

GYDE

Amended Clause 4.6 Request - Floor Space Ratio

Parramatta Local Environmental Plan 2023

85-91 Thomas Street Parramatta

submitted to the City of Parramatta Council

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Report Version: Final

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TABLE OF CONTENTS

1.	Executive Summary	4
2.	Standard to be Varied	6
3.	Extent of Variation	6
4.	Unreasonable or unnecessary	7
4.1.	The objectives of the development standard are achieved notwithstanding non-compliance with the standard .	8
4.2.	The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary	15
4.3.	The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.....	15
4.4.	The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary	15
4.5.	The zoning of the land is unreasonable or inappropriate.....	15
5.	Environmental Planning Grounds	16
6.	Public Interest	18
7.	State or Regional Environmental Planning	20
8.	Conclusion	21

1. EXECUTIVE SUMMARY

This is a request prepared in accordance with Clause 4.6 of the Parramatta Local Environmental Plan 2023 (PLEP) to justify a variation to the Floor Space Ratio (FSR) development standard (clause 4.4 of PLEP). This clause 4.6 request accompanies a Development Application (DA) submitted to the City of Parramatta Council for a residential flat development at 85-91 Thomas Street Parramatta (the Site).

The proposal involves the demolition of existing structures, construction of 2 residential flat buildings containing 56 apartments, and a centralised communal open space area. The buildings include a shared single level basement servicing 80 vehicles and 61 bicycles. The proposal also includes the offer to dedicate the rear of the site to Council for public open space.

The proposed development has a maximum FSR of 0.98:1 (5,037sqm). This equates to a 908.44sqm (22%) variation to the FSR standard of 0:8:1 (4128.56sqm) pursuant to clause 4.4 of PLEP 2023. The variation to the standard in this instance is considered acceptable due to the lack of environmental impacts generated by the built form, the compatibility of the built form to existing developments within the visual catchment, consistency with the envisioned desired future character for the Morton Street Precinct (as per Parramatta Development Control Plan 2011), and in order to offset for loss of floor space due to the historic rezoning of the rear portion of 85 Thomas Street from R4 High Density Residential to RE1 Public Recreation. Despite the variation, the FSR remains considerably below the 1.3:1 FSR limit which was part of a previously discontinued planning proposal (PP) which benefited from gateway determination and initial Council endorsement.

Council initiated its own amendments to the then PLEP 2011 ('Amendment 20') at around about the same time the proponent initiated the abovementioned PP. Amendment 20 sought to review public open space and land acquisition provisions throughout the local government area (LGA). Proposed Amendment 20 sought to rezone approximately 1,200sqm of land at 85 Thomas Street from R4 – High Density Residential to RE1 – Public Recreation and nominated the same area for acquisition purposes also. There was an agreement between the landowner at Council that any development potential lost as a result of the Amendment 20 rezoning, would be recouped as part of the proponent-initiated PP referenced earlier.

Amendment 20 proceeded and approximately 1,200sqm of land at 85 Thomas Street was rezoned, as described above. However, the proponent-initiated PP was ultimately refused despite receiving gateway approval. Arguably, therefore, the proponent has lost all or some of the yield associated with that 1,200sqm portion of land pertaining to 85 Thomas Street. The FSR variation sought by this request goes somewhat towards offsetting this lost development potential yield.

It is noted that the FSR and site area for the purposes of this clause 4.6 have been calculated pursuant to clause 4.5 of PLEP. In this case, portions of the site where the subject development is prohibited (i.e. RE1 zone) have been excluded from site area calculations. If these portions of land are included as site area, which arguably they could be given the context surrounding the development of Amendment 20, the FSR would be 0.80:1 which is compliant with the PLEP.

The objectives of Clause 4.6 are to provide an appropriate level of flexibility in applying certain development standards to particular development, and to achieve better outcomes for and from development, by allowing flexibility in particular circumstances.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and various recent decisions in the New South Wales Land and Environment Court (LEC) and New South Wales Court of Appeal (Appeals Court).

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130) and *Al Maha Pty Ltd v Huajun Investments Pty Ltd (2018) 233 LGERA 170; [2018] NSWCA 245*:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)]; and
3. That the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard and the objectives for development within the zone in which the development is proposed to be carried out [clause 4.6(4)].

