



AMENDED CLAUSE 4.6 VARIATION STATEMENTS

Demolition of existing structures and construction of a part six, part fifteen storey mixed use building comprising a childcare centre, commercial units and shop top housing with four levels of basement parking, landscaping, Torrens title subdivision and land dedication for public laneways.

86-96 Station Street
Wentworthville

Prepared for: Beaini Projects

REF: M220598

DATE: 12 September 2025



DEVELOPMENT



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CLAUSE 4.6 VARIATION STATEMENT – MAXIMUM BUILDING HEIGHT (CLAUSE 16(3) OF THE HOUSING SEPP)

1. Introduction

This Variation Statement has been prepared in accordance with Clause 4.6 of the Cumberland Local Environmental Plan 2021 (CLEP 2021). The subject application seeks consent for *‘Demolition of existing structures and construction of a part six, part fifteen storey mixed use building comprising a childcare centre, commercial units and shop top housing with four levels of basement parking, landscaping, Torrens title subdivision and land dedication for public laneways’* at No. 86-96 Station Street, Wentworthville (‘the site’).

2. Height of Building Standard

Clause 4.3 of CLEP 2021 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 reproduced below at **Figure 1** identifies the subject site as having a split maximum height of 20 metres and 30 metres.

Clause 16(3) of SEPP (Housing) 2021 relates to the maximum building height when in-fill affordable housing is provided in an accessible area. Clause 16(3) reads as follows:

(3) If the development includes residential flat buildings or shop top housing, the maximum building height for a building used for residential flat buildings or shop top housing is the maximum permissible building height for the development on the land plus an additional building height that is the same percentage as the additional floor space ratio permitted under subsection (1).

The proposed development provides at minimum 15% affordable housing in accordance with Part 2, Division 1 of the Housing SEPP. Resultingly, an additional 30% above the CLEP 2021 maximum height control can be applied. This permits a maximum building height of 39m (in 30m control) and 26m (in 20m control).

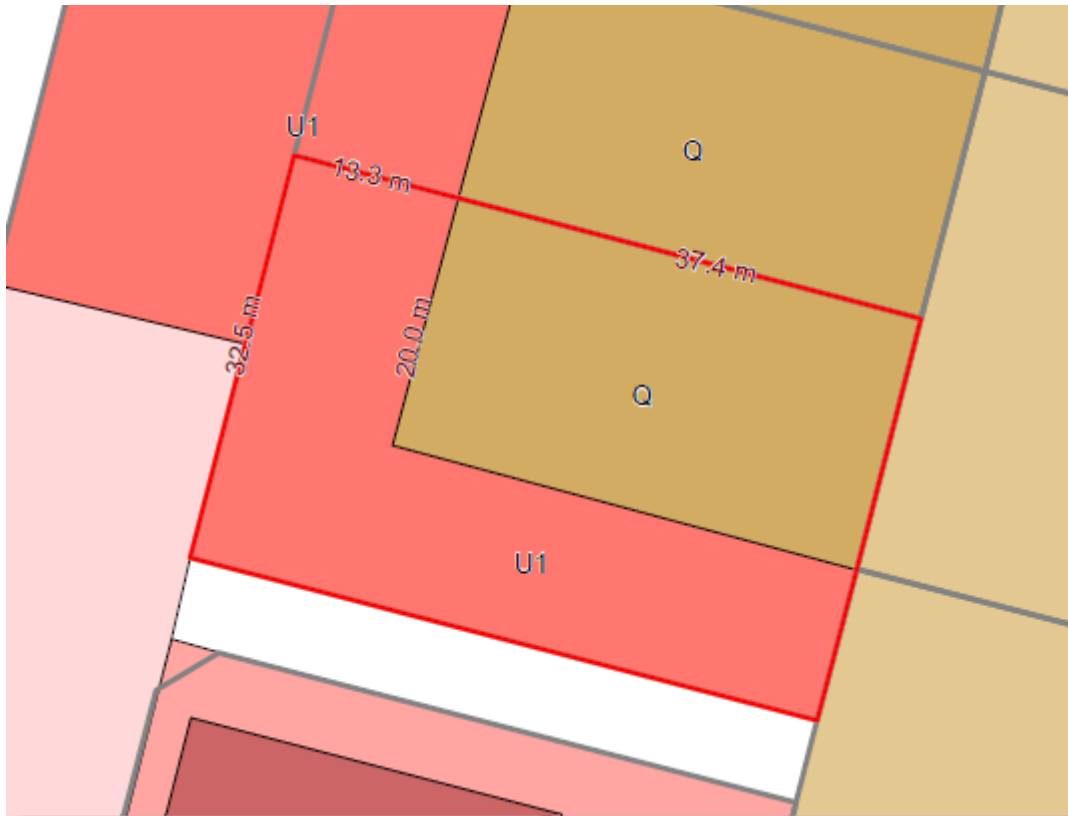


Figure 1 Extract of Height of Buildings map (site in blue outline)– Q = 20m, U1 = 30m

3. Proposed variation to height of buildings development standard

The proposed development seeks a maximum building height of 51.33 metres measured to the lift overrun and 50.21 metres to the upper western parapet of the tower and 49.5 metres in the portion of the site restricted to a 39 metres bonus height control. A proposed maximum building height of 24.49 metres measured to the upper parapet associated with the rear communal open space area, in the portion of the site restricted to a 26 metres bonus height control.

A small portion of the building's tower element will encroach beyond the front part of the site with the 30 metres height limit into the rear part of the site with the 20 metres height limit. Council has provided its exact measurements for the boundaries of the height zones and indicates the tower will encroach between 2.8 to 3 metres into this zone. Therefore, this Variation Request has also addresses this non-compliance.

The maximum building heights are depicted in Table 1, below.

Table 1 Maximum building heights			
Component	Building Height	Variation to LEP	Variation to Housing SEPP
Majority of lift overrun	51.33 metres	21.33 metres or 71.1%	12.33 metres or 31.6%
Majority of uppermost parapet edge, addressing Station Street	50.21 metres	20.21 metres or 67.3%	11.21 metres or 28.7%



Table 1 Maximum building heights			
Section of lift overrun	51.33 metres	31.33 metres or 156.65%	25.33 metres or 97.42%
Section of Uppermost parapet edge and areas of several floors below on eastern side of building	50.21 metres	30.21 metres or 151%	24.21 metres 93%
Majority of uppermost parapet edge, addressing future rear of site containing communal open space	24.49 metres	4.49 metres or 14.9%	Complies

As per Table 1, the proposed maximum height of the proposed development contravenes the bonus height under the Housing SEPP by 12.33 metres (31.6%), respectively. The height breach is depicted in **Figures 2 and 3**, below.

