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CLAUSE 4.6 VARIATION REQUEST TO CLAUSE 4.4 FLOOR SPACE RATIO

29-57 Christie Street, St Leonards

Prepared for
ARROW CAPITAL PARTNERS
16 November 2020

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1. INTRODUCTION

This Clause 4.6 Variation Request (**the Request**) has been prepared by Urbis Pty Ltd on behalf of Arrow Capital Partners (**the Proponent**) to accompany a concept and detailed Development Application (**DA**) for the proposed development at 29-57 Christie Street, St Leonards (**the site**).

The Request seeks a variation to the floor space ratio development standard prescribed for the site under clause 4.4 of *Lane Cove Local Environment Plan (LCLEP)* 2009. The variation is request is made pursuant to clause 4.6 of LCLEP 2009.

The Department of Planning, Industry and Environment (**DPIE**) has prepared a comprehensive land use and infrastructure package for St Leonards and Crows Nest to guide future development and infrastructure decisions in the area to 2036.

The St Leonards and Crows Nest 2036 Plan (**2036 Plan**) was finalised on 29 August 2020 and provides for increased height and density controls for the subject site.

The proposed development is generally consistent with the height and density controls under the 2036 Plan.

The extent of FSR variation sought through this Request will deliver the strategic intent of the 2036 Plan and will enable development to proceed in the short term prior to Lane Cove Council (**Council**) amending the LCLEP 2009 to reflect the 2036 Plan.

2. PROPOSED DEVELOPMENT

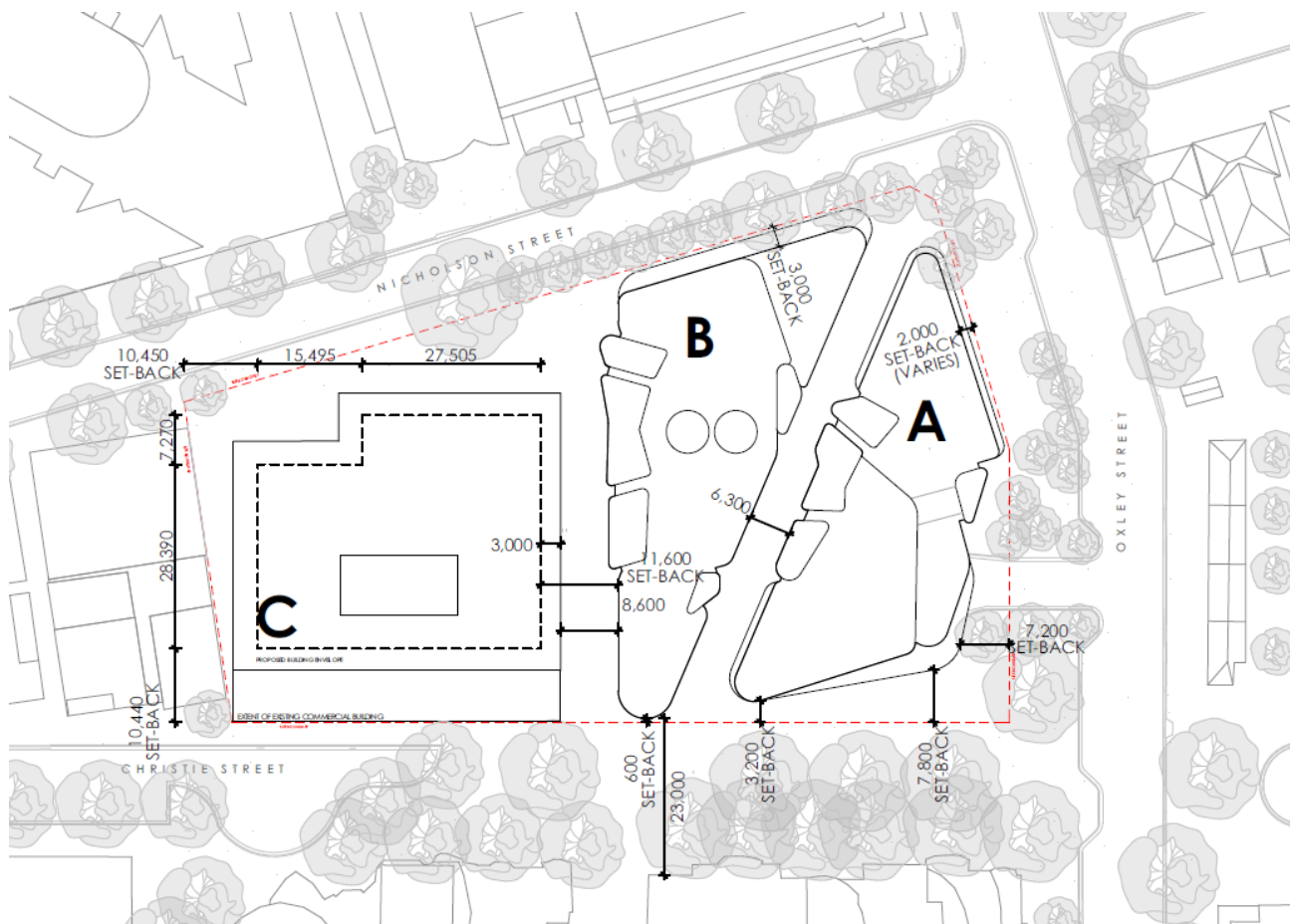
This Request has been prepared to accompany a DA for the redevelopment of the site at 29-57 Christie Street, St Leonards.

