



Amended Clause 4.6 Request – Non-Residential Floor Space.

Willoughby Local Environmental Plan 2012
(Amendment 34)

Nos 629-639 Pacific Highway, Chatswood

Submitted to Willoughby Council
on behalf of Polytec Australia Development Pty Ltd

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1. EXECUTIVE SUMMARY

This is an amended written request prepared in accordance with Clause 4.6 of the Willoughby Local Environmental Plan 2012, Amendment 34 (WLEP) to justify a variation to the non-residential floor space ratio (FSR) development standard that relates to Shop top housing in the Mixed Use - MU1 zone. It has been prepared to support an amended Development Application (DA) submitted to Willoughby Council for a mixed-use development at 629-639 Pacific Highway, Chatswood (the site).

The amended development seeks to reduce the extent of variation from the 17% non-residential floor space requirement through a reconfiguration of ground floor space and the deletion of Unit 201 at the podium level. The residential floor space will be dedicated to the provision of additional communal open space and landscaping.

Clause 6.25 of the WLEP prescribes a minimum non-residential floor space ratio of 17% of the gross floor area of the building. The minimum non-residential floor area requirement for the development equates to 1176.6m². The proposal provides 1176.6m² resulting in a variation amounting to 15.05m², representing a 1.3% variation from development standard.

Clause 6.25 does not include objectives for the non-residential floor space development standard. Notwithstanding, the intent of Clause 6.25 is set out in the Chatswood CBD Strategy prepared by Willoughby City Council. The Chatswood CBD Strategy seeks to increase non-residential floor space within the Chatswood CBD to promote employment growth of the Strategic centre. The boundary of the Chatswood CBD was expanded to the north and south under the Strategy and facilitates residential opportunities on the periphery of the CBD as part of a MU1- Mixed Use zone, whilst providing growth prospects for commercial at the core of the CBD, being the previously recognised B3 Commercial Core zone.

To support jobs growth in the CBD, the Chatswood CBD Strategy initially proposed a minimum non-residential floor space ratio of 1:1 to be provided in the podium levels of a mixed-use development seeking to achieve a maximum overall 6:1 FSR.

The requirement was subsequently moderated to 17% to accommodate sites subject to lower FSR controls due to site constraints, surrounding context and the applicable built form controls, such as the Sun Access Planes affecting large areas of the CBD. Importantly, at page 33, the Chatswood CBD Strategy states that the objective of the recommended 1:1 minimum non-residential floor space standard (later converted to 17%) is:

*“The objective of this key element is to achieve a **satisfactory** level of commercial in the B4 Mixed Use zone to deliver a **reasonable amount** of employment floor space, typically to be within the podium levels of a development. This will **be moderated** depending on the overall FSR.”* (our emphasis in bold)

At page 11, the CBD Strategy offers further guidance in relation to the purpose non-residential floor space control. The Strategy outlines further objectives, and these are identified in Section 5 of this written submission.

This written submission also refers to the SGS Economic and Planning Report dated February 2020 that provides advice in relation to the derivation of the 17% requirement for the Chatswood Mixed use zones. The report particularly refers to the viability and capacity of the Chatswood Mixed Use zone controls and identifies a distinct difference in the demands and characteristics and likely uses to be attracted to these zones in comparison the core commercial areas. Importantly, the report states at page 33 the following: -

“It should be noted that 0.5:1 non-residential development may better reflect the lessor suitability and demand for commercial use on sites in the further part of the southern extension area”

The site at No 629 Pacific Highway is located at the very southern part of the extension area.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development. As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the circumstances of this application.

The amended proposal involves a twenty-seven (27) storey mixed use tower development comprising two levels of retail/commercial and twenty-five (25) storeys of residential apartments. The amended proposal will entail:

Demolition of existing structures

- Part 2, part 3-storey podium with ground floor retail premises, first floor commercial premises, second floor plant, and residential communal open space.
- Construction of 52 residential units;
- 5 level basements with car parking spaces (including basement mezzanine)
- Strata subdivision.

A detailed analysis and arguments in favour of the requisite preconditions relevant to Clause 4.6 of the WLEP 2012-34 are contained within this written submission.

In summary, the requirement to comply with the non-residential FSR development standard is unreasonable and unnecessary in the circumstances because: -

- The proposal satisfies the objectives of the non-residential FSR development standard.
- There are sufficient environmental planning grounds to justify the variation and,
- The variation is also in the public interest because the development satisfies the objectives of the MU1 – Mixed Use Zone that applies to the land as well as the FSR development standard.

This request also addresses the requirement for the concurrence of the Secretary.