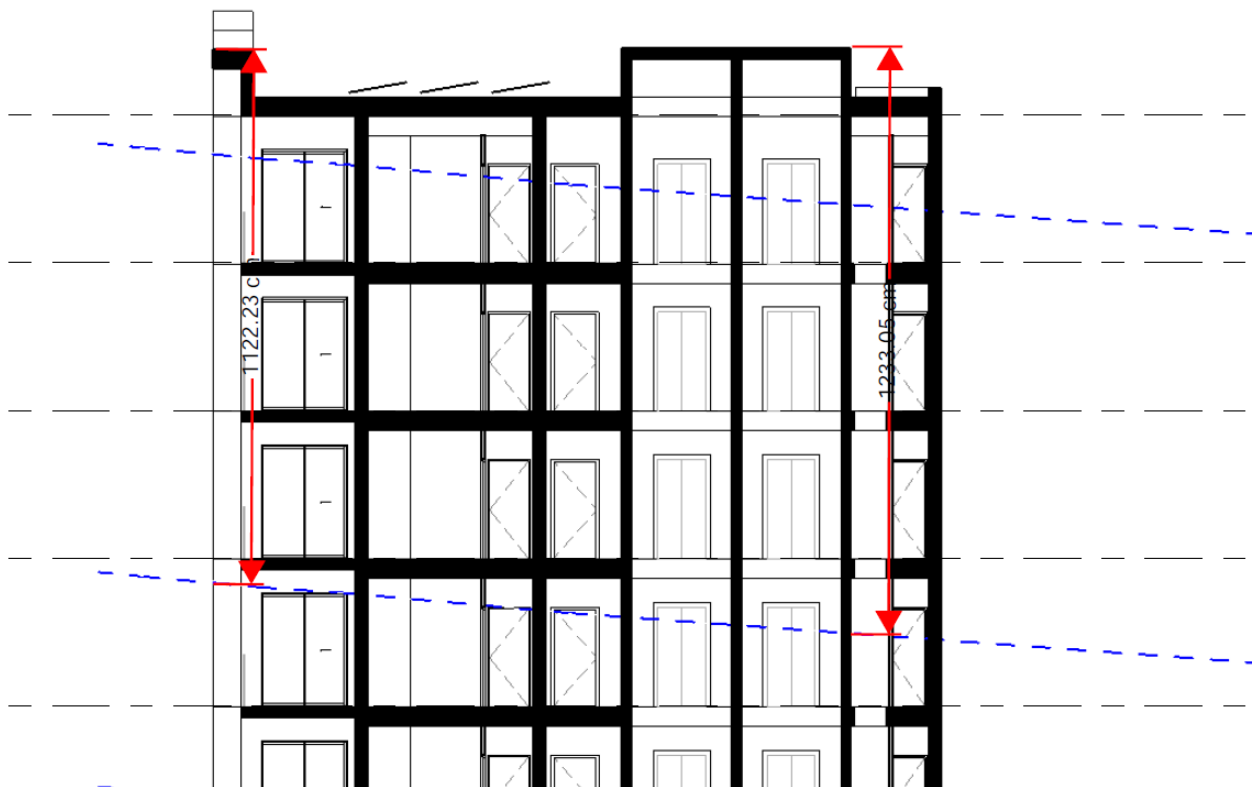


Figure 2 Section through the tower that fronts Station Street with the 30 metres CLEP height control (Source: IDA Design Group)



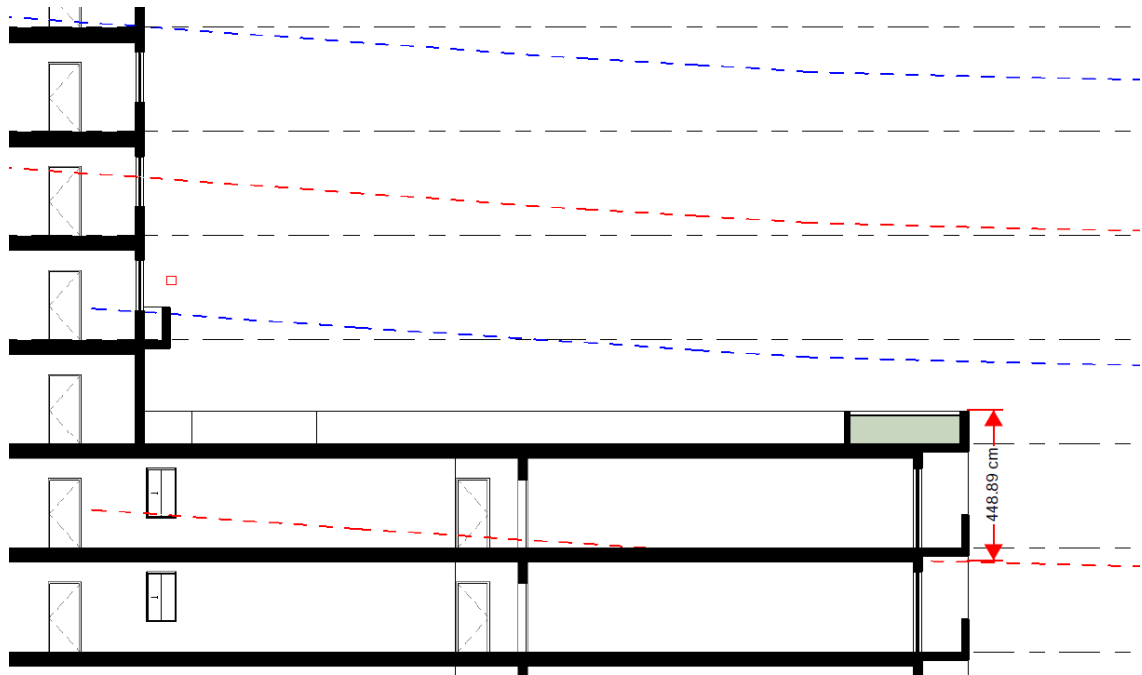


Figure 3 Section through the rear of the built form partially within 20 metres CLEP height control (Source: IDA Design Group)

Figure 4 below shows that there is a small part of the tower element that protrudes into the portion of the site with the lower height limit. The LEP *Floor Space Ratio Map* does not provide any dimensions for the boundary between the two height zones and an estimate was made based on the best information available at the time. Council has subsequently clarified that the 30m height zone is 13.3m deep and therefore a small part of the tower element sits within the 20m zone. This results in a small part of the building having a larger height non-compliance than the rest of the building. This non-compliance is indicated within Table 1 above. Despite the size of the variation proposed in this small part of the tower, the built form that is being proposed has been subject of extensive consultation with Council's planning and design staff. The planning grounds relied upon to justify this non-compliance are well founded and provided elsewhere in this Variation Request.

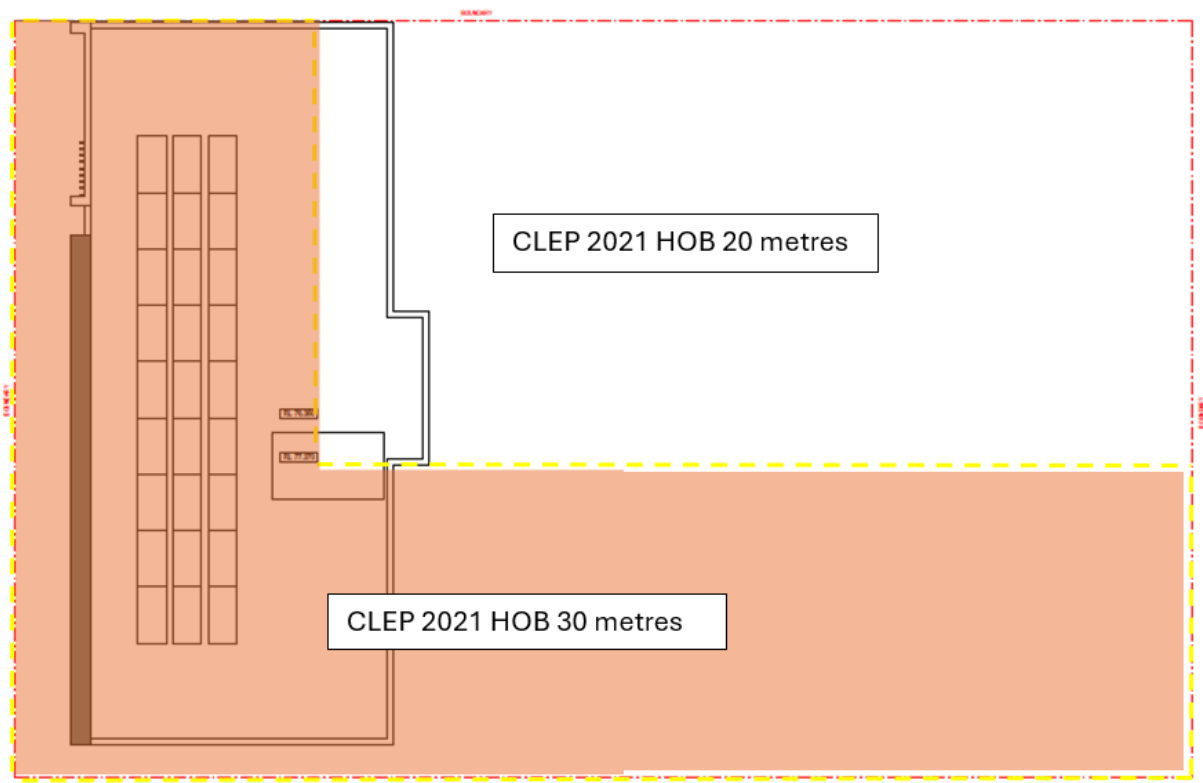


Figure 4 Proposed building footprint with LEP Height Controls overlayed

The maximum building height control is a “development standard” to which exceptions can be granted pursuant to clause 4.6 of the LEP.

