

Clause 4.6 Variation

Floor Space Ratio

Clause 4.4 – FSR – Parramatta (Form The Hills) Local Environmental Plan 2012

Proposed Shoptop Housing
9-11 Thallon Street, Carlingford NSW

Project 21-085
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Revision B

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1. Introduction

1.1. Overview

This is a formal written request that has been prepared in accordance with Clause 4.6 of the Parramatta *(Former The Hills) Local Environmental Plan 2012 (the LEP)* to justify a variation to the Floor Space Ratio development standard imposed by clause 4.4(2) of the LEP sought in the subject application.

The proposal seeks consent for a shoptop housing development at 9-11 Thallon Street, Carlingford. The proposed development is 12 storeys and includes a landscaped rooftop garden with lift and stair access.

1.1.1. The standard to be varied – Clause 4.4 FSR

Clause 4.4 of the LEP and the associated map prescribes a maximum FSR of 1.99:1 for the site.

1.1.2. Nature and extent of the variation

The proposed development seeks a variation to the FSR control. The proposed FSR is 3.13:1 (GFA = 9,936 m².) The variation is 57.4%.

1.2. Clause 4.6 framework and relevant case law

The proposal seeks a variation to the building height control in clause 4.4 of the *Parramatta (Former The Hills) Local Environmental Plan 2012*. The objectives of clause 4.4 are:

- (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.*

The site is zoned R1 General Residential with proposed shoptop housing permitted with consent. The R1 zone objectives are:

- To provide for the housing needs of the community.*
- To provide for a variety of housing types and densities.*
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- To enable other land uses that support the adjoining or nearby commercial centres and protect the amenity of the adjoining or nearby residential areas.*

Clause 4.6 of the LEP states:

4.6 Exceptions to development standards

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

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

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

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

(3) Development consent must not be granted 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 C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

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

(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,
- (caa) clause 5.5.
- (ca), (cb) (Repealed)

This document constitutes the written request referred to in Clause 4.6(3) in relation to the Development Application's proposed breach of the height of building development standard. This request has been prepared having regard to the latest authority on Clause 4.6, contained in the following guideline judgments:

- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118
- *RebelMH Neutral Bay Pty Ltd v North Sydney Council* [2019] NSWCA 130

In summary, the principles arising from the above matters are:

- a. In as far as they are relevant, there are five methods of establishing that compliance is unreasonable or unnecessary identified by Preston J in *Wehbe* that remain relevant. However, in order to satisfy the unreasonable and unnecessary test in Clause 4.6(3)(a), you need something more than Method 1 in *Wehbe*, because that test is now encompassed in Clause 4.6(4)(a)(ii) where consistency with the objectives of the standard is a mandatory precondition.
- b. Preston CJ in *Initial Action* held (at paragraph 15) that for there to be power to grant development consent for a development that contravenes a development standard, cl 4.6(4)(a) requires that the Court, in exercising the functions of the consent authority, be satisfied that the written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)) and adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)). The Court must also be satisfied that the proposed development will be consistent with the objectives of the zone and with the objectives of the standard in question, which is the measure by which the development is said to be in the public interest (cl 4.6(4)(a)(ii)).
- c. At paragraphs 23 and 24 in *Initial Action*, Preston CJ held that with respect to "environmental planning" grounds, although not defined, the grounds should relate to the subject matter, scope and purpose of the EP&A Act, including the objects in s. 1.3 of the Act. Further, in order that the environmental planning

grounds proffered in the written request are “sufficient”, firstly the focus should be on the aspect or element of the development that contravenes the development standard, rather than the development as a whole and why the contravention is justified and secondly, the environmental planning grounds must justify the contravention of the development standard, not just promote the benefits of carrying out the development as a whole.