The proposed built form outcome is consistent with the objectives of Clause 6.25 as well as the MU1 – Mixed Use Zone and has no material social or economic adverse impacts given the location and having regard to the transitioning character of the southern edge of the Chatswood CBD. The non-residential floor area is entirely consistent with the objective of optimising commercial and employment opportunities in this location under the Willoughby LEP and Chatswood CBD Strategy.

2. INTRODUCTION

This is a written request prepared in accordance with Clause 4.6 of the Willoughby Local Environmental Plan 2012, Amendment 34 (WLEP) to justify a variation to the non-residential floor space ratio (FSR) development standard that relates to Shop top housing in the Mixed Use - MU1 zone. It has been prepared to support an amended Development Application (DA) as described above, submitted to Willoughby Council for a mixed-use development at Nos 629-639 Pacific Highway, Chatswood (the site).

Clause 6.25 of the WLEP prescribes a minimum non-residential floor space ratio of 17% of the gross floor area of the building. The minimum non-residential floor area requirement for the development equates to 1176.6m². The proposal provides 1176.6m² resulting in a variation amounting to 15.05m², representing a 1.3% variation from development standard.

The objectives of clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development. As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application.

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

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

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

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

3. STANDARD TO BE VARIED

The standard that is proposed to be varied is the non-residential FSR development standard which is set out in Clause 6.25 of the WLEP. Clause 6.25 states:

Development consent for the purposes of shop top housing on land in Zone MU1 Mixed Use must not be granted unless the Consent authority is satisfied at least 17% of the gross floor area of the building will be used for non-residential purposes.

Clause 6.25 does not include objectives for the non-residential floor space development standard. Notwithstanding, the intent of Clause 6.25 is set out in the Chatswood CBD Strategy prepared by Willoughby City Council. The Chatswood CBD Strategy seeks to increase non-residential floor space within the Chatswood CBD to promote employment growth of the Strategic centre. The boundary of the Chatswood CBD was expanded to the north and south under the Strategy and facilitates residential opportunities on the periphery of the CBD as part of a MU1- Mixed Use zone, whilst providing growth prospects for commercial at the core of the CBD, being the previously recognised B3 Commercial Core zone.

To support jobs growth in the CBD, the Chatswood CBD Strategy initially proposed a minimum non-residential floor space ratio of 1:1 to be provided in the podium levels of a mixed-use development seeking to achieve a maximum overall 6:1 FSR.

The requirement was subsequently moderated to 17% to accommodate sites subject to lower FSR controls due to site constraints, surrounding context and the applicable built form controls, such as the Sun Access Planes affecting large areas of the CBD. Importantly, **at page 33**, the Chatswood CBD Strategy states that the objective of the recommended 1:1 minimum non-residential floor space standard (later converted to 17%) is:

*“The objective of this key element is to achieve a **satisfactory** level of commercial in the B4 Mixed Use zone to deliver a **reasonable amount** of employment floor space, typically to be within the podium levels of a development. This will **be moderated** depending on the overall FSR.” (our emphasis in bold)*

At **page 11**, the CBD Strategy offers further guidance in relation to the purpose non-residential floor space control. The Strategy outlines further objectives, and these are addressed in Section 5 of this written submission.

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

4. EXTENT OF VARIATION

The definition of FSR is established in Clause 4.5 - Calculation of floor space ratio and site area of the WLEP 2012.

Floor Space Ratio

Is the ratio of the gross floor area of all buildings within the site to the site area.

In determining the site area of proposed development for the purpose of applying FSR, the site area is taken to be:

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

The definition of gross floor area (GFA) is as follows:

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.*

Non-residential floor space is not specifically defined under the WLEP 2012. The calculation of the non-residential floor space control has been undertaken in accordance with these definitions and judgements.

Clause 6.25 of the WLEP prescribes a minimum non-residential floor space ratio of 17% of the gross floor area of the building. The minimum non-residential floor area requirement for the development equates to 1176.6m². The proposal provides 1176.6m² resulting in a variation amounting to 15.05m², representing a 1.3% variation from development standard.

5. UNREASONABLE OR UNECESSARY

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

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

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

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; (First Test)
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary; (Second Test)
3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable; (Third Test)
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; (Fourth Test) and
5. The zoning of the land is unreasonable or inappropriate. (Fifth Test)

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

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

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

Clause 6.25 does not include objectives for the non-residential floor space development standard. Notwithstanding, the intent of Clause 6.25 is set out in the Chatswood CBD Strategy prepared by Willoughby City Council. Importantly, at page 33, the Chatswood CBD Strategy states the objective of the recommended 1:1 minimum non-residential floor space standard (later converted to 17%). At page 11, the CBD Strategy offers further guidance in relation to the purpose of the non-residential floor space control. The following table considers these objectives and considers them to be achieved notwithstanding the proposed variation (First test under Wehbe).