A detailed description of the proposed development is provided in the Statement of Environmental Effects prepared by Urbis Pty Ltd and dated 17th November 2020. The proposal is also detailed within the architectural, engineering, landscape and public domain plans that form part of the DA.

The proposed development is presented in the form of a concept and detailed DA for the redevelopment of the entire site and the construction of two commercial towers, landscaping and public domain works.

The concept DA seeks to establish three building envelopes to be developed in two stages. The detailed DA seeks approval for the construction of two commercial buildings, identified as Building A and Building B on the staging plan in **Figure 1** below. Building A and B are located in the southern portion of the site.

Figure 1 Concept site plan



Source: Fitzpatrick + Partners

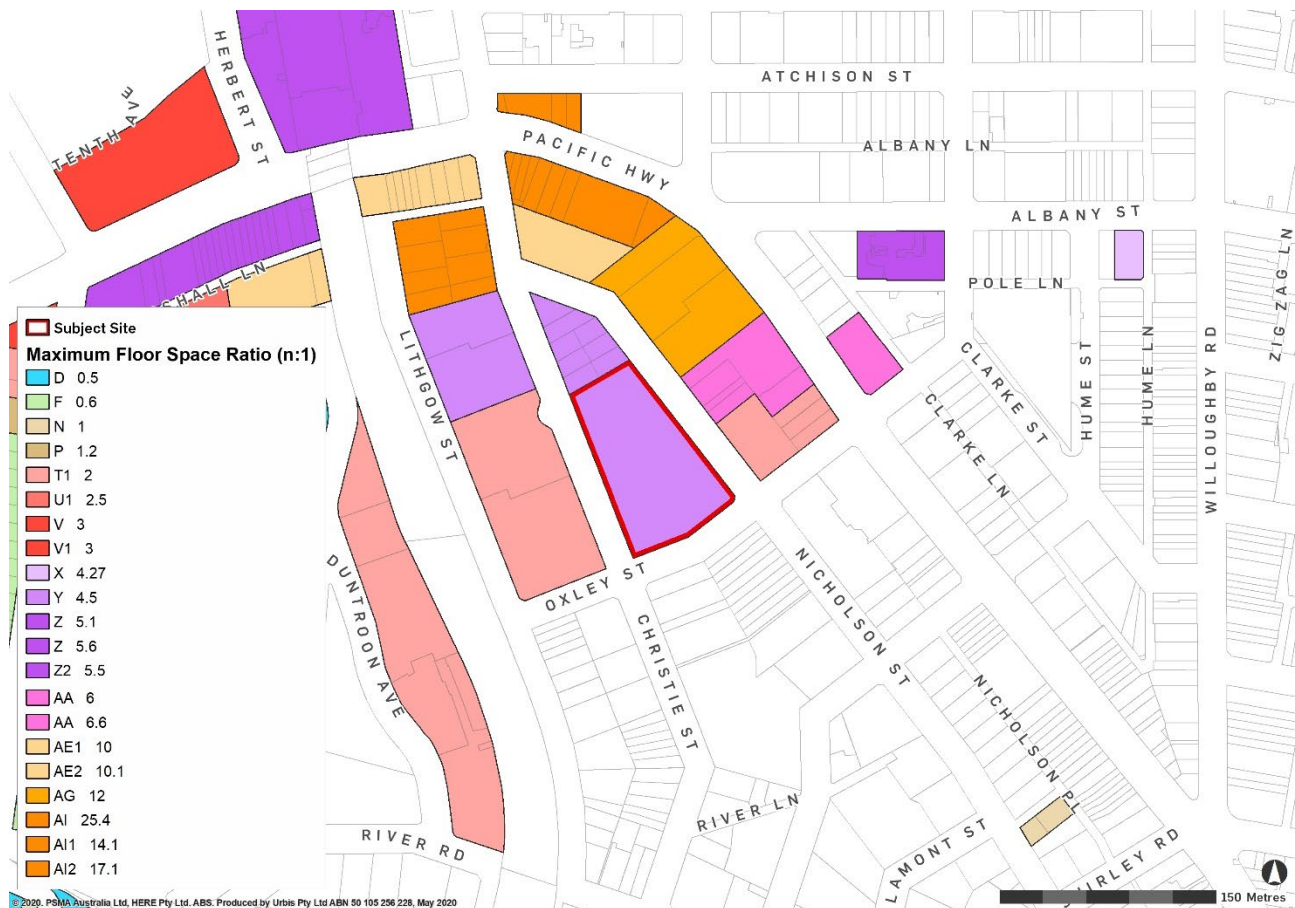
3. VARIATION TO FSR STANDARD

This section of the report identifies the development standard, which is proposed to be varied, including the extent of the contravention. A detailed justification for the proposed variation is provided in **Section 5**.

3.1. DEVELOPMENT STANDARD

This Request seeks a variation to the development standard contained within clause 4.4 of LCLEP 2009 which identifies the site as having a maximum FSR of 4.5:1 as demonstrated on the LCLEP FSR map in **Figure 2** below.

Figure 2 FSR Map



3.2. EXTENT OF VARIATION

The proposed development has a maximum FSR of 7.5:1 spread across three buildings on the site. Therefore, the maximum extent of variation sought is 3:1.

As previously mentioned, DPIE's St Leonards and Crows Nest 2036 Plan recommends an increased FSR control of 7.5:1 for the site.

In this regard, the proposal aligns and complies with the 2036 Plan and a variation is sought to the LCLEP 2009 FSR control of 4.5:1.

[illegible]

4 VARIATION TO FSR STANDARD

4. RELEVANT ASSESSMENT FRAMEWORK

Clause 4.6 of LCLEP includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 of the Lane Cove LEP are:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a DA that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, clause 4.6(3) requires that the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development by demonstrating:

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

Clause 4.6(4)(a) requires the consent authority to be satisfied that the applicant's written request adequately addresses each of the matters listed in clause 4.6(3). The consent authority should also be satisfied that that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which it is proposed to be carried out.

Clause 4.6(4)(b) requires the concurrence of the Secretary to have been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary consider:

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*
- (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*

The concurrence of the Secretary can be assumed to have been granted for the purpose of this variation request in accordance with the Department of Planning Circular PS 18–003 'Variations to development standards', dated 21 February 2018. This circular is a notice under section 64(1) of the Environmental Planning and Assessment Regulation 2000 and provides for assumed concurrence. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The Secretary can be assumed to have given concurrence if the matter is determined by an independent hearing and assessment panel or a Sydney district or regional planning panel in accordance with the Planning Circular.

This clause 4.6 request demonstrates that compliance with the FSR control prescribed for the site under clause 4.4 of LCLEP is unreasonable and unnecessary, that there are sufficient environmental planning grounds to justify the requested variation and that the approval of the variation is in the public interest because it is consistent with the development standard and zone objectives.