In *RebelMH* the Court, in exercising the functions of the consent authority, must “in fact” be satisfied of the above matters. The satisfaction that compliance is “unreasonable or unnecessary” and that there are “sufficient environmental planning grounds” to justify the contravention must be reached only by reference to the cl 4.6 request. The evidence in the proceedings cannot supplement what is in the request, although the evidence may assist in understanding the request and in considering its adequacy. On the other hand, the satisfaction that the proposed development is consistent with the relevant objectives, and therefore in the public interest, can be reached by considering the evidence before the Court and is not limited to what is contained in the cl 4.6 request.

2. Grounds for Clause 4.6 Variation

Justification in accordance with the five grounds established in *Wehbe v Pittwater Council (2007)* is set out below.

3.1 Compliance with the standard is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a))

The principle set out in *Wehbe v Pittwater Council (2007)* (*Wehbe*) provides an accepted method for justifying that compliance with the development standard is unreasonable or unnecessary. This request relies on method 1 in *Wehbe* which requires an applicant to demonstrate that the objectives of the relevant development standard will be achieved, despite the non-compliance with the numerical standard.

Compliance with the FSR control is unreasonable and unnecessary in the circumstances of this proposal as the objectives of the development standard (FSR) are achieved, notwithstanding the non-compliance with the control. The Development Application achieves the objectives of the development standard contained at clause 4.4 of the LEP, as outlined below. Further, the FSR non-compliance itself is related to achieving a better planning outcome than what would otherwise be achieved by a building that strictly complied with the FSR limit. This is also discussed below.

2.1.1. Floor Space Ratio - Objective (a)

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

The development is compatible with the bulk, scale and character of existing and future surrounding development despite the non-compliance for the following reasons:

- The development is located within the core of the R1 zone and as such will be surrounded by future (proposed and approved) high density residential and mixed use development. In this regard the development, despite the non-compliance is compatible with the streetscape by providing a transition from the 18-21 storey buildings (with 8 storey podiums) on the west, southwest and south to the 7-9 storey buildings to the north, northeast and east. The Key Sites to the south and west of the site have an FSR standard of 4:1. The lower density sites to the north have an FSR of 1.99:1. The site's proposed FSR sits between these two FSR areas, providing an effective transition.
- The majority of sites to the north have been redeveloped from low and medium density residential or are approved for development, creating a context to the north that is greater in bulk and scale and which has a higher density character than what currently exists. The proposed development achieves compatibility with its two interfaces by achieving a transition between the two.
- The proposed built form in its bulk and scale fits within the pattern of buildings considered from both north to south and east to west across the Carlingford Precinct south area (south of Post Office Road). The proposal provides a transition in both the north-south and east-west directions in terms of the bulk and scale of built form. The Urban Design Report by Dickson Rothschild provides a detailed analysis of the contextual fit of the proposal.
- Refer to the figures below.