This request considers that compliance with the FSR development standard is unreasonable and unnecessary in the circumstances of the proposed development because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

There are sufficient environmental planning grounds to justify the variation. These include that the proposed building density is consistent in terms of scale and form to other developments within the visual catchment, and the buildings are well articulated, which minimises perception of bulk. Further, the proposal's environmental impacts, in particular overshadowing to the saltmarshes at the rear of the site, are effectively the same as a scheme which fully complied with the PLEP. The development satisfies the objectives of the FSR development standard, as well as the objectives of the R4 High Density Residential zone. As indicated earlier, that 1,200sqm portion of land on the subject site zoned RE1 formed part of an agreement between Council and the proponent. That agreement included adopting the RE1 zone, but any loss of GFA would be recouped elsewhere on the site as part of an owner-initiated PP. Council achieved the RE1 rezoning, but the proponent's PP was not realised. In effect, this variation request simply regains some of the GFA lost as part of previous rezonings. This, in itself, is considered to be a sufficient environmental planning ground.

This request also addresses the requirement for concurrence of the Secretary as required by Clause 4.6(4)(b).

It is therefore considered appropriate in these circumstances to grant the Clause 4.6 variation request.

2. STANDARD TO BE VARIED

The standard that is proposed to be varied is the Floor Space Ratio development standard which is set out in clause 4.4 of the PLEP as follows:

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



Figure 1: Extract of FSR Map, subject site outlined in red (Source: PLEP)

The numerical value of the development standard applicable in this instance is 0.8:1.

The development standard to be varied is not excluded from the operation of clause 4.6 of the LEP.

3. EXTENT OF VARIATION

The proposed development has a maximum FSR of 0.98:1:1 (5,037sqm). This equates to a 908.44sqm (22%) variation to the FSR standard of 0.8:1 (4128.56) pursuant to clause 4.4 of PLEP.

The FSR and site area for the purposes of this clause 4.6 have been calculated pursuant to clause 4.5 of PLEP. Portions of the site where the subject development is prohibited have been excluded from site area calculations.

It is important to note that prior to 28 July 2017 the rear portion of 85 Thomas Street was zoned R4 High Density Residential and hence would have contributed towards site area calculations. For reference, if this area was still able to be included in the site area calculation, the proposed FSR would be 0.80:1.

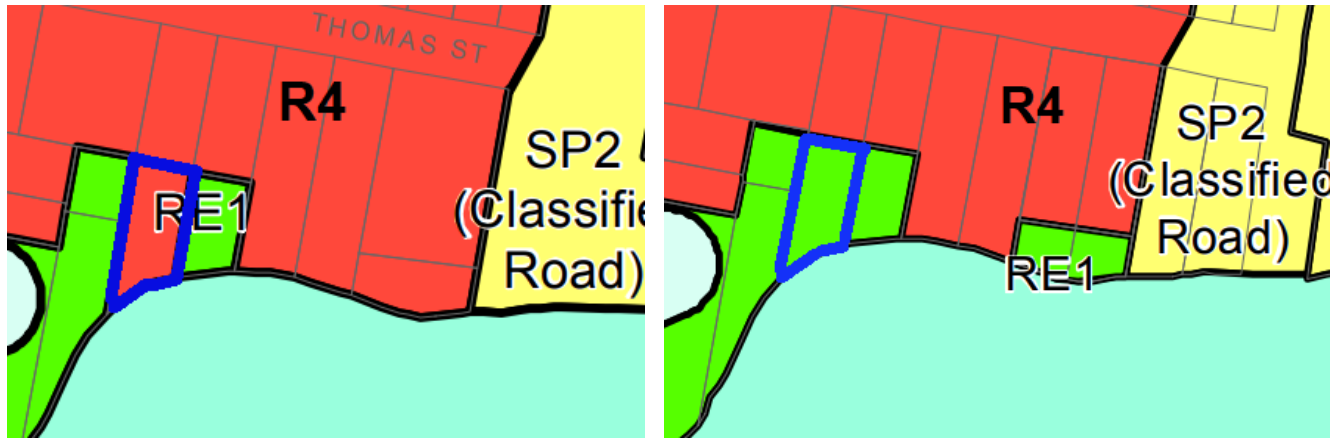


Figure 2 Left: Zoning map showing rear portion of 85 Thomas Street in blue, dated 23 September 2016- 27 July 2017.

Right: Zoning map showing rear portion of 85 Thomas Street in blue, dated 28 July 2017.

(Source: Parramatta Local Environmental Plan 2011)

Relevant to the calculation of FSR and the contents of this clause 4.6, gross floor area and site area are defined by PLEP as:

site area means the area of any land on which development is or is to be carried out. The land may include the whole or part of one lot, or more than one lot if they are contiguous to each other but does not include the area of any land on which development is not permitted to be carried out under this Plan.