4. Clause 4.6 to CLEP 2021

The objectives and provisions of clause 4.6 are as follows:

4.6 Exceptions to development standards

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

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



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

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

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

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

(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

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

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

(5) (Repealed)

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

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

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

(7) (Repealed)

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

(a) a development standard for complying development,

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

(c) clause 5.4,

(caa) clause 5.5.”

The development standard in Clause 16(3) of the Housing SEPP is 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)(a) and (b). 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 16(3) of the Housing SEPP imposes a split maximum height of 26m to the north/east and 39m to the south/west of the site. It is hereby requested that an exception to this development standard be granted pursuant to clause 4.6 so as to permit a maximum building height of 51.02m (within the 39m control area) which equates to a numerical variation of 12.33m (31.6%) to the Housing SEPP.

5. 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.”

Subclause 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. The proposal seeks to vary subclause 16(3) under Division 1 of Part 2, Chapter 2 of the Housing SEPP. With regard to subclause 16(3), the objective of Division 1 of Part 2, Chapter 2 of the Housing SEPP is as follows:

The objective of this division is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.

The proposed development will facilitate the delivery of new in-fill affordable housing which will meet the needs of very low, low and moderate income households. To request strict compliance and require deletion of the additional levels will adversely reduce the provision of affordable residential accommodation in the Wentworthville town centre which is contrary to the above objective and certainly does not *“facilitate the delivery of new in-fill affordable housing”*. The proposed distribution of floor space above the height limit is the most appropriate response to the site constraints (primarily topography), relationship to neighbouring properties and the public domain.

The proposal will allocate twelve (12) apartments as affordable housing in accordance with the Housing SEPP. Importantly, the site is ideally located to accommodate affordable housing, and the subsequent uplift in height and density, given its prime location within an accessible area, with excellent access to public transport, commercial and retail premises and services. Given the context and size of the site, it is considered suitable to accommodate the additional development density to support affordable housing without adversely impacting surrounding properties.

Ultimately, the provision of affordable housing on the site is delivering a significant social benefit to the locality.

To request strict compliance would be antipathetic to the objective of *Division 1 In-fill affordable housing* and as such, is insisting on compliance with the numerical development standard is unreasonable and unnecessary in this instance.

Furthermore, for completeness and given there is only a single objective for Clause 16(3) of the Housing SEPP, the objectives under Clause 4.3 of CLEP 2021 have been addressed, below.

The objectives and relevant provisions of Clause 4.3 of CLEP 2021 are as follows, inter alia:

- (1) The objectives of this clause are as follows—*
- (a) to establish a maximum height of buildings to enable appropriate development density,*
 - (b) to ensure that the height of buildings is compatible with the character of the locality,*
 - (c) to minimise the visual impact of development,*
 - (d) to ensure sufficient solar access and privacy for neighbouring properties.*

The objectives of clause 4.3 are addressed in turn below.

Objective (a)

The proposed development exceeds the height of building development standard by up to 12.33 metres measured to the lift overrun. Only the western most extent of the built form contravenes the development standard to such a degree, given the optimal orientation toward Station Street and lack of amenity impacts. The remaining built form located centrally and to the east (rear) is restricted to six (6) storeys and rooftop communal open space. This portion of the built form is compliant with the bonus height control. It can therefore be argued that the appropriateness of the proposed building height is bolstered by the predominantly six (6) storey built form. The additional building height to the built form that immediately addresses Station Street is deemed appropriate given

the lack of amenity impacts and improved opportunities for passive surveillance.

Contextually speaking, the site is located in the Wentworthville Town Centre, recently rezoned under the *Wentworthville Centre Revitalisation Planning Proposal* and intended for significant uplift. The site immediately to the south provides a built form that reflect the intended future character for Wentworthville Town Centre. The neighboring site contains a twelve (12) storey mixed use building with three (3) levels of basement carparking with CLEP 2021 permitting a split maximum building height of 41 metres and 29 metres.

Given the proximity of the site to Wentworthville Railway Station, services and amenities and precedent set by the site to the south, the proposed building height can be deemed appropriate.

The proposal satisfies objective (a), despite the height breach.

Objective (b):

Objective (b) seeks to ensure that buildings are of a scale that is compatible with adjoining development and the character of the street and locality in which the building is located. It is noted that objective (b) refers to being 'compatible' with the above-mentioned elements. It is considered 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."

The subject site is in transition to higher density development reflective of the applicable planning controls and the recently constructed development immediately to the south. The proposed development, even with the height variation, is considered to be compatible with the height, bulk and scale of the recently approved and emerging character of the locality, yet still respects the existing building by creating a development that is not visually jarring relative to the permissible planning controls.

As mentioned in objective (a), the design seeks to achieve appropriate separation from neighbouring sites concentrating communal open space to the rear away from the site boundaries. The primary height breach located at the Station Street frontage and positioned to achieve a better outcome for the site and surrounding properties in terms of amenity when compared to a compliant building height. As such, it is considered that this variation will not be visually jarring when viewed from the public domain and is considered to be compatible with the future character of the locality. Particularly considering the future utilization of the affordable housing bonuses within Wentworthville Town Centre.

The proposal satisfies objective (b), despite the height breach.

Objective (c):

Objective (c) seeks to ensure that the visual impact of development is minimised. It is noted the use of the word "minimise" was considered in a recent judgement which included a variation to the height of buildings control in *Pallas Development Management Pty Limited trading as Fortis Development Group v Woollahra Municipal Council* [2022] NSWLEC 1048 where Morris AC states:

99. I do not accept Mr Perdigao's evidence that for the impact to be minimised it would have to be reduced the smallest possible amount or degree. To do so would mean that there would be no impact at all. The objective of the control contemplates some impact, it just requires the impact to be minimised. I accept the submission of Mr To, for the Applicant, that to adopt this logic, there would always be a further reduction possible to the point of there being no breach and therefore no impact. This is not what is contemplated by cl 4.6 of the WLEP. It contemplates that the development standard will be breached. What has to be determined is if that breach is appropriate in the circumstances of the case. I consider that it is.

The height breach does seek to minimise the visual impact by providing a 3 metres setback from Level 5 upwards to assist in the articulation of the building and to ensure the building doesn't appear visually jarring. The bulk and scale of the proposed building is comparable to the neighbouring mixed use building at No. 108 Station Street, as depicted in **Figure 5**.

Given the existing character along Station Street, largely comprising single and double storey commercial buildings, it is anticipated that a compliant building height at the site would impose a visual impact. Evidence of this can be seen at No. 108 Station Street. It is anticipated that once the future character of the Wentworthville Town Centre comes to fruition, the visual impact due to the bulk and scale of the proposal will be lessened and fit comfortably with the built form context.



Figure 5 Montage of the proposed development when viewed from Station Street (Source: IDA Design Group)

While the proposed development exceeds the height development standard it is contemplated by the DCP control



which requires the dedication of 318m² of the site for the purpose of public laneways. The resultant built form is a reflection of the significant loss of developable land, hence required to prioritise a taller built form. The proposal is consistent with this objective and is not visually jarring when compared to existing development nearby. The variation to the height of building development standard does not contribute to any significant visual impact and does not dominate the built form.

The proposal satisfies objective (c), despite the height breach.

Objective (d):

This objective seeks to ensure sufficient solar access and privacy for neighbouring properties. It is noted that the word “sufficient” is used in the objective.

The proposal has been designed to ensure a reasonable solar outcome for neighbouring properties, noting they have benefited from the underdeveloped nature of the existing double-storey commercial building. Accordingly, the proposed development will result in additional overshadowing of residential apartments at Nos. 25-27 & 31-33 Lane Street and No. 108 Station Street.

In order to determine if sufficient solar access is provided to neighbouring sites, reference should be made to the solar access controls of CDCP 2021. The controls of CDCP 2021 require a minimum 70% of living and private open space areas on neighbouring sites to achieve three (3) hours of sunlight during mid-winter from 8:00am to 4:00pm. It is a further requirement that no public places be unsuitably overshadowed.