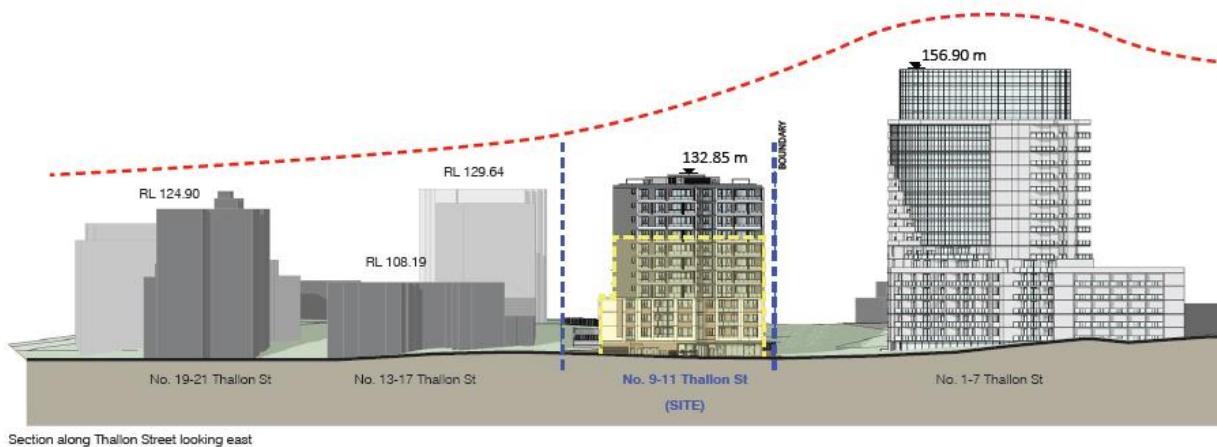


Figure 1: Excerpt, Urban Design Report, Dickson Rothschild, pg. 14

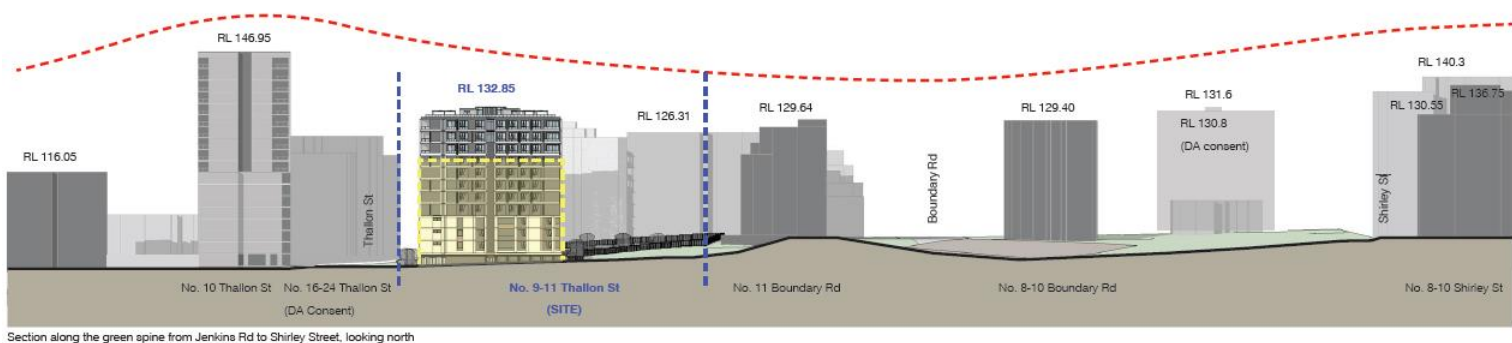


Figure 2: Excerpt, Urban Design Report, Dickson Rothschild, pg. 14

- The site context does not represent a uniform character of built form and character. Building types range for medium rise to high rise and from 4-21 storeys within 40m of the site. Generally, the precinct is emerging as a high density precinct, but there is a variety of heights, density, built form, and character in the area. The proposal is compatible with this eclectic character and transitional setting. The FSR non-compliance does not result in incompatibility.
- The proposal limits building bulk and floor space close to the northern boundary of the site where the interface is with a lower scale existing building, meeting the objective. The proposed tower is setback from the podium to the northern boundary to provide visual relief to the north and achieve an effective transition to the north, thus achieving compatibility with the streetscape and context.
- The proposed building is concentrated on the western half of the site with a rear setback of over 35m from the rear boundary of the site with structures being underground or associated with the proposed ground level Common Open Space. Built form is concentrated in this western location which is closer in its context to the 18 storey buildings to the west and south west and the 21 storey building to the south which have FSRs greater than what is proposed on the subject site.
- The proposal also has an increased front setback to its southwestern half to protect significant trees which exist on site. The proposed siting of the building which responds to site context and on-site constraints limits the tower footprint, pushing the building up in scale while maintain an overall building bulk compatible with the immediate streetscape context. The tower footprint (above the proposed podium and including balconies) is 1,068m² or 34% of the site area, limiting building bulk, particularly in the more sensitive part of the site towards the rear.
- The precinct plan that forms the DCP and informed the FSR standard for the site, took the view that the site would not be redeveloped due to its strata titling. Therefore, its strategic location within the precinct including its proximity to the rail station and open space spine were not considered when determining development potential. This led to the FSR pattern in the precinct being irregular with the 4:1 FSR area:
 - Being further from the light rail station than the subject site.
 - Extending northward past the subject site on the western side of Thallon Street.