Table 1 Consistency with Objectives of Clause 6.25 of WLEP.

OBJECTIVE	DISCUSSION
6.25 Non-residential Floor space percentage	
(1) The assumed underlying objectives of this clause are as follows—	
The objective of this key element is to achieve a satisfactory level of commercial in the B4 Mixed Use zone (now MU1-Mixed Use Zone) to	The amended development will provide retail and commercial floor space with a total of 325.08m ² located at ground floor level and within the two-storey podium. Two separate ground floor level tenancies provide 97.18m ² and 111.15m ² with a strong sense of address facing the Pacific Highway. A further retail space of 116.75m ² is located at the corner of Hammond Lane and Gordon Avenue and provides activated fronts to these frontages. A commercial floor space of 678.2m ² is also provided at podium level. The ground floor retail

OBJECTIVE	DISCUSSION
deliver a reasonable amount of employment floor space, typically to be within the podium levels of a development. This will be moderated depending on the overall FSR (pg 33 of CBD Strategy)	space dedicates approximately 93% of the floor plate to employment floor space (excluding lifts, ramp and services) and this is considered a reasonable and satisfactory area, noting the areas required to accommodate internal basement waste collection (ramps & driveways) and services for lifts, fire services, stairs and reasonably dimensioned lobby areas. The podium level dedicates the entire floor plate to commercial space. The ground floor and podium level are dimensioned and of a nature that will attract a range of retail, hospitality, small offices and local services (as identified in the SGS Economic and Planning Report dated February 2020) as opposed to larger commercial space-related corporate tenants that are attracted to the core that seek co-location, a sense of commercial address and atmosphere. The podium level space will also provide opportunities for mid-sized corporate tenants seeking benefits that come from locating close to the periphery of the lower density residential zones. Such uses include offices, medical centers, childcare facilities, and leisure facilities like gyms. While the proposed non-residential floor space provision is below the minimum 17% requirement, the extent of variation is numerically small, being a variation of 15.05m², representing a 1.3% (15.05m) from the development standard. In terms of satisfying this objective, it should be particularly noted that the prescribed control was conceived after several studies and investigations were undertaken (including the above-mentioned SGS report) that involved the following: - • An analysis of the property market in Chatswood and the policy context and an assessment of what kinds of businesses would be likely to move into small offices built as part of mixed-use developments • Modelling into the feasibility of mixed-use development in the proposed extensions to the Chatswood CBD with varying amounts of commercial development. • Estimations of the floorspace capacity and likely future floorspace demand in the Chatswood CBD. Under Section 4.2 (Development capacity, pg 25) of the SGS Economics & Planning advice dated February 2020 states that the requirements in relation to non-residential floor space were derived using “<i>high level assumptions</i>” without having regard to the interplay of other development standards or site-specific constraints. The feasibility and floor space capacity studies that led to the adoption of the 17% requirement were based on an analysis of the following sites: - • Site 1: Archer Street, Johnson Street and Bertram Street: 3,589.2 m² • Site 2: 16-22 Devonshire Street: 2290.62 m² • Site 3: 655A Pacific Highway: 4116.27 m² • Site 4: 849-859 Pacific Highway and 2 Wilson Street: 3,111.11 m² It is relevant to note that these sites are located closer to the core commercial areas of the Chatswood CBD, were predominately rectangular and uniform in shape and have