The proposal has been designed so the bulk and scale in terms of building height is focused toward Station Street. This assists in mitigating overshadowing impacts to the tower at No. 108 Station Street. The front portion of the building at No. 108 Station Street is overshadowed at 8:00am, however, by 12:00pm there is no overshadowing to this extent of the building. In the afternoon, between 12:00pm and 4:00pm, minor overshadowing occurs to the rear portion of the building. It can be concluded that whilst some extents of the building are overshadowed, they would remain to receive three (3) hours of sunlight during mid-winter.

With regard to the three-storey residential flat buildings to the east, both Nos. 25-27 and 31-33 receive no overshadowing impact between 8:00am and 12:00pm during mid-winter. Therefore, these buildings would maintain at minimum three (3) hours of solar access.

The site is not in close proximity to any schools or public parks, with the exception of Friend Park on the opposite side of Station Street. The proposed development would have no overshadowing impact on Friend Park between 8:00am and 4:00pm.

Therefore, the extent of the variation will not result in any significant loss of solar access for surrounding properties, rather it is the complying parts of the building that will result in the additional overshadowing. Therefore, the height breach will retain “sufficient” solar access to neighbouring properties.

The design focuses the tallest extent of the building towards the street frontage, the land dedication towards the east and south, achieving almost compliant building separation required under the ADG. The site will possess three (3) street frontages following the construction of Station Lane at the rear. These public roads and laneways provide considerable separation, at minimum 8m to neighbouring site boundaries. It should be noted an additional 2 metres setback is provided to the rear Station Lane. All private open space areas associated with the tower fronting Station Street are orientated to the public domain. Likewise, the majority of POS areas located within the central/rear portion of the built form are orientated to future Station Lane and are set back 8 metres from the current site boundary.

The amenity of the adjoining properties will be “sufficient” and not be lessened in any way compared to a scheme that is fully compliant with the relevant building height controls. Therefore, the proposal satisfies objective (d), despite the height breach.

6. 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 whereby Justice Pain ratified the decision of Commissioner Pearson. On the above basis, the following environmental planning grounds are submitted to justify contravening the maximum building height:

1. The proposed variation results in a built form which is contextually responsive and appropriate with regard to the future anticipated character and development at No. 108 Station Street. As discussed above, the site to the south is afforded a greater maximum building height of 29 metres for podium and 41 metres for tower. It is understood that a site specific planning proposal to increase density at No. 108 Station Street was sought and is now reflected in the CLEP 2021 controls. Despite the subject site being closer to Wentworthville Railway Station, it is afforded lower density compared to No. 108 Station Street. The proposed building height will allow a logical transition of higher densities based on proximity to Wentworthville Railway Station, beyond that envisaged by the Housing SEPP.
2. The proposed development is fundamentally a six (6) storey building, with the exception of the tall, pencil-like tower that faces Station Street. In particular, the bulk and scale located centrally and to the rear of the site is limited to six (6) storeys and rooftop communal open space. Considerable additional built form could have been focused along the southern boundary as envisaged by the CLEP 2021 height control (30 metres). However, this would have resulted in unfavourable amenity impacts to the residential apartments at No. 108 Station Street and No. 29-33 Lane Street.
3. The height breach facilitates an arrangement of floor space on the site in a manner that is effective in providing high levels of amenity to occupants of the development. By re-distributing bulk and scale, prioritizing building height, greater opportunities for natural ventilation, solar access, privacy and passive surveillance are provided. In accordance with the requirements of the ADG, 83% of

apartments achieve adequate solar access. A total of 71% of apartments achieve cross ventilation. As discussed in the statement of environmental effects, visual privacy is largely compliant with the exception (to the extent of the height non-compliance) of one (1) small window from Level 8-14 (4m deficit with public laneway providing separation). However, this window is considered non-habitable and is associated with a bathroom. The distribution of floor space prioritised toward Station Street results in the majority of private open space areas providing outlooks to the public domain.

4. The height variation is, in part, a result of the requirement to dedicate a part of the site (being a 1.4 metre wide strip of land along the southern boundary and 8 metres wide strip to the eastern boundary totaling 318m²) to Council that will allow for the delivery of a public laneway in accordance with Part F-2 of CDCP 2021 (refer to **Figure 6**). This land dedication will deliver a significant benefit to the community but requires the relocation and redistribution of building mass, reducing the floor plate and resultingly increasing building height.

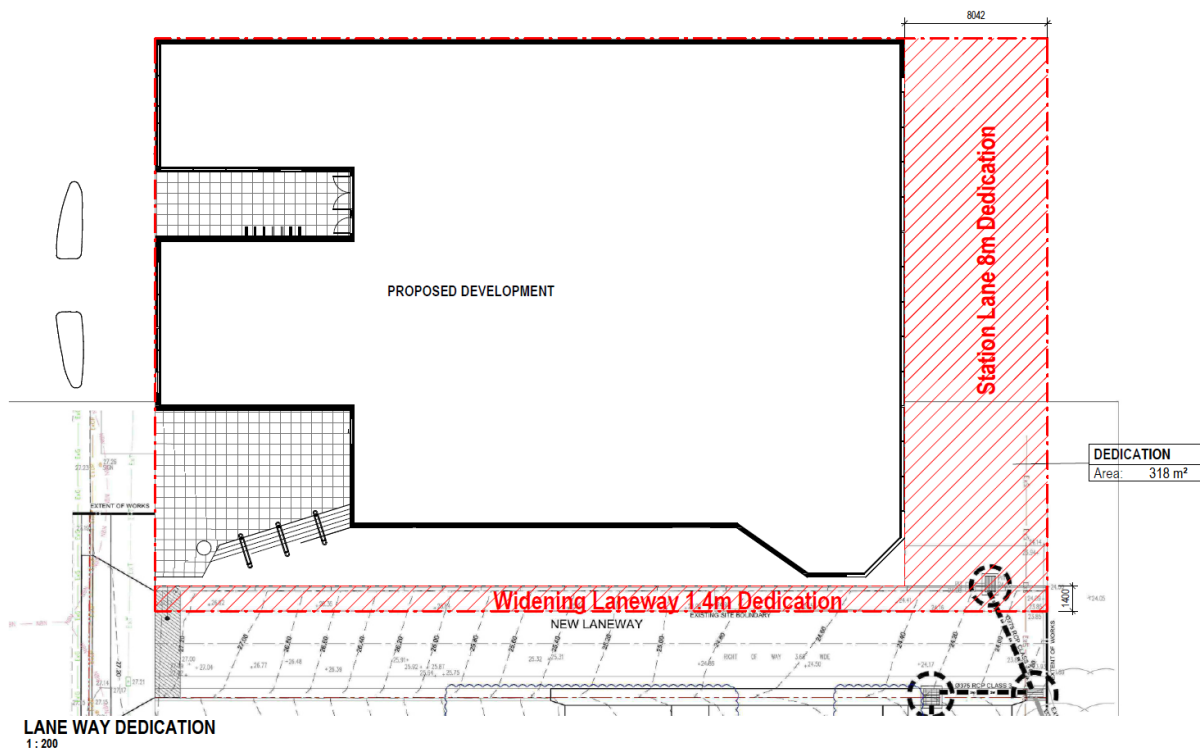


Figure 6 Laneway Dedication (IDA Design Group)

5. The height variation is, in part, also a result of the provision of two (2) commercial units and a childcare facility on the ground and first floor level with floor to ceiling heights that exceed 3.3 metres. Had the proposal not included these permissible non-residential uses in the design, but rather provided a typical residential level, the overall height variation would be significantly reduced and the building height more compatible with the Housing SEPP bonus. The provision of non-residential uses at ground level are integral in accordance with the E1 zone and requirements of CDCP 2021.