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.

4. UNREASONABLE OR UNNECESSARY

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by clause 4.6(3)(a) of the LEP.

The Court has held that there are at least five different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. See *Wehbe v Pittwater Council* [2007] NSWLEC 827 (Wehbe).

The five ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; (First Test)
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary; (Second Test)
3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable; (Third Test)

4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; (Fourth Test) and
5. The zoning of the land is unreasonable or inappropriate. (Fifth Test)

It is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

Nonetheless, we have considered each of the ways as follows.

4.1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard

The following table considers whether the objectives of the development standard are achieved notwithstanding the proposed variation (First test under *Wehbe*).

Table 1 Consistency with Objectives of Clause 4.4 of PLEP.

OBJECTIVE	DISCUSSION
4.4 Floor space ratio	
<i>(1) The objectives of this clause are as follows—</i>	
<p><i>(a) to ensure buildings are compatible with the bulk, scale and character of existing and desired future development in the surrounding area,</i></p>	<p>The proposal's-built form and massing, expressed as FSR, is compatible with surrounding developments and consistent with the scale and materials and colours of other developments in the area. The proposed materials palette utilises neutral and recessive contemporary materials in sympathetic colours, including clear glazing, cladding elements, rendered cement, and timber elements.</p> <p>While the Thomas Street locality and particularly the local visual catchment has consistent elements that can be used to define the predominant character elements, it is considered that the locality is undergoing change given the area currently exhibits a range of development types ranging from traditional pitched roof dwelling houses to contemporary designed buildings.</p> <p>The site is located within area 3 (Morton Street – East) and the desired future character as expressed by the Parramatta Development Control Plan 2011 (PDCP) is as follows:</p> <p><i>“The Morton Street Precinct is located adjacent to the Parramatta CBD with the capacity to accommodate more residential growth and supporting infrastructure. It will undergo managed growth and change in its urban form with anticipation of a mix of housing types with mixed use community activity centred on Morton Street.</i></p> <p><i>The built form will include some taller building elements along north / south orientated sites to reduce visual bulk, encourage more modulation, reduce overshadowing and encourage dual aspect apartments for enhanced access to sunlight and breezes. The building form for east / west sites will be lower in height to optimise solar access to private and public open space and allow view corridors from the south. Taller, slender “statement” buildings will be located along the foreshore to enable a strong visual relationship between the precinct and the CBD, mark the entry to Parramatta and provide a punctuated built edge to the river.</i></p> <p><i>The development of the precinct will allow for a greater emphasis and recognition of the riverside location and the opportunity for enhancing the foreshore and public domain with development that is both well-designed and strongly related to the river. The connection of the north and south banks of the river with a pedestrian bridge will be explored to provide better linked communities across the river.”</i></p> <p>Case law has held that compatibility means ‘capable of existing together in harmony’ (<i>Project Venture Development v Pittwater Council</i> NSWLEC 191), and the test of compatibility is not a test of ‘sameness’ (<i>Gow</i></p>