The nomination of Key Sites in the centre also related to the undergrounding of High Voltage Power Lines and providing that corridor as an east-west open space spine which also contributes to a pattern of heights and densities that see key sites peppered along the east-west open space link (the open space link being where the HV Power Lines were previously located). The densities of these sites in relation to the provision of open space informs the density setting of the subject site. 1-7 Thallon Street and 2-14 Thallon Street have FSRs much larger than 4:1 FSR standard if the RE-1 zoned parts of those sites are disregarded. Refer to the table and figure below:

Lot No.	Height in storeys	Height in RL levels	FSR	FSR (excl. open space provision)
No. 1-7 Thallon St [Yellow dashed box]	up to 21st	RL156.90 (roof top)	2.85:1	5.17:1
No. 2-14 Thallon St [Purple dashed box]	up to 18st	RL146.95 (roof top)	3.86:1	4.44:1
No. 19-21 Thallon St [Pink dashed box]	Max. 9st (29m to roof top and 30.54m to lift overrun)	RL 125.40 (top of roof parapet); RL 128.4 (top of lift overrun)	1.99:1	
No. 16-24 Thallon St [Blue dashed box]	7-9st (29.75m)	RL120.33 (roof top)	1.99:1	

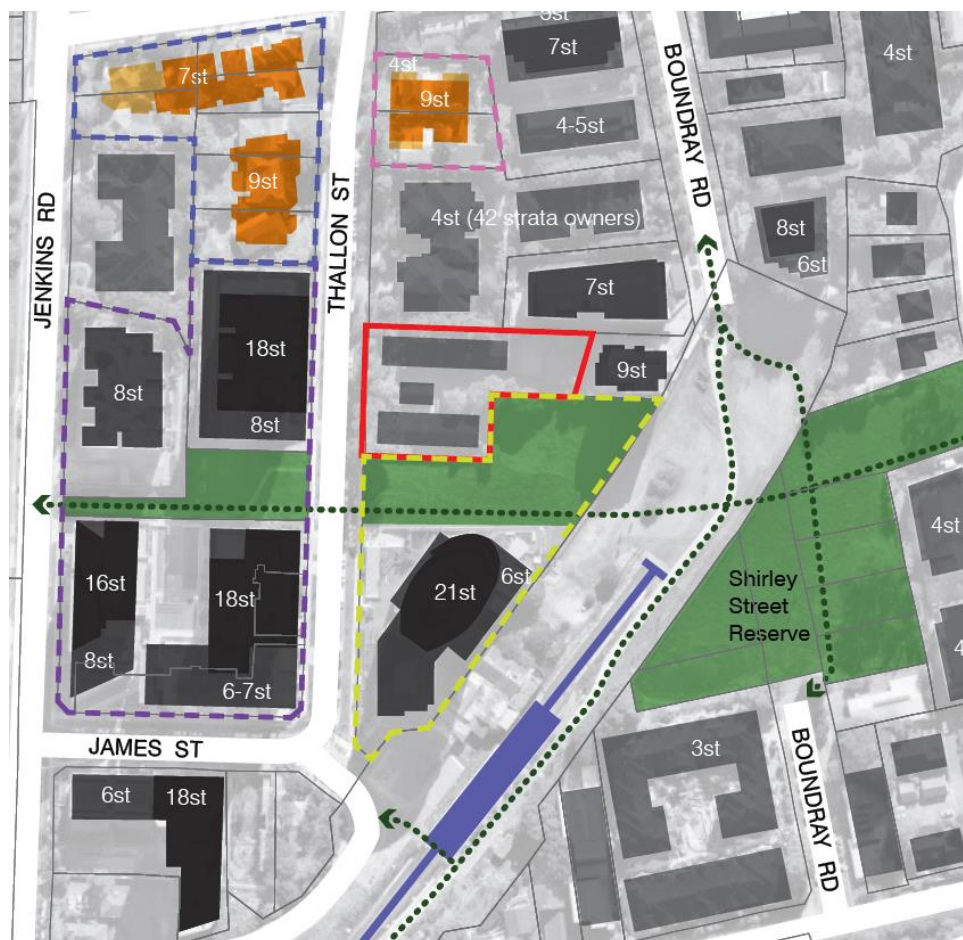


Figure 3: FSR analysis plan, Dickson Rothschild, Urban Design Report, pg. 8

The site is fully compatible with the pattern of development density proximate to the site.

- The site is located directly across Thallon Street from a site (2-14 Thallon Street, a Key Site) which is afforded a building height standard of 57m and which comprises an 18 storey building with an 8 storey podium and an LEP FSR standard of 4:1. The site is in the immediate streetscape context of this 18 storey building at 1-14 Thallon Street. The building at 2-14 Thallon Street is also very wide, having a significant streetscape presence with a width of approximately 60m to the street. The subject site's streetscape context is strongly influenced by this building. The proposed development has a lesser bulk and scale to 2-14 Thallon Street

and achieves a transition towards the north where buildings are generally lower and not as wide.

- The precinct plan included a low scale (approximately 4 storey) building at 1-7 Thallon Street immediately adjacent to the subject site (DA 943/2010/JP). This building was subsequently eliminated and the floor space shifted onto the tower at 1-7 Thallon Street, resulting in a building on that site of 21 storeys under DA/495/2017. The removal of the four storey building just south of the subject site eliminated a significant constraint on the subject site in terms of its bulk, scale and character context. This four storey building would have been heavily impacted by a redevelopment of the subject site. Instead, in the location of the previously approved 4-storey building, public open space has been expanded and the built form context of the site to the south is that of the large 21 storey building at 1-7 Thallon Street separated by the public reserve. The proposed development is compatible in character and built form with the 21 storey building to the south of the site.