6. The proposed development will dedicate 1,058.5m² (15.57%) of GFA to affordable housing in accordance with Part 2, Division 1 of the Housing SEPP. This permits a 30% bonus to the CLEP maximum building height control. Therefore, permitting a 39m building height (where 30 metres control applies) and 26 metres building height (where 20 metres control applies). With the bonus, the central and eastern portions of the built form are compliant. Whilst the proposed development remains to exceed the maximum height control with the affordable housing bonus, consideration should be given the potential affordable housing uplifts on alternate sites in the Wentworthville Town Centre. Whilst its acknowledged No. 108 Station Street has recently been developed, the current CLEP controls with the added 30% bonus for affordable housing would permit a building height of 37.7 metres and 53.3 metres. On the northern side of Station Street, adjacent to Friend Park, a continuous building height of 53.3 metres could be permitted under the affordable housing provisions. The permissible building heights under the CLEP 2021 continue to increase closer to Wentworthville Railway Station.
7. 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:
 - (a) The extent of the additional height creates no significant adverse overshadowing impacts to adjoining development or public domain when compared to a compliant development. A compliant floor plate would result in a continuous built form of 39 metres along the southern boundary creating both privacy and solar access implications. Although the additional height results in a minor degree of overshadowing, this will not adversely impact the amenity of the neighbouring developments or public domain. As such, the increase to overshadowing caused by the non-compliant elements would be insignificant;
 - (b) The height breach does results in limited additional privacy impacts. It is the compliant parts of the building being the windows below would have the same or greater impact on overlooking. As such, the loss of privacy caused by the non-compliant elements would be insignificant; and
 - (c) The height breach will not result in any significant view loss as the subject site does not contain any significant views across or from the public domain. The maximum height non-compliance is limited to the tower fronting Station Street and consistent with the future intended building height of the surrounding locality. As such, the extent of view loss caused by the non-compliant element would be insignificant.
8. The social benefits of providing additional housing stock, especially much needed apartments and affordable housing, within a highly sought-after and accessible location should be given weight in consideration of the variation request. The additional distribution of floor space necessitates a form and scale that breaches the height limit. It would be a loss to the community (and contrary to the public interest) to deny the variation and require the removal of several residential apartments that would aid housing stock and affordability.
9. Insistence on compliance with the height of buildings development standard plus affordable housing bonus will require the deletion of several stories within the tower fronting Station Street.



Despite the limited amenity impacts this extent of the building causes to the streetscape and neighboring sites. This is a disproportionate response to the impacts created by the proposal given the site is located in an accessible area and ideally suited for this location.

10. The proposed development meets the objectives of the development standards and meets the objectives of the Zone E1 Local Centre zone as follows:
 - The proposal provides for a range of business and community uses including the provision of two commercial tenancies and a 120 place childcare centre.
 - The proposed would boost employment opportunities associated with the commercial units and child care centre.
 - The proposed shop top housing is consistent with the objectives of the Wentworthville Centre Revitalisation Planning Proposal in providing increased densities and housing opportunities (including affordable) in centres in close proximity to public transport.
 - Nonresidential uses are proposed on the ground and first floor. An active street frontage is proposed to Station Street. In addition, land dedication is proposed to the south and the east to facilitate two public laneways in line with Council's DCP.
11. The proposed development achieves the objects in Section 1.3 of the EP&A Act, specifically:
 - 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));
 - 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)).
12. The variation to the height of buildings development standard will give better effect to the principles of the SEPP (Housing) 2021. In particular:
 - The proposed variation will encourage the development of housing that will meet the needs of more vulnerable members of the community, including low to moderate income households, seniors and people with a disability;
 - Approval of the development will promote the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services,
 - Approval of the proposed variation will ensure new housing development provides residents with a reasonable level of amenity;
 - Approval will provide an additional twelve (12) apartments to the affordable housing stock to assist in bridging the significant deficit.
 - The development will integrate a much needed community use bringing the residents and nearby community together through a well-designed and located community facility; and
 - 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 singles and couples in a socially inclusive building.

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development, particularly given the context of the locality and the height variation forms a transition without having any adverse impacts from the public domain. Furthermore, the additional height does not significantly impact the amenity of the neighbouring properties and has been designed in such a way to ensure the additional height is compatible with the character of the locality.



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:

- 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.*
- 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.

7. Conclusion

This written request has been prepared in relation to the proposed variation to the 30% bonus maximum height control under clause 16(3) of SEPP (Housing) 2021, permitting split 26 metres and 39 metres building heights.

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 in accordance with clause 16(3) of SEPP (Housing) 2021, clause 4.3 of the CBLEP 2021 and the zone objectives. The proposal has also demonstrated sufficient environmental planning grounds to support the breach. In addition, the proposal will deliver a public benefit by dedicating land for the purpose of a public laneway along the southern and eastern boundaries via a voluntary planning agreement.

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 STATEMENT – MAXIMUM FLOOR SPACE RATIO (CLAUSE 16(1) OF SEPP (HOUSING) 2021)

1. Introduction

This Variation Statement has been prepared in accordance with clause 4.6 of the Cumberland Local Environmental Plan 2021 (CLEP 2021). The subject application seeks consent for *'Demolition of existing structures and construction of a part six, part fifteen storey mixed use building comprising a childcare centre, commercial units and shop top housing with four levels of basement parking, landscaping, Torrens title subdivision and land dedication for public laneways'* at Nos. 86-96 Station Street, Wentworthville ('the site').

2. Cumberland Local Environmental Plan 2021 (CLEP 2021)

Clause 4.4 of CLEP 2021 relates to the maximum floor space ratio and refers to the Floor Space Ratio Map.

Floor space ratio is defined as:

*"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".*

In the case of the subject site there is a maximum Floor Space Ratio (FSR) applicable under clause 4.4 of the *Cumberland Local Environmental Plan 2021* (CLEP 2021) of 2.8:1 as illustrated on the FSR map reproduced below at **Figure 7**.

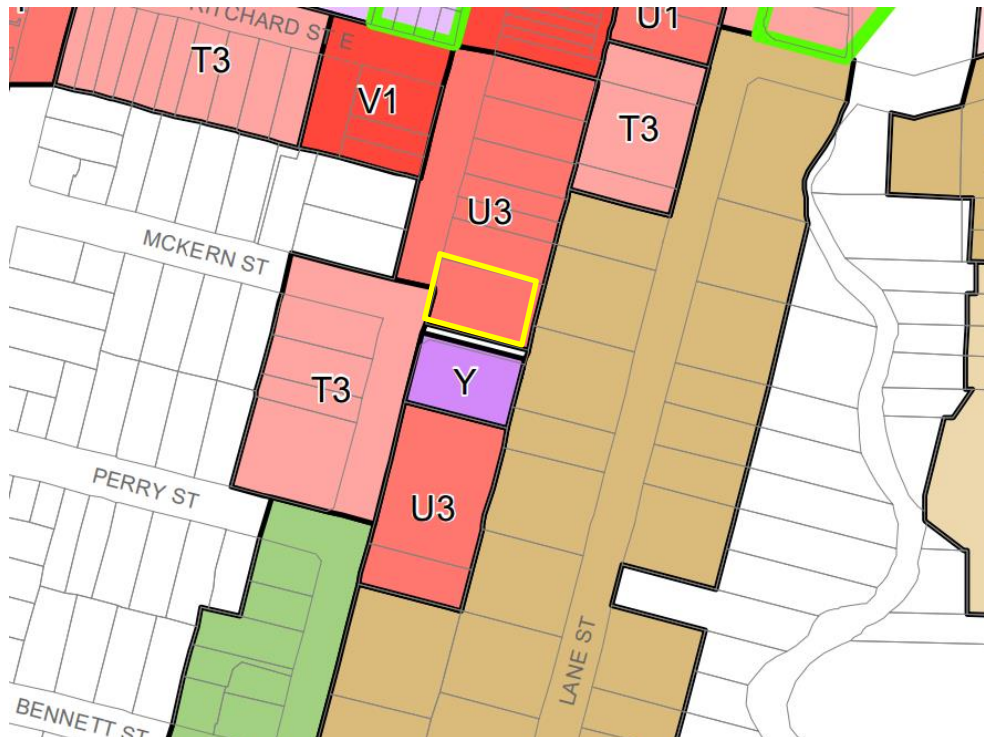


Figure 7 Extract from the FSR Map – site in yellow (U3 = 2.8:1)

Clause 16(1) of the Housing SEPP relates to the floor space ratio when infill affordable housing is provided in an accessible area. Clause 16(1) reads as follows:

(1) The maximum floor space ratio for development that includes residential development to which this division applies is the maximum permissible floor space ratio for the development on the land plus an additional floor space ratio of up to 30%, based on the minimum affordable housing component calculated in accordance with subsection (2).