OBJECTIVE	DISCUSSION
	<p>v Warringah Council NSWLEC 1093). The test of compatibility can be assessed with regards to the Planning Principle set by Project Venture Development v Pittwater Council NSWLEC 191.</p> <p>The first test is whether the building's physical impacts are acceptable. The FSR exceedance in this instance will not have a detrimental impact in terms of view loss, privacy, or overshadowing. The proposed FSR departure would also not prevent any future redevelopment of the adjoining sites. The buildings achieve the required Apartment Design Guide (ADG) internal solar access and ventilation controls and cast the majority of their shadow towards the public domain and not towards residential dwellings. Privacy impacts have been mitigated by offsetting windows and achieving the building separation controls of the ADG, as well as implementing privacy screens where necessary. The development's use as residential is not a known noise generating use hence the acoustic impacts are likely to be acceptable. Finally, the development will not constrain or isolate adjoining allotments. Specifically in relation to overshadowing, it is worth noting that the proposal's shadow impacts to the saltmarshes is effectively identical to a fully compliant scheme as demonstrated in the shadow diagrams prepared by PTI. Only at 9am does the proposal provide shadows greater than what a compliant scheme would, and these additional shadows do not protrude into the saltmarshes. For the above reasons, it is considered the physical impacts of the proposal are acceptable.</p> <p>The second test is that of the proposal's appearance being in harmony with the surrounding buildings. It is considered that the buildings are of a bulk and scale that is commensurate to the building at 93-95 Thomas Street and adopt a comparable colour palette which allows the buildings to sit in harmony with the surrounding developments. The building's density and overall massing is acceptable having regard to the stepped design which visually recesses the building. The front setback adopted is consistent with the street average and the overall envelope is not significantly different to that of the existing building. The separation between the eastern and western building is 9m consistent with the ADG, to ensure a consistent streetscape appearance. Finally, the proposal provides 30% deep soil landscaping which far exceeds the 7% ADG guideline.</p> <p>With reference to the PDCP Morton Street desired future character statement, the land is located upon a north-south oriented site and given its location, an increased FSR will contribute to "<i>marking an entry to Parramatta and provide a punctuated built edge to the river.</i>"</p> <p>The siting of the proposed buildings ensures that a logical step in density and built form follows, whereby a balance is achieved between what is permissible by the planning controls, and what is currently visible by way of already constructed developments occupying the skyline.</p> <p>In consideration of the above, the proposal is considered to be compatible with the character of the local area and will make a positive contribution to the future desired character as expressed in the planning controls.</p>
<p>(b) to regulate density of development and generation of vehicular and pedestrian traffic,</p>	<p>Clause 4.4 in so far as it refers to regulating density of development is explanatory of the central purpose of the floor space ratio standard: <i>Baron Corporation Pty Ltd v Council of the City of Sydney [2019] NSWLEC 61 per Preston CJ at [49]</i>. Accordingly, it is unnecessary to demonstrate that incremental and cumulative exceedance of FSR is consistent with that aspect of clause 4.4.</p> <p>In this case, as a result of providing 30% of deep soil landscaping in lieu of the required 7%, and being commensurate in terms of built form to developments within the visual catchment, the bulk and scale of the development is acceptable notwithstanding the FSR variation.</p> <p>In relation to car parking, the development provides 79 car spaces as required by the PDCP. It is noted that the amount of parking providing is greater than the minimum 61 car spaces required by the Guide to Traffic Generation Developments (Roads and Traffic Authority 2002). The accompanying traffic and parking report (Appendix L) concludes that the proposed development is not envisaged to have adverse impacts on the surrounding traffic or parking conditions.</p> <p>In relation to pedestrian movement, the development will remove 5 redundant existing vehicular crossovers and replace them with a consistent public domain treatment encompassing a new footpath, public landscape</p>

OBJECTIVE	DISCUSSION
	<p>strip and consistent kerb and gutter treatment. The resultant reduction in vehicular crossovers allows for a safer pedestrian environment and better streetscape presentation. The application is accompanied by civil engineering plans (Appendix T) which detail the proposed public domain works along Thomas Street.</p>
<p>(c) to provide a transition in built form and land use intensity,</p>	<p>With reference to the existing typologies and building forms (figure 3), as development moves westward along the Parramatta River, density and scale generally increases until reaching the Parramatta CBD. The site is located along the Parramatta River foreshore in close proximity to the Parramatta CBD (approximately 1 km west) and only 150m east of the Morton Street precinct west of Pemberton Street.</p>  <p><i>Figure 3: Aerial view of site (in red) with view of existing upstream developments (Source: Nearmap)</i></p> <p>The development has adopted an FSR that is not dissimilar to those shown within the PLEP FSR map (figure 4). The Morton Street precinct west of Pemberton Street observes an FSR of 1.75:1, while allotments opposite to the site across the Parramatta River observe an FSR of 3.3:1. In this instance, albeit an FSR variation, the buildings will sit in harmony with their surroundings and will not appear as larger or bulkier, given they are situated upon the developable portion of the site and will be heavily screened due to the preservation of the lower portion of the site (subject to planning agreement).</p>

OBJECTIVE	DISCUSSION
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Figure 4: Extract of FSR Map, subject site outlined in red (Source: PLEP)

With regard to the proposed siting of the buildings, a logical transition can be viewed given the intensity observed 150m west of the site across Pemberton Street.