- The proposed tower is concentrated on the western part of the site, providing reasonable separation to the existing 7 and 9 storey towers to the east and north east of the subject site to limit the impact of bulk and scale and achieve compatibility. Building separation which is consistent with the separation between existing buildings is achieved to create a relationship between built form and open space compatible with what has emerged in the area to the east and north east of the site. The 12 storey building and its resulting bulk and scale transitions from the 18-21 storey buildings to the south, south west and west towards the 7-9 storey buildings to the east and northeast, achieving compatibility with the streetscape and site context.
- The proposed development steps back at the south west corner, opening up the corner to the public open space to the south, protecting existing trees and reducing bulk and scale within the streetscape, achieving compatibility with the site context and streetscape. This corner is activated with a shop and restaurant fronting the street and the public open space, contributing to the vibrancy and character of the precinct in close proximity to the light rail station and the key east-west pedestrian link in the precinct. This non-residential floor space in a strategic location connected with the public domain is consistent with the desired character of the area. The non-residential floor space contributes to FSR on the site.
- Each façade is well articulated, limiting the impact of bulk and scale.
- The proposal is consistent with the desired future character statement for the Carlingford Southern Precinct as set out in the Hills DCP – Part D, Section 12, Clause 3.3. The proposal achieves the desired street-oriented village built form and character.
- The site's landscape character of the site is not diminished by the floor space and bulk and scale proposed. Sufficient deep soil landscape is provided on site, consistent with ADG and DCP standards. Large, significant trees are retained on the site, which have a significant positive impact on the streetscape. On structure planting is proposed to soften built form and enhance the landscape character of the site. A large communal open space is maintained at ground level with deep soil setbacks, contributing positively to the spatial relationship of the site to adjoining buildings to the north and east. The proposed balance of built form and landscape is compatible with the character and site context.
- The site achieves full compatibility with its streetscape and context. The proposed building's bulk and scale provides a transition, achieving a smoother transition than would a squatter, 8 storey building which would be an abrupt change in scale within Thallon Street. The clearer

transition created by the development has a positive impact on the streetscape in contrast to a more abrupt transition that would arise from a building with less bulk and scale.