The proposed development provides at minimum 15% affordable housing in accordance with part 2, division 1, chapter 2 of SEPP (Housing) 2021. Resultingly, a 30% bonus to the CLEP 2021 FSR control can be applied. This permits a maximum FSR of 3.64:1 and corresponding GFA of 5,904.08m².

3. Proposed variation to Floor Space Ratio development standard

The proposed development has a total site area of 1,622m². Based on an FSR of 3.64:1, the site is capable of a building with a gross floor area of 5,904.08m².

In calculating gross floor area, the relevant definition from the standard instrument states that:

“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 proposed GFA is 6,756m² which equates to a FSR of 4.165:1. The proposal would result in a variation to the 30% affordable housing bonus of 852m² or 14.43%.

As referenced in Part F-2 of CDCP 2021 and the *Wentworthville Centre Revitalisation Structure Plan*, the site is required to dedicate land for the public purpose of delivery of new public laneways. The total area of the site to be dedicated to Council is 318m² as indicated on the architectural plans by *IDA Design Group*. As previously discussed with Council at pre-DA stage, an additional 890m² (318m² x 2.8) can be applied to the permitted GFA/FSR which reflects the material benefit associated with the dedication of land.

In total, if adding the permitted FSR under CLEP (2.8:1) + 30% bonus (3.64:1) + land dedication (890m²) this permits an FSR at the site of 4.19:1 or 6,794.1m² to which the proposal complies.

4. Clause 4.6 of CLEP 2021

Clause 4.6 of the CLEP 2021 allows flexibility in the application of development standards in certain circumstances.

The objectives and provisions of Clause 4.6 are reproduced below.

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



- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,
 - (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.
- (2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.
- (3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—
 - (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and
 - (b) there are sufficient environmental planning grounds to justify the contravention of the development standard.
- Note—** The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).
- (4) The consent authority must keep a record of its assessment carried out under subclause (3).
- (5) (Repealed)
- (6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—
 - (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
 - (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.
- (7) (Repealed)
- (8) This clause does not allow development consent to be granted for development that would contravene any of the following—
 - (a) a development standard for complying development,
 - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
 - (c) clause 5.4,
 - (caa) clause 5.5.”

The development standard in clause 16(1) of SEPP (Housing) 2021 is 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)(a) and (b). 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).

Together CLEP 2021 and the additional FSR provided by SEPP (Housing) 2021 nominate a maximum FSR of 3.64:1 for the site. It is hereby requested that a variation to FSR be granted pursuant to clause 4.6 of the CLEP 2021 so as to permit a maximum floor space ratio of 4.165:1 which equates to a numerical variation of 852m² and represents a variation of 14.43%.



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

Of relevance to Clause 4.6(3)(a) is Preston CJ's judgment in *Wehbe v Pittwater Council* (2007) NSW LEC 827 which sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states (at [42]), 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 judgment goes on to state (at [43]) 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 then expressed the view that there are at least 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 written request [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. The proposal seeks to vary Clause 16(1) under division 1 of part 2, chapter 2 of SEPP (Housing) 2021. With regard to clause 16(1), the objective of division 1 of part 2, chapter 2 of SEPP (Housing) 2021 is as follows:

“The objective of this division is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households”.

The proposed development will facilitate the delivery of new in-fill affordable housing which will meet the needs of very low, low and moderate income households. To request strict compliance and require deletion of the additional levels will adversely reduce the provision of affordable residential accommodation in the Wentworthville town centre which is contrary to the above objective and certainly does not *“facilitate the delivery of new in-fill affordable housing”*. The proposed distribution of floor space above the height limit is the most appropriate response to the site constraints (primarily topography), relationship to neighbouring properties and the public domain.

The proposal will allocate twelve (12) apartments as affordable housing in accordance with SEPP (Housing) 2021. Importantly, the site is ideally located to accommodate affordable housing, and the subsequent density, given its prime location within an accessible area, with excellent access to public transport, commercial and retail premises and services. Given the context and size of the site, it is considered suitable to accommodate the additional development density to support affordable housing without adversely impacting surrounding properties.

The additional gross floor area has been demonstrated to not cause significant burden in terms of environmental and amenity impacts. Adequate solar access and cross ventilation is achieved, minimal opportunities for overlooking and overshadowing are created and traffic and parking and acoustic impacts are appropriately mitigated.

Ultimately, the provision of affordable housing on the site is delivering a significant social benefit to the locality.

To request strict compliance would be antipathetic to the objective of *Division 1 In-fill affordable housing* and as such, is insisting on compliance with the numerical development standard is unreasonable and unnecessary in this instance.

Furthermore, for completeness and given there is only a single objective for Clause 16(1) of SEPP (Housing) 2021, the objectives under clause 4.4 of CLEP 2021 have been considered, below.

The objectives and relevant provisions of clause 4.4 of CLEP 2021 are as follows, inter alia:

- (a) to establish a maximum floor space ratio to enable appropriate development density,*
- (b) to ensure that development intensity reflects its locality.*

The objectives of clause 4.4 are addressed in turn below.

Objective (a)

Objective (a) seeks to establish an appropriate development density via the FSR development standard.

The proposal delivers a high quality urban and architectural design which clearly exhibits design excellence, despite the variation to the FSR development standard (14.2%) and will contribute positively to the emerging character in this high density, mixed use zone. The building is well articulated with separation distances largely consistent with the ADG for the residential levels, the above ground boundaries are well landscaped, and the balconies areas are orientated away from neighbouring dwellings and towards the street frontages.

Contextually speaking, the site is located in the Wentworthville Town Centre. Recently rezoned under the *Wentworthville Centre Revitalisation Planning Proposal* and intended for significant uplift. The site immediately to the south is one of few built forms that reflect the intended future character for the Wentworthville Town Centre. The



neighboring site located to the south (No. 108 Station Street) contains a twelve (12) storey mixed use building with three (3) levels of underground carparking with CLEP 2021 permitting a FSR of 4.5:1, being almost double that permitted on the subject site.

Given the proximity of the site to Wentworthville Railway Station, services and amenities and precedent set by the site to the south, a considerable variation to the FSR control can be justified.

The proposed variation to the FSR development standard will provide a transition from the higher density development to the south, uniquely located further from Wentworthville Railway Station than sites to the north, featuring more conservative FSR controls. The contravention would further provide a more seamless transition to the 3:1 FSR controls on the northern edge of Station Street, adjacent to Friend Park (refer to **Figure 8**).