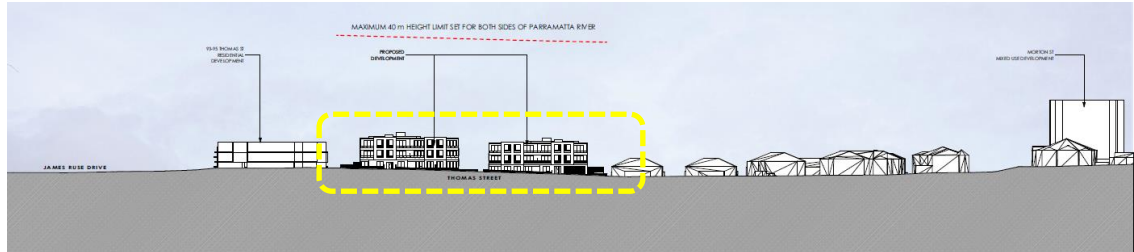


Figure 5: Northern building transition (Source: PTI Architects)

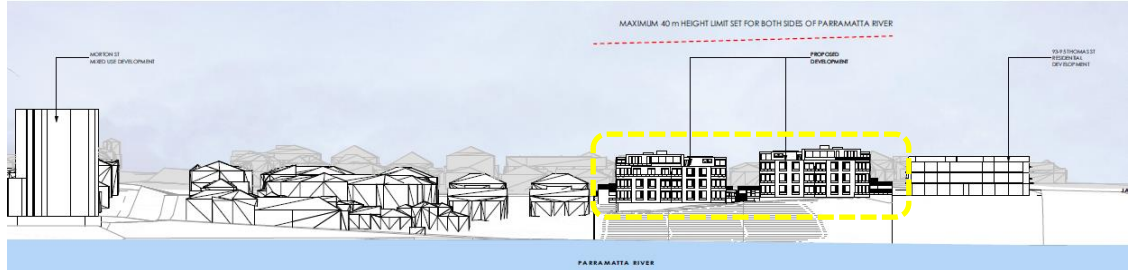


Figure 6: Southern building transition (Source: PTI Architects)

OBJECTIVE	DISCUSSION
	<p data-bbox="343 264 1513 327">Figure 7 below also demonstrates that the proposed is 'stepped' and follows the site's gradient down to the Parramatta River foreshore.</p>  <p data-bbox="343 801 1513 864"><i>Figure 7: Extract of southern (side) elevation exemplifying how the built form 'steps down' the site's gradient towards the Parramatta River (Source: PTI Architects)</i></p> <p data-bbox="343 898 1513 1133">In relation to intensity of the development when viewed from Thomas Street, the buildings will comply with the 11m height limit along the street interface. The transition and separation between the residential flat building at 93-95 Thomas Street is well ordered and will not result in an inconsistent appearance. Both proposed envelopes read as 3 storeys (see Figure 5 above) from Thomas Street, which ensures a compatible outcome. The western façade will be screened by 10 trees exceeding a height of 12m at maturity, which will soften the built form and provide visual relief. It is noted that along the rearmost portion of the western façade, a <i>Corymbia Maculata</i> (Spotted Gum) tree is proposed which is capable of reaching a height of 30m at maturity.</p> <p data-bbox="343 1167 1513 1469">It is important to make reference to a Planning Proposal (PP-2020-2819) which received gateway determination in August 2020 from the Department of Planning, Industry and Environment (DPIE). The proposal intended to allow for an FSR of 1.3:1; a matter which was supported by Council whereby the exhibited Planning Proposal prepared by Council stated on page 30: "<i>Council's Planning and Design units have maintained their recommendation that there is strategic merit in increasing the height to a maximum of 6 storeys to accommodate a similar amount of high-density residential floor-space permissible on the site at lodgement of the Planning Proposal</i>". Whilst acknowledging that this PP has no application to the subject DA, these comments remain relevant in terms of their description of appropriate density and scale transitions associated with the subject site.</p> <p data-bbox="343 1503 1133 1529">The current scheme proposes far smaller buildings with an FSR of 0.98:1.</p>



Figure 7: Extract of southern (side) elevation exemplifying how the built form 'steps down' the site's gradient towards the Parramatta River (Source: PTI Architects)

OBJECTIVE	DISCUSSION
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Figure 7 Previously proposed southern façade of development endorsed by Council as part of Planning Proposal (PP-2020-2819)



Figure 8 Currently proposed southern façade of development (Source: PTI Architecture)



(d) to require the bulk and scale of future buildings to be appropriate in relation to heritage sites and their settings,

The subject site is located in close proximity to (I011), a locally listed heritage item encompassing the Wetland areas. An archaeological and heritage impact statement (Appendix H) accompanies the proposal and concludes that there is a very low to low chance that archaeological deposits relating to significant historical activities from the 18th and 19th Century will be found.