In accordance with clause 4.6(3), the applicant requests that the FSR control be varied (subject to the applicant's position that such a request should not actually be necessary).

5. ASSESSMENT OF CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standards relating to FSR in accordance with clause 4.4 of LCLEP.

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

- Varying development standards: A Guide, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court.

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

5.1. IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED? – CLAUSE 4.6(2)

The FSR control prescribed by clause 4.4 of the LEP is a development standard capable of being varied under clause 4.6(2) of Lane Cove LEP 2009.

The proposed variation is not excluded from the operation of clause 4.6(2) as it does not comprise any of the matters listed within clause 4.6(6) or clause 4.6(8) of Lane Cove LEP 2009.

5.2. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE? – CLAUSE 4.6(3)(A)

Historically, the most common way to establish a development standard was unreasonable or unnecessary was by satisfying the first method set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method requires the objectives of the standard are achieved despite the non-compliance with the standard.

This was recently re-affirmed by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [16]-[17]. Similarly, in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [34] the Chief Judge held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This Request addresses the first method outlined in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

- ***The objectives of the standard are achieved notwithstanding non-compliance with the standard*** (the first method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43])

The specific objectives of the FSR development standard as specified in clause 4.4 of the LEP are detailed in **Table 1** below. An assessment of the consistency of the proposed development with each of the objectives is also provided.

Table 1 Assessment of consistency with clause 4.4 objectives

Objective	Assessment
(a) to ensure that the bulk and scale of development is compatible with the character of the locality.	<p>The proposed bulk and scale of the concept development is considered to be compatible with the character of the locality for the following reasons:</p> <ul style="list-style-type: none">▪ The proposed FSR variation facilitates three built forms that are compatible with the emerging context of St Leonards CBD which is increasingly being characterised by podium and tower developments. This is evident by the recently approved or constructed developments to the north at 88 Christie Street, the New Hope building at 500 Pacific Highway and the Mirvac building at 472-486 Pacific Highway.

Objective	Assessment
	<ul style="list-style-type: none"> ▪ The proposed bulk and scale responds appropriately to the low density development to the south by locating the lowest building (Building A) closest to the R2 Zone and increasing the scale of Building B and C towards the central CBD to the north where taller buildings are located. The proposed floor area is distributed across three buildings on the site, providing a transition from low density to high rise towers front the Pacific Highway. ▪ The proposed FSR complies with the recently finalised 2036 Plan which recognises St Leonards' significant economic role as the sixth largest office market in the Greater Sydney Region. The 2036 Plan seeks to reinforce this status. In this regard, the proposed FSR variation allows for additional commercial floor space in Building A and B which is compatible with the B3 Commercial Core zone in which it is located and satisfies State and Council strategic objectives for St Leonards, which include: <ul style="list-style-type: none"> – Providing A-Grade commercial office within highly accessible areas – Contributing to the St Leonards jobs target for the Precinct – Growing employment and collaboration areas within the Eastern Economic Corridor and St Leonards Strategic Centre. – Promote potential synergies with the Royal North Shore Hospital and other health or education activities.

The above assessment demonstrates that the objective of the development standard is achieved, notwithstanding the non-compliance with the standard in the circumstances described in this variation report.

5.3. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD? – CLAUSE 4.6(3)(B)

The Land & Environment Court judgment in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, assists in considering the sufficient environmental planning grounds. Preston J observed:

“...in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and

...there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development”

There is an absence of environmental harm arising from the contravention and positive planning benefits arising from the proposed development as outlined in detail above.

The proposed FSR complies with the recommended 2036 Plan controls for the site. It is therefore demonstrated that the site and locality has the capacity to accommodate the proposed bulk and scale.

The proposed FSR variation facilitates the delivery of high-quality employment floor space in Building A and B consistent with the strategic objectives for St Leonards under the Greater Sydney Regional Plan, North District Plan and the 2036 Plan as well as Council's objectives for employment growth in Strategic Centres close to public transport.