2.1.2. FSR - Objective (b)

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

The development satisfies the objective notwithstanding the non-compliance for the following reasons:

- The role of Carlingford is as a Local Centre under the LSPS, District Plan and Region Plan. The role is as an urban renewal precinct with increased densities within walking distance of the new light rail. The proposal is fully consistent with this role. The site's very close proximity to the light rail station and core of Carlingford centre makes it ideal for the built form proposed.
- The proposed development achieves a transition in built form between the higher, bulkier buildings to the south and west and the lower, less bulky buildings to the north and east. This is consistent with the general urban design principles set out in the Carlingford Precinct Plan which has two key built form/urban design elements:
 - To transition in built form from the light rail (at the time of the precinct plan being formulated it was a heavy rail) where densities and heights are greatest near the transport hub and reduced towards the peripheries of the site, particularly towards the north where densities are lower.
 - To utilise Key Site Controls to underground power lines and delivers RE-2 zoned land along an east-west spine (a corridor that adjoins the subject site's southern boundary).
- As described under objective a) above, at the time of the precinct plan being developed it was considered the subject site had a very low susceptibility to change. However, the site is ready for redevelopment and its proximity to the light rail station and key sites at Thallon Street makes it ideal for increased densities. An FSR of 1.99:1 would be an underutilisation of a site in an optimal location within a strategic planning area.

2.2. Sufficient Planning Grounds for Justifying the Non-Compliance (Clause 4.6(3)(b))

The strength of the relevant grounds ought to be a balancing factor when assessing the reasonableness of the variation to a standard. This is because the word "sufficient" is included in clause 4.6(3)(b). Environmental planning grounds will be "sufficient" having regard to the circumstances of each case such that matters will have different weight in different circumstances.

A large breach with many impacts must have weighty and strong environmental planning grounds. A relatively minor breach without real amenity impacts, such as that proposed in this application, will require a different weighing of factors and therefore a different approach to what may constitute that which is "sufficient" (see Initial Action at paragraphs 23 and 24).

There are sufficient environmental planning grounds to justify contravening the development standard due to the following:

- The breach of the FSR control promotes the orderly and economic development of the land (object (c) of the *Environmental Planning and Assessment Act 1979*). The additional floor space

allows for an infill development in a precinct that is an urban renewal area with high public transport accessibility and which responds to the site's unique transitional location between the key sites to the south, south west and west and the lower scale development to the north, north east and east.

- The proposed development meets the objectives of Clause 4.4 and the objectives of the R1 General Residential Zone.
- The strategic location of the site very near the light rail station means that the site is highly suited to a development with a density and scale consistent with the principles of Transit Orientated Development (TOD). The additional floor space allows for a density on the site which is suitable for the site because of its close proximity to public transport and its location within the core of an identified Urban Renewal precinct as set out in the Region Plan and District Plans. This reduces demand for development of more sensitive land such as land at the urban fringe, and serves to better satisfy object (a) (b) and (c) of the *Environmental Planning and Assessment Act 1979*.
- The additional density proposed also increases housing and activity on a site immediately adjacent to a large open space corridor. Co-locating higher densities and open spaces achieves a more sustainable urban structure.
- The proposed development achieves increased densities while maintaining high quality open spaces on the site and minimising adverse impacts on surrounding sites.
- The proposed development establishes appropriate built form incorporating increased setbacks to the front boundary to protect trees, a setback not contemplated in the DCP, while still achieving a bulk and scale compatible with the site's immediate and wider built form context.
- The additional floor space is achieved without adversely impacting surrounding sites and ensuring that the subject site and surrounding sites maintain reasonable privacy and solar access.
- The proposed density on the site can be achieved without give rise to adverse impacts on the function of key infrastructure, namely the local road network. The report by TTPP has analysed the proposed development in its existing and future context and determined that the proposed development density and intensity shall not reduce the level of service of key road intersections and that the proposal can be absorbed into the local system. This takes into account future developments in the area to determine a reasonable future scenario with increased traffic on the roads.
- The proposed FSR breach gives rise to a building which better meets the objectives of the zone than a building which complied with the standard. In particular this is maximising housing in close proximity of the light rail, providing non-residential floor space with an active edge to the public domain to meet the day to day needs of the community and providing conveniently located parking for non-residential uses.
- The non-compliance maintains a suitable transition in bulk and scale from the south to the north and from west to east.
- The proposal is considered orderly and economic development of the land and there is a public benefit in developing the site to its capacity including the provision of retail space and residential housing while maintaining a high quality streetscape.