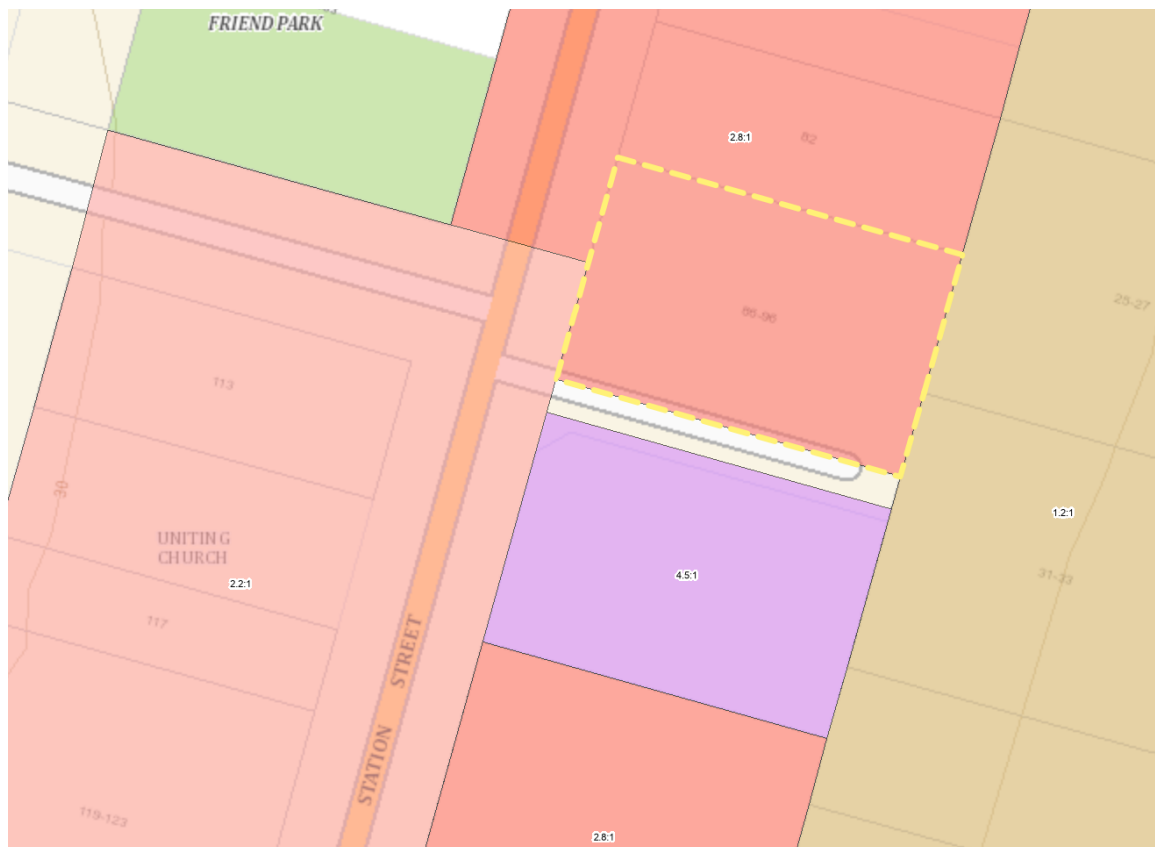


Figure 8 The subject site and FSR map overlaid (Source: Planning Portal Spatial Viewer)

The proposed development establishes a density of 4.165:1 which includes two (2) commercial units and childcare facility ground and first floor level to provide additional services for the community. These additional non-residential uses typically occupy a larger floor plate than residential development but provide for an important contribution to the community and should be attributed additional density. In this regard, the non-residential uses will occupy 1,128m² which equates to 16.4% of the total GFA. The proposed variation will establish a transition in bulk and scale with the E1 zoned land, within 290m walking distance of Wentworthville Railway Station and will provide for additional childcare services to aid demand caused by the increased in residential capacity within the centre.

The additional FSR is not attributed to a building that is out of character with the scale of adjoining properties. Particularly given the neighbouring site at No. 108 Station Street is afforded a FSR of 4.5:1. Building separation is largely compliant with the ADG. The site will front three (3) public roads/laneways and therefore adequate separation in the built form will be protected in perpetuity.

The appropriateness of the proposed density is founded in the optimal site location, contextual surroundings and lack of amenity impacts.

The proposal satisfies objective (a), despite the FSR variation.

Objective (b)

Objective (b) seeks to ensure that development intensity reflects its locality.

In order to reflect the locality, it is considered that the proposed development must be compatible with development in that locality. It is considered 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.”

The subject site is in transition to higher density development reflective of the applicable planning controls and recently constructed development immediately to the south of the site. The proposed development, even with the FSR variation, is considered to be compatible with the height, bulk and scale of the recently approved and emerging character of the locality. In this regard, the proposed development is clearly subservient to the higher density development adjoining Wentworthville Railway Station but remains compatible with the future scale of development on Station Street.

As mentioned in objective (a), the design largely seeks to achieve appropriate separation from neighbouring sites that satisfies the requirements of the ADG. Therefore, the additional FSR is not the result of a development that is excessive or incompatible with surrounding development. It is proposed to be constructed of high-quality materials, well-articulated and provided with a landscaped garden which reflects its setting within a residential area.

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. As such, it is considered that this variation will not be visually jarring when viewed from the public domain and is considered to be compatible with the character of the locality. Furthermore, the design ensures that the FSR variation will not have any adverse impact to the visual bulk and scale of the building and the proposal will remain compatible with the existing and emerging development character in the locality.

The proposal satisfies objective (b), despite the FSR variation.

6. 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, this Variation Request does so below. 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 following planning grounds are submitted to justify contravening the maximum FSR:

1. The proposed FSR is a result of the land dedication which removes a 1.4 metre wide strip of land along the southern boundary and an 8 metres wide strip to the eastern boundary, totaling 318m² to be dedicated to Council to extend and create a public laneway in accordance with Part F-2 of CDGP 2021 (refer to **Figure 9**). This land dedication will deliver a significant benefit to the community but requires the relocation and redistribution of building mass, reducing the building envelope and resultingly increasing building height. During the pre-DA, Council confirmed that the allowable FSR for the site could be calculated as follows (site area x 2.8:1) plus additional 30% affordable housing bonus plus and additional 890m² to over the laneway dedication. Based on this calculation, the allowable GFA and FSR at the site is 6,756m² or 4.165:1. The method to which the allowable FSR and GFA has been calculated is supported by a letter from *Mills Oakley Lawyers* (dated 7 May 2024), submitted under separate cover. Importantly, the proposed GFA/FSR complies with the agreed upon methodology above.

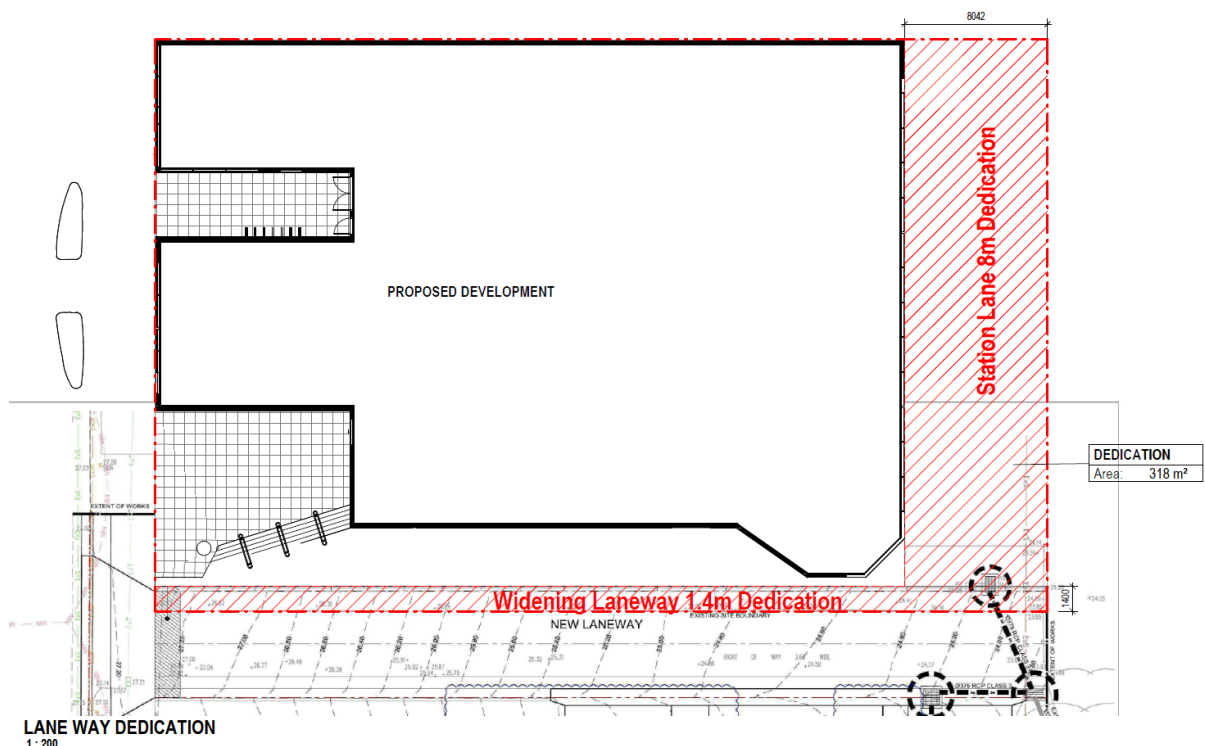


Figure 9 Laneway Dedication (Source: IDA Design Group)

2. The proposed variation results in a built form which is contextually responsive and appropriate with regard to the future anticipated character and development at No. 108 Station Street. As discussed above, the site located to the south is afforded a FSR of 4.5:1, which far exceeds the 2.8:1 permitted on the subject site. No. 108 Station Street has an approximate area of 1,598m² which would permit an approximate GFA of 7,191m² which exceeds the 6,743.5m² GFA proposed on the subject site. Furthermore, if the affordable housing bonus were applied to No. 108 Station Street, a GFA of approximately 9,348.3m² and FSR of 5.85:1 could be



achieved. It is understood that a site-specific planning proposal to increase density at No. 108 Station Street was sought and is now reflected in the CLEP 2021 controls. Despite the subject site being closer to Wentworthville Railway Station, it is afforded lower density compared to No. 108 Station Street. The proposed variation will allow a logical transition of higher densities based on proximity to Wentworthville Railway Station.

3. The FSR breach facilitates an arrangement of floor space on the site in a manner that is effective in providing high levels of amenity to occupants of the development. The non-residential component (1,128m²) equates to a substantial portion of the proposed variation which is important to provide additional services and community facilities that are not present in the employment zones. The FSR variation will not be visually jarring or readily discernible when viewed from the street level and presents as a building that appears compliant with the applicable planning controls. In this regard, the proposal, including the FSR variation, will not be readily discernible or out of character given the scale of development to the south. The variation is considered to be compatible with surrounding development, noting the area is in transition.
4. The extent of the FSR variation, whilst not numerically small, a lack of amenity impacts can be a reason (along with other reasons) advanced in support of environmental planning grounds: *Big Property Group Pty Ltd v Randwick City Council [2021] NSWLEC 1161 at [49]*). In *Big Property* the contravention was permitted — in part due to lack of adverse impacts — even though the numerical extent of the contravention was 43%. When considering the variation sought in this instance, it appears numerically significant with an area of 852m² or 14.43%, however the non-compliance is largely contained within the first six (6) storeys of the building associated with a larger floor plate. The built form can be readily absorbed due to its location within the Wentworthville Town Centre and E1 Local Centre zone.
5. 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:
 - (a) The extent of the additional FSR creates no significant adverse overshadowing impacts to adjoining development or public domain when compared to a compliant FSR envelope. That is, although the proposal results in a minor degree of overshadowing, this will not adversely impact the amenity of the neighbouring developments or public domain. As such, the increase to overshadowing caused by the non-compliant elements would be insignificant;
 - (b) The FSR breach results in limited additional privacy impacts. The elements that breach the FSR largely relate to the pencil-like tower that fronts Station Street. Levels 6-14 will have extremely limited adverse privacy impacts. The separation distances of the Apartment Design Guide are adhered to on these upper floors with the exception of a single bedroom window on each level (between Levels 6-14). All private open space areas and apartments are orientated to the Station Street frontage associated with the tower, ensuring privacy and passive surveillance. Therefore, it is the compliant parts of the building, being the windows and balconies associated with the podium, that would have the same or greater impact on overlooking. As such, the loss of privacy caused by the non-compliant elements would be insignificant; and
 - (c) The FSR breach will not result in any significant view loss as the subject site does not contain any significant views across or from the public domain. The maximum FSR variation is limited and is

compatible with the scale of surrounding development. As such, the extent of view loss caused by the non-compliant element would be insignificant.

6. The social benefits of providing additional housing stock, especially much needed market and affordable housing, within a highly sought-after and accessible location should be given weight in consideration of the variation request. The additional distribution of floor space necessitates a form and scale that breaches the height limit. It would be a loss to the community (and contrary to the public interest) to deny the variation and require the removal of several residential apartments that will aid housing stock and affordability.
7. Insistence on compliance with the FSR development standard plus affordable housing bonus will require the deletion of several storeys within the tower fronting Station Street. Despite the limited amenity impacts this extent of the building causes to the streetscape and neighboring sites. This is a disproportionate response to the impacts created by the proposal given the site is located in an accessible area and ideally suited for this location.
8. The proposed development meets the objectives of the development standards and meets the objectives of the Zone E1 Local Centre zone as follows:
 - (a) The proposal provides for a range of business and community uses including the provision of two commercial tenancies and a 120 place childcare centre,
 - (b) The proposed would boost employment opportunities associated with the commercial units and child care centre,
 - (c) The proposed shop top housing is consistent with the objectives of the Wentworthville Centre Revitalisation Planning Proposal in providing increased densities and housing opportunities (including affordable) in centres in close proximity to public transport,
 - (d) Non-residential uses are proposed on the ground and first floor. An active street frontage is proposed to Station Street. In addition, land dedication is proposed to the south and the east to facilitate two (2) public laneways as required by Council's DCP.
9. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:
 - 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));
 - 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)).
10. The variation to the FSR development standard will give better effect to the principles of SEPP (Housing) 2021. In particular:
 - The proposed variation will encourage the development of housing that will meet the needs of more vulnerable members of the community, including low to moderate income households, seniors and people with a disability,
 - Approval of the development will promote the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services,
 - Approval of the proposed variation will ensure new housing development provides residents with a reasonable level of amenity;



- The development will integrate a much needed community use bringing the residents and nearby community together through a well-designed and located community facility,
- Approval will provide an additional twelve (12) apartments to the affordable housing stock to assist in bridging the significant deficit, and
- 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 singles, couples and families in a socially inclusive building.

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development, especially the contextually responsive design and lack of material amenity impacts on surrounding properties.

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 than that of a compliant development:

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. There are sufficient environmental planning grounds to justify contravening the development standard.

The proposal offers positive planning benefits that would not likely be available if the contravention were not allowed, being the provision of a much needed community facility within close proximity of local centres, employment areas, schools and public transport.

For completeness, we note that the size of the variation to the SEPP (Housing) 2021 standard (14.36%) is not in itself, a material consideration as whether the variation should be allowed. 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].

Some examples that illustrate the wide range of commonplace numerical variations to development standards allowed under clause 4.6 (as it appears in the Standard Instrument) are as follows:

- 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%.
- 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% (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% (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, whilst the development standard was 0.9:1. The exceedance was around 65%.
- 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% (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% exceedance of the floor space ratio control.
- 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% (3.54:1 compared to the permitted 2.5:1).
- In *Symond Family Investments Pty Ltd v Woollahra Municipal Council* [2023] NSWLEC 1789 the Court granted development consent to alterations to commercial premises and, in doing so, approved a 36.6 per cent contravention of the 14.7-metre height standard (to 20.075 metres). The Court also approved an 18.7% contravention of the 2.5:1 floor space ratio standard (allowing development at 3.01:1).
- 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% (1.27:1 compared to the permitted 1.0:1).
- In *88 Bay Street Pty Ltd v Woollahra Municipal Council* [2019] NSWLEC 1369 the Land and Environment Court granted development consent for a new dwelling house, swimming pool and landscaping at 6 Bayview Hill Road, Rose Bay with a height exceedance of 49% (14.16m compared to the permitted 9.5m).
- 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% (from 0.65:1 to 1.21:1).
- In *Leda Holdings Pty Ltd v Northern Beaches Council* [2022] NSWLEC 1179, the Court granted development consent for a mixed use building containing nine self-storage units and 27 industrial units (including car parking and landscaping works) with a height exceedance of 28% (14.1m compared with the permitted 11m).

7. Conclusion

This written request has been prepared in relation to the proposed variation to the additional FSR control of 3.64:1 under clause 16(1) of SEPP (Housing) 2021.

Council have previously confirmed an additional 890m² of GFA is permitted on this site due to the land identified for dedication for a public purpose. Resultingly, when including the 890m², the proposed GFA and FSR comply.

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. The proposal has also demonstrated sufficient environmental planning grounds to support the breach. In addition, the proposal will deliver an important public benefit for the Wentworthville Town Centre by the dedication of land that will support the delivering the public laneway to be provided along the south and east, to be introduced via a Voluntary Planning Agreement with Council.

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.