OBJECTIVE	DISCUSSION
	significantly larger site areas, ranging from 2290.62 m² - 4116.27m² These attributes present very few constraints in terms of achieving the 17% non-residential floor space control. Importantly, the advice recognizes that in some circumstances “<i>site-specific constraints in combination with design standards may mean that the possible yield of some sites is less than the maximum permissible floor space...</i>”. This statement equally applies to the provision of non-residential floor space. It is clearly recognized that the overarching CBD strategy was based on the realization and delivery of an overall commercial floor space based across a broad locality that includes a vast array of uses permitted in both the commercial core and surrounding mixed-use development zones. Comparatively, some site circumstances will allow redevelopment and compliance with this control while others may not. The underlying objective of this control requires that “<i>a reasonable amount of employment floor space is provided</i>”. It is submitted that a “reasonable amount” of employment floor space must be determined on a site-by-site basis, firstly having regard to the specific environmental and physical constraints of the site and surroundings. In this regard, the subject site is 1185 m² and represents an undersized allotment under Clause 6.16(3) of the WLEP 2012 that sets a site area minimum of 1200m². Reasonable efforts towards amalgamation have been unsuccessful. The site is irregular(trapezoidal) in shape and has three (3) street frontages to the Pacific Highway, Gordon Avenue and Hammond Lane and under the WDCP the site requires specific setbacks to each frontage and importantly identifies Hammond Lane as part of a strategic through site link and service lane. As Council staff are aware, several design options have been examined with the aim of providing compliant non-residential floor space and by comparison. The site area and configuration are constraints and the application of the suite of prescribed controls (through site link, basement waste collection and setbacks) have been clearly demonstrated to compete against each other and represent significant pre-determinates to the amount of employment floor space that can be reasonably provided at ground floor and podium level. It is important to also recognize that the site is also subject to street frontage wall height and setback and separation controls under the ADG & DCP. These setbacks and separation distances also reduce the available floorplate that can be dedicated to non-commercial floor space. Council staff have encouraged the current design after significant, protracted discussions with all relevant specialist staff. The current design is considered to provide an optimum result having regard to the site and applicable controls and in accordance with this objective. Consequently, it is considered that a “reasonable amount of employment floor space” is delivered given these constraints. An engineering statement is provided with the cover letter

OBJECTIVE	DISCUSSION
	to this revised submission and supports this conclusion. The SGS Economic and Planning Report dated February 2020 refers to the viability and capacity of employment floor space in the Chatswood Mixed Use zone and identifies a distinct difference in the demands and characteristics and likely uses to be attracted to these zones in comparison to the core commercial areas. Importantly, the report states at page 33 the following: - <i>“It should be noted that 0.5:1 non-residential development may better reflect the lesser suitability and demand for commercial use on sites in the further part of the southern extension area”</i> The site at No 629 Pacific Highway is located at the very southern part of the extension area and the figure below identifies the sites proximity to the commercial core (highlighted in blue).  If the 0.5:1 requirement was applied in the circumstances of our site and overall site area, the amount of non-residential floor space would equate to 592 m² The amended design currently provides 1176.6m² and by comparison provides well more than what the SGS advice recommended for sites in the further part of the southern extension area. On balance, it is considered that a reasonable amount of employment floor space is provided and that the constraints of the site and inherent in meeting the abovementioned requirements justify the variation sought. It should be also noted that an underlying objective to the provision of non-residential commercial floor space relates primarily to the protection and growth of Chatswood’s CBD commercial core as the primary business location, while encouraging carefully located and designed mixed-use developments surrounding the core area to provide for businesses

OBJECTIVE	DISCUSSION
	which may not be catered for by the E1 Local Centre Zone. As stated above it is considered that the proposed development will not adversely affect the future growth of the commercial core by virtue of its location and will deliver spaces that will attract a range of retail, hospitality, small offices and local services that the SGS advice anticipates. In accordance with the objective, no habitable residential floor space is proposed at ground floor level or within the building podium. Level 1 of the proposed development has been dedicated to 100% commercial floor space, providing flexibility for a variety of employment uses. Despite the variation, the proposed non-residential floor space facilitates the provision of commercially attractive and flexible floorplates that are suited to a wider range of supporting businesses, and which make the development itself economically feasible when compared The development outcome also ensures onsite waste disposal using Council's large waste vehicles, which is a benefit and improvement to the local area. It is also relevant to note that the planning proposal and concept scheme that was developed throughout the design excellence competition was based on a non-residential floor space requirement recommended under the Chatswood CBD strategy of 1:1. This ratio results in a lesser amount of non-residential floor space generally by comparison to the 17% calculation which was based on overall gross floor area of the development.(WLEP CI 6.16). See also justification in relation to Bullet point 1, in relation to the "sufficient environmental planning grounds" section referenced below.
Achieve a sustainable balance between commercial, retail, residential, education, cultural and other uses to ensure on-going vibrancy (pg 6 of CBD Strategy).	The proposal provides a balance of residential, commercial, and retail uses to create a high-density residential environment with convenient access to local transport and services, shops and employment opportunities for residents. The proposal includes vibrant and active street frontages and provides high levels of pedestrian amenity in the public realm on Gordon Avenue and Hammond Lane. In addition, the proposal integrates existing and future pedestrian linkages. The proposal offers livable and accessible housing options in the development. Accessible living units that can be adapted to suit the needs of people with disability, and livable units that can be adapted to the changing needs of the home occupant. The development offers a compliant range of housing that caters to the needs of the residents, which will have a positive impact on the social character by encouraging inclusivity. The proposed residential use will support the commercial core of Chatswood