In addition, views to and from the Parramatta Wetlands heritage item are unlikely to be impacted by the proposed works due to the presence of adequate screening vegetation at the southern border of the subject area. In addition, the proposed works are unlikely to modify the visual catchment of this item substantially from the existing urban landscape of its setting. Finally, shadows from the proposal are effectively the same as a fully compliant scheme. Only at 9am does the proposal generate more shadows than a compliant scheme. These additional shadows are minor in area, but importantly, do not impede within the area nominated as the heritage item.

The FSR departure in this instance does not result in any adverse impacts to the heritage item given the development is fully contained within the developable portion of the site and due to the physical separation from the wetlands area.

With reference to figure 9 below, due to the thick vegetation cover along the Parramatta River cycleway which itself traverses over the wetlands area, the development will not be readily visible from the curtilage of the heritage item and in this regard, the impact of the FSR variation upon the heritage item is acceptable.

OBJECTIVE	DISCUSSION
	 <p data-bbox="347 683 1484 739"><i>Figure 9 Approximate location of site (beneath red marker) with higher density development observed upstream (left), with dense mangrove and vegetation cover along foreshore - as viewed from James Ruse Drive (Source: GYDE Consulting)</i></p>
<p data-bbox="159 739 327 1064"><i>(e) to reinforce and respect the existing character and scale of low density residential areas.</i></p>	<p data-bbox="347 739 1484 851">The site and its surrounds are located within an R4 high density residential zoned area. However, it is noted that sites north of Thomas Street have yet to be developed to their potential and still contain typologies commensurate to that of a low-density residential area, being mainly single storey dwelling houses.</p> <p data-bbox="347 873 1484 1153">The design of the proposal adopts a compliant 11m height along the Thomas Street interface in order to provide for an appearance that aligns with the planning controls. In addition, the street façade treatment is not dissimilar to that observed at 93-95 Thomas Street with similar elements proposed in addition to a varied use of colours and materials. Although the development does propose an FSR variation to broadly offset the loss of FSR due to the historic rezoning of the rear portion of 85 Thomas Street from R4 High Density Residential to RE1 Public Recreation, the buildings as viewed from Thomas Street will respect the existing character north of Thomas Street. It is noted that the redevelopment of sites north of Thomas Street could occur at any time given the planning controls allow for such an uplift.</p>  <p data-bbox="347 1657 1484 1713"><i>Figure 10 Previously proposed northern façade of development endorsed by Council as part of Planning Proposal (PP-2020-2819)</i></p>

OBJECTIVE	DISCUSSION
	 <p data-bbox="343 492 1189 526"><i>Figure 11 Currently proposed northern façade of development (Source: PTI Architecture)</i></p> <p data-bbox="343 548 1503 728">It is important to note that the site does not adjoin an R2 zoned low density residential area. The site is 130m east of the closest R2 zoned land. Although portions of the development may be visible from certain viewing angles from the R2 zoned land, existing street trees and the compatible built form will allow the proposed buildings to sit comfortably without appearing out of place. In this case, the existing character and scale of low-density residential areas in the vicinity will be maintained.</p>

As demonstrated in Table 1 above, the objectives of the FSR development standard are achieved notwithstanding the proposed variation.

In accordance with the decision in *Wehbe v Pittwater Council [2007] NSWLEC 827*, *Initial Action Pty Limited v Woollahra Municipal Council [2018] NSWLEC 118*, *Al Maha Pty Ltd v Huajun Investments Pty Ltd (2018) 233 LGERA 170*; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130* and *SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112* at [31], therefore, compliance with the FSR development standard is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met on this way alone.

For the sake of completeness, the other recognised ways are considered as follows.

4.2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary

The underlying objective or purpose is relevant to the development. Therefore, this reason is not relied upon.

4.3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable

The objective would not be defeated or thwarted if compliance was required. Therefore, this reason is not relied upon.

4.4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary

The standard has not been abandoned by Council actions. Therefore, this reason is not relied upon.

4.5. The zoning of the land is unreasonable or inappropriate

The zoning of the land is reasonable and appropriate. Therefore, this reason is not relied upon.

5. ENVIRONMENTAL PLANNING GROUNDS

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

The environmental planning grounds to justify the departure of the FSR development standard are as follows:

- The proposed FSR is not dissimilar to developments within the visual catchment, given several buildings with a far greater density are observed 150m west of the Site, in addition to multi-storey building located on the southern side of the Parramatta River opposite to the site (refer to figure 3).
- Whilst not a statutory consideration for the current DA, it is noted that Planning Proposal (PP-2020-2819) which received gateway determination in August 2020 from the (then) DPIE allowed for an FSR of 1.3:1; a matter which was supported by Council whereby the exhibited Planning Proposal prepared by Council stated on page 30: "*Council's Planning and Design units have maintained their recommendation that there is strategic merit in increasing the height to a maximum of 6 storeys to accommodate a similar amount of high-density residential floor-space permissible on the site at lodgement of the Planning Proposal*".