The proposed development will deliver a public benefit in the form of two new through site links, upgrades to the public domain and adjacent public open space and new amenities as well as a monetary contribution towards local public infrastructure.

The proposed bulk and scale of the development is compatible with the emerging context of St Leonards CBD, particularly in relation to the much taller buildings to the north on Christie Street and Pacific Highway. The proposed FSR will be contained within three building envelopes that are stepped down to provide a clear transition in density across St Leonards.

The proposed FSR will not result in any unreasonable amenity impacts to neighbouring properties or open spaces in regard to solar access, privacy and visual bulk.

The proposed FSR variation is associated with a development that provides a superior public domain outcome that will contribute to the 'Green Grid' and enhance the local character of St Leonards and is therefore in the public interest.

It is evident that there are sufficient environmental planning grounds to justify the proposed height variation in this instance.

5.4. HAS THE WRITTEN REQUEST ADEQUATELY ADDRESSED THE MATTERS IN SUB-CLAUSE (3)? – CLAUSE 4.6(4)(A)(I)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

Each of the sub-clause (3) matters are comprehensively addressed in this written request, including detailed consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. The written request also provides sufficient environmental planning grounds, including matters specific to the proposal and the site, to justify the proposed variation to the development standard.

5.5. IS THE PROPOSED DEVELOPMENT IN THE PUBLIC INTEREST? – CLAUSE 4.6(4)(B)(II)

Clause 4.6(4)(a)(ii) states development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the proposal will be in the public interest because it is consistent with the objectives of the development standard and the objectives for the zone.

The consistency of the development with the objectives of the development standard is demonstrated in **Table 2** above. The proposal is also consistent with the land use objectives that apply to the site under LCLEP 2009. The site is located within the B3 Commercial Core zone. The proposed development is consistent with the relevant land use zone objectives as outlined in Table 3 below.

Table 2 Assessment of compliance with land use zone objectives

Objective	Assessment
<ul style="list-style-type: none"> To provide a wide range of retail, business, office, entertainment, community and other suitable land uses that serve the needs of the local and wider community. 	<p>The proposed FSR variation will facilitate the delivery of commercial floor space in Building A and B that includes office, retail and community-serving uses including a gym and public bathrooms.</p> <p>The use of Building C will be subject of a future development application.</p> <p>The proposal also seeks to enhance the existing Christie Street Reserve adjacent to site to create a greater degree of useable public open space that will be integrated with the public domain of the proposed development.</p>

Objective	Assessment
<ul style="list-style-type: none"> To encourage appropriate employment opportunities in accessible locations. 	<p>The proposed FSR variation will provide for additional employment floor space in Building A and B in a highly accessible location between St Leonards Railway Station and the future Crows Nest Metro Station.</p> <p>The proposed commercial levels in Building A and B will achieve PCA Office Grade A classification which will attract a variety of commercial tenants.</p>
<ul style="list-style-type: none"> To maximise public transport patronage and encourage walking and cycling. 	<p>The site is located within 300m of both the existing St Leonards Railway Station and the Crows Nest Metro Station currently under construction which facilitates public transport patronage.</p> <p>The proposed development will enhance pedestrian connections to these Stations through the provision of through site links and an enhanced public domain, offering an enjoyable alternative to the busy Pacific Highway route.</p> <p>Such improvements will encourage walking and cycling in proximity to the site.</p>
<ul style="list-style-type: none"> To integrate business, retail and other development in accessible locations. 	<p>The proposal provides for a mix of retail and commercial tenancies in Building A and B within the B3 Commercial Core zone that will service the needs of the local and visitor population of St Leonards.</p> <p>The mix of uses will be integrated within a high-quality architectural development which will provide an enhanced public domain, public open spaces and landscaped areas.</p>
<ul style="list-style-type: none"> To maximise sunlight for surrounding properties and the public domain. 	<p>The proposed building massing across the site has been informed by the FSR controls and solar access requirements set out in the 2036 Plan. In this regard, the proposed development achieves a compliant level of solar access to the residential dwellings to the south and Newlands Park to the south-west, notwithstanding the height non-compliance.</p> <p>Therefore, the proposed FSR variation is not responsible for any additional overshadowing beyond that anticipated for a compliant building development.</p> <p>In addition, the proposed site plan is considered to promote sunlight through the site and to public places adjacent to the site by splitting the massing in to three built forms and reducing the site</p>