3. The Public Interest

The site is zoned R1 – General Residential Zone. The zone objectives are:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To enable other land uses that support the adjoining or nearby commercial centres and protect the amenity of the adjoining or nearby residential areas.*

The proposal is consistent with the objectives for development within the zone as explained below.

3.1.1. Zone Objective 1

- *To provide for the housing needs of the community.*

The proposed development satisfies Objective 1 of the zone despite the LEP non-compliance for the following reasons:

- The proposed development provides high amenity, high density development within almost immediate proximity of public transport.
- The proposal's additional floor space locates additional housing on a site optimally located for increased densities within the core of an urban renewal precinct that has strategic importance within the LSPS, District Plan and Region Plan.
- The proposed development provides a mix of housing that responds to demand and considers the unit sizes delivered in other nearby buildings. In this regard, the proposal provides a mix of 2, 3 and 4 bedroom units.
- Adaptable housing and liveable housing (to a silver level of service) is provided.
- Residential car parking which meets the RMS's sub-regional rates is provided on site.
- The increased floor space allows for additional dwellings to be located on a site with excellent access not only to public transport, but goods and services and immediate access to public open space.
- The proposal, while being a high density residential development, achieves high amenity in terms of access to open space and recreation with 49% of the site area used as common open space which includes BBQs, seating, shade, soft landscaping and a pool, supporting the high density housing type which is proposed to be delivered. The proposal achieves generous and high quality open spaces even with an FSR non-compliance.

3.1.2. Zone Objective 2

- *To provide for a variety of housing types and densities.*

The proposed development satisfies Objective 2 of the zone despite the LEP non-compliance for the following reasons:

- The site is only a short walk to the light rail station. It is also immediately adjoining the east-west open space link and the key sites at the light rail station and to the west of the light rail station. It is optimally located for high density development, of which the proposed FSR non-compliance is integral to delivering.
- The proposal has a density which is compatible with the adjoining sites, representing a transition from the 4:1 FSR area to the south, southwest and west and the 1.99:1 FSR area to the north, north east and east. The proposed FSR contributes to the variety of housing and density while achieving compatibility with its context.
- The proposal provides 2, 3 and 4 bedroom units, adding to the diversity of dwelling types in Carlingford, noting many recent developments have delivered smaller sized units. The proposed density adds to the diversity of housing types and densities in the area.

3.1.3. Zone Objective 3

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

The proposed development satisfies Objective 3 of the zone despite the LEP non-compliance for the following reasons:

- The site is in very close proximity to the light rail station. It also has a long frontage to the east-west public open space network that forms a spine within the precinct, making it ideal for mixed use development that activates the park and provides non-residential space that caters to meeting the day-to-day needs of the local residents. The proposed neighbourhood shop and restaurant will enhance amenity and convenience for local residents living in the immediate vicinity of the site. The additional floor space provides a reasonable balance of residential and non-residential floor space that is capable of being supported on the site.
- The proposed non-residential space is optimally located with good visibility from Thallon Street and the Public Open Space.
- The proposed development provides employment generating space within a short walking distance of the light rail station and bus stops.
- The proposed non-residential floor space is flexible and use can change over time to meet demand.
- The proposed non-residential floor space activates the street and the public domain. This is a significant improvement to the key sites on Thallon Street which while providing non-residential floor space achieve limited public domain activation. The proposed development achieves a superior outcome in comparison to its neighbours. Generous ceiling heights in the non-residential spaces add to their amenity and visibility.
- The proposed development is located in a walkable location with the non-residential floor space being easily accessible without the use of a private motor vehicle, close to public transport and within easy walking distance of numerous apartments. The quantum of non-residential floor space is in keeping with its character to cater to the immediate population and not compete with existing retail and commercial spaces and zones nearby.
- The proposed development provides secure bicycle parking to encourage cycling.

3.1.4. Zone Objective 4

- *To enable other land uses that support the adjoining or nearby commercial centres and protect the amenity of the adjoining or nearby residential areas.*

The proposed development satisfies Objective 4 of the zone despite the LEP non-compliance for the following reasons:

- The proposed development provides flexible non-residential spaces with public domain activation and good visibility from the public domain.
- The proposed non-residential spaces will cater to the day-to-day needs of residents in immediate proximity of the site. They are of a size that supports nearby commercial centres, rather than competing with them.
- The non-residential uses are located at the southwestern part of the site, facing the public open space such that they will not adversely impact adjoining residential buildings to the north, northeast and east of the site.
- The FSR non-compliance relates in part to providing non-residential floor space in a high quality setting which shall enhance the amenity of adjoining and nearby residential areas.
- The proposed predominance of residential uses on the site is compatible with the zoning and location of the site and supports the nearby commercial centres.
- The additional floor space proposed on the site does not give rise to unreasonable adverse amenity impacts in regard to visual, privacy and overshadowing, and the amenity of the nearby residential areas is protected.

All in all, the proposed development meets each of the objectives of the R1 zone. The FSR non-compliance contributes to the satisfying the objectives.

4. Clause 4.6(4)(b) and (5) Concurrence of the Planning Secretary

We have assumed that the consent authority has delegated authority from the Secretary to concur to this request, but will defer to the consent authority (The Sydney District Planning Panel) regarding whether concurrence of the Secretary is necessary in this case, given the extent of non-compliance.

5. Conclusion

The proposed variation from the LEP FSR of 1.99:1 m is justified as the proposed development meets the objectives of the FSR control in Clause 4.4 and the requirements of Clause 4.6. Further, the proposed development meets the objectives of the zone notwithstanding the non-compliance.

The FSR exceedance is directly related to the following factors and site constraints:

- site's close proximity to the new light rail station;
- site being overlooked in master plan due to it being strata titled, and whereby master plan did not consider its potential for uplift given its proximity to rail transport and open space;
- site's adjacency to key sites with significantly greater height and density than what is set out for the subject site;

- site's significant frontage to public open space;
- provision of additional floor space commensurate with the site's particular level of public transport accessibility and access to public open space;
- provision of a highly articulated built form and a bulk and scale compatible with the site's transitional location and allowing for high levels of amenity for the proposed apartments even with the FSR exceedance arising;
- achievement of a built form that is fully compatible with its particular context being in a transitional location within the southern precinct of Carlingford; and
- provision of non-residential floor space well located with high visibility and activation of the public domain.

With multiple site-specific reasons, the FSR non-compliance is reasonable in this case.

The exceedance results in a building that is fully compatible with the site's built form context while delivering housing and supporting non-residential floor space commensurate with the sites' strategic location within the Carlingford Precinct.

For these reasons, the proposed non-compliance accords with well-considered development overcoming the unique constraints of the site and relating the development to its immediate site context. The variation does not result in any unacceptable level of environmental impact; rather the variation is preferable to a development which was to fully comply with the LEP FSR limit.

The consent authority should be satisfied that the request is justified.