The rationale with regard to the 1.3:1 FSR was to allow for additional floor area along the developable portion of the site, to offset previously permissible floor area within 85 Thomas Street prior to its rezoning from R4 High Density Residential to RE1 Public Recreation under PLEP 2011 amendment no. 20.

In these circumstances, the additional 908.44sqm is acceptable as it effectively offsets the historical loss in FSR with regard to 85 Thomas Street, and enables viable development.

The outcome is not considered inappropriate for the locality given the visual catchment includes several examples of buildings exceeding an FSR of 0.8:1.

- Prior to the rezoning on 28 July 2017 the rear portion of 85 Thomas Street to RE1, it was zoned R4 High Density Residential and hence would have contributed towards site area calculations. For reference, if this area was still able to be included in the site area calculation, the proposed FSR would be 0.80:1, which would have complied with the FSR control applicable to the site. This administrative and technical approach to the calculation of FSR does not change the built form outcome of the development on the land and is further evidence of the reasonableness of the proposed variation.
- The site is located approximately 1km from Parramatta CBD, 300m walking distance to Western Sydney University and within 800m walking distance to future light rail stops. Clearly, from a strategic planning perspective, the additional floor area and associated additional housing on the subject site is in complete alignment with the strategic planning direction for this precinct.
- The built form is consistent with the future desired character statement for the Morton Street Precinct given it places greater emphasis and recognition of the riverside location and the opportunity for enhancing the foreshore and public domain with a development that is both well-designed and strongly related to the river.
- Although the western façade of the development will be visible from Thomas Street, particularly if travelling east toward James Ruse Drive, 10 trees exceeding a height of 12m at maturity have been proposed to soften the built form and provide visual relief. It is noted that along the rear most portion of the western façade, a *Corymbia Maculata* (Spotted Gum) tree is proposed, capable of reaching a height of 30m at maturity.

- Whilst no longer directly relevant to the current proposal, Planning Proposal P-2020-2819, in receiving gateway determination, demonstrated that substantially greater height and FSR on the site than currently proposed was seen as having some strategic and site specific merit. The current proposal seeks to take advantage of this strategic merit through a smaller scaled proposal that does not necessitate a Planning Proposal to enable approval to be granted.
- The solar diagrams submitted demonstrate that the shadows cast by the development will not adversely impact adjoining developments and will not result in adverse environmental impacts as determined by the ecology report (Appendix R).
- The density and scale of the buildings are appropriate, and the proposed development is capable of existing in harmony with the surrounding buildings. Moreover, the buildings have been sympathetically designed to allow consistency with the future desired character of the area as expressed by part 4.1.9 Morton Street Precinct of the PDCP.
- The buildings are consistent with surrounding development forms and present a high-quality addition to the street. The proposed typology is commensurate to newly developed buildings in the area and the scale and bulk of the proposal is considered acceptable given the lack of adverse privacy, acoustic, overshadowing and view loss impacts.
- The proposed increased scale of buildings will not be perceived as jarring or antipathetic in the urban design context of the site and is in fact entirely compatible with the emerging and anticipated context around the site.
- The proposed FSR and density will not result in any increase in traffic as demonstrated by the accompanying traffic report which concludes that the proposed development is not envisaged to have adverse impacts on the surrounding traffic or parking conditions.
- The proposed FSR and built form will not result will not result in any adverse impact to the nearby heritage items.
- The proposed variation and the development as a whole satisfy the objectives of the current standard notwithstanding the variation with no detrimental impact.
- The proposal is an orderly and economic use of the site and provides a contemporary built form that is compatible with the desired future character of the locality.
- The proposal will deliver a high-quality development that will increase the vibrancy of the precinct whilst providing a greater diversity of housing to meet the demand generated by changing demographics and housing needs in an existing urban area with excellent access to public transport, health services, educational establishments, recreational opportunities and services and facilities.
- The proposed development meets the relevant objectives of the *Environmental Planning and Assessment Act 1979* as follows:
 - 1.3(c) - the proposal is an orderly and economic use of the site, and the development is largely consistent with the objectives of the standard.
 - 1.3(g) - the proposed development presents a built form outcome for the site that is of high-quality design and will establish the standard for the quality of built form design in the centre. The development maximises residential amenity available to the site through an overall well-designed development with sufficient open space. The proposal provides a contemporary built form that is compatible with the desired future character of the locality.

6. PUBLIC INTEREST

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. This is required by clause 4.6(4)(a)(ii) of the LEP.

In section 4 it was demonstrated that the proposed development overall achieves the objectives of the development standard notwithstanding the variation of the development standard.

The table below considers whether the proposal is also consistent with the objectives of the zone.

Table 2: Consistency with R4 High Density Residential Zone Objectives

OBJECTIVES OF R4 ZONE	DISCUSSION
<i>To provide for the housing needs of the community within a high density residential environment.</i>	The proposed development will replace the existing dwellings with a new modern and better designed buildings that meets the community's needs and expectations.
<i>To provide a variety of housing types within a high density residential environment.</i>	The buildings provide a highly diverse development containing 71 apartments ranging from dual key typologies to 3-bedroom apartments to respond to the growing demand for high amenity apartments in a highly strategic location.
<i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i>	The proposal does not prevent or constrain other land uses that may provide facilities and services to residents.
<i>To provide for high density residential development close to open space, major transport nodes, services and employment opportunities.</i>	The proposed development will provide for an additional 71 apartments within a highly centralized and strategic location in close proximity to the Parramatta CBD. The site is located approximately 1km from Parramatta CBD, 300m walking distance to Western Sydney University and within 800m walking distance to future light rail stops. The site location is well serviced by existing pedestrian facilities with footpaths on both sides of the site. The site is in very close proximity to high quality open space which maximizes the amenity of residents.
<i>To provide opportunities for people to carry out a reasonable range of activities from their homes if the activities will not adversely affect the amenity of the neighbourhood.</i>	All apartments have been designed to maximise internal and external amenity, in addition to incorporating a large centralised communal area for the use of residents. As a result of the compliant building separation metrics, household activities, in addition to any future home occupation/business are unlikely to adversely affect the amenity of the neighborhood.

Table 3: Consistency with RE1 Public Recreation Zone Objectives

OBJECTIVES OF RE1 ZONE	DISCUSSION
<i>To enable land to be used for public open space or recreational purposes.</i>	No development works are proposed along the RE1 zoned portion of the site. This portion of the land has been dedicated to Council.
<i>To enable land to be used for public open space or recreational purposes.</i>	The proposal will not adversely impact the use and enjoyment of the RE1 zoned portion of the site or public areas beyond.
<i>To provide a range of recreational settings and activities and compatible land uses.</i>	The proposal is accompanied by the dedication of land to Council, which will in turn increase the amount of publicly available space along the Parramatta River foreshore.
<i>To protect and enhance the natural environment for recreational purposes.</i>	No development is proposed along the RE1 zoned portion of the site. No vegetation or trees are proposed to be removed within the RE1 zoned portion of the site.
<i>To conserve, enhance and promote the</i>	The RE1 portion of the site is not a heritage item. No development is proposed

<i>natural and cultural heritage value of parks and open space in the zone.</i>	along the RE1 zoned portion of the site hence its natural and cultural significance will not be adversely impacted.
<i>To create opportunities to use riverfront land for public recreation.</i>	The proposal does not preclude Council from acquiring the RE1 zoned portion of the site, for use by the public.

As demonstrated in Table 2 and 3, the proposal is consistent with the objectives of the zone and in Section 4 it was demonstrated that the proposal is consistent with the objectives of the development standard. According to clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

7. STATE OR REGIONAL ENVIRONMENTAL PLANNING

This section considers whether contravention of the development standard raises any matter of significance for State or regional environmental planning, the public benefit of maintaining the development standard, and any other matters required to be taken into consideration by the Secretary before granting concurrence required by clause 4.6(5).

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

As demonstrated already, the proposal is consistent with the objectives of the zone and the objectives of the development standard and in our opinion, there are no additional matters which would indicate there is any public benefit of maintaining the development standard in the circumstances of this application.

Finally, we are not aware of any other matters required to be taken into consideration by the Secretary before granting concurrence.

8. CONCLUSION

This submission requests a variation, under clause 4.6 of the *Parramatta Local Environmental Plan 2023*, to the FSR development standard and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- The development achieves the objectives of the development standard notwithstanding the variation.
- There are sufficient environmental planning grounds to justify the contravention;

The consent authority can be satisfied to the above and that the development achieves the objectives of the development standard and is consistent with the objectives of the zone and is therefore in the public interest.

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