objectives of Zone R4 in that it will result in a development within a highly accessible area that will provide increased residential accommodation and additional uses within the locality. The FSR variation is not antipathetic to the objectives for the zone and for that reason the proposed variation is acceptable.

8. The concurrence of the Secretary has been obtained (clause 4.6(4)(b))

The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

9. Whether contravention of the development standard raises any matter of significance for state or regional environmental planning (Clause 4.6(5)(a))

Contravention of the maximum FSR development standard proposed by this application does not raise any matter of significance for State or regional environmental planning.

10. The public benefit of maintain the development standard (Clause 4.6(5)(b))

As detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the maximum FSR. As such there is no public benefit in maintaining strict compliance with the development standard. Whilst the proposed building FSR exceeds the maximum permitted on the site by 15,286m², the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.

11. Conclusion

Having regard to all of the above, it is our opinion that compliance with the maximum FSR development standard is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives. Furthermore, it is also considered that the maximum FSR development standard has been abandoned and/or destroyed by the consent authority as the previous application approved on the subject site, under DA1103/2011/JP, was approved with a similar FSR variation. The proposal has also demonstrated sufficient environmental planning grounds to support the breach.

Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation supported.