Objective	Assessment
	coverage from what could be achieved if a single lower built form was proposed.
<ul style="list-style-type: none"> To encourage urban design maximising attractive public domain and adequate circulation space throughout the St Leonards commercial centre for current and future users. 	<p>The proposed development will provide attractive built forms within an enhanced public domain and landscaped setting.</p> <p>The proposed site layout will improve circulation space through St Leonards CBD by enhancing pedestrian connections between the site and nearby transport nodes including St Leonards Train Station and Crows Nest Metro Station and providing a greater degree of public open space.</p>

The above table demonstrates that the proposed development will be in the public interest notwithstanding the proposed variation to the FSR standard as 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.

5.6. HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED? – CLAUSE 4.6(4)(B) AND CLAUSE 4.6(5)

The Secretary can be assumed to have concurred to the variation under Department of Planning Circular PS 18–003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2000*.

The Secretary can be assumed to have given concurrence as the matter will be determined by an independent hearing and assessment panel or a Sydney district or regional planning panel in accordance with the Planning Circular.

The matters for consideration under clause 4.6(5) are considered below.

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

The proposed non-compliance with the FSR standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

▪ **Clause 4.6(5)(b) - is there a public benefit of maintaining the planning control standard?**

The proposed development achieves the objectives of the FSR development standard and the B3 Commercial Core zone objectives notwithstanding the technical non-compliance.

The proposed FSR variation results in a better planning outcome for the site as it allows for a development of a scale that better responds to the emerging context of the site and locality. In addition, the proposed density is able to be accommodated without creating any discernible amenity impacts beyond those anticipated for the site under the 2036 Plan controls.

The proposed variation also allows for a greater degree of employment floor space in Building A and B within an accessible location. The mix of uses within Building A and B, as well as the enhanced public domain will contribute to the vitality of St Leonards centre.

As there are indiscernible amenity impacts associated with the proposed FSR variation, there is no material impact or benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard.

▪ **Clause 4.6(5)(c) – are there any other matters required to be taken into consideration by the Secretary before granting concurrence?**

Concurrence can be assumed, however, there are no known additional matters that need to be considered within the assessment of the clause 4.6 variation request prior to granting concurrence, should it be required.

6. CONCLUSION

For the reasons set out in this written request, strict compliance with the FSR development standard contained within clause 4.4 of Lane Cove LEP is unreasonable and unnecessary in the circumstances of the case. Further, there are sufficient environmental planning grounds to justify the proposed variation and it is in the public interest to do so.

It is reasonable and appropriate to vary the FSR standard to the extent proposed for the reasons detailed within this submission and as summarised below:

- The proposed 7.5:1 FSR complies with the recommended FSR control for the site under the St Leonards and Crows Nest 2036 Plan and therefore the variation from the 4.5:1 LEP control is considered to be a technical non-compliance only.
- The proposed FSR variation from the LEP development standard facilitates the delivery of additional high-quality employment floor space within Building A and B consistent with the strategic objectives for St Leonards under the Greater Sydney Regional Plan, North District Plan and the St Leonards and Crows Nest 2036 Plan as well as Council's objectives for employment growth in Strategic Centres close to public transport.
- The proposed bulk and scale is compatible with the emerging context of St Leonards CBD, particularly in relation to the much taller buildings to the north on Christie Street and Pacific Highway.
- The proposed FSR will not result in any unreasonable amenity impacts to neighbouring properties or open spaces.
- The proposed FSR variation is associated with a development that provides a superior public domain outcome and is therefore in the public interest.

For the reasons outlined above, the clause 4.6 request is well-founded. The development standard is unnecessary and unreasonable in the circumstances, and there are sufficient environmental planning grounds that warrant contravention of the standard. In the circumstances of this case, flexibility in the application of the FSR control should be applied.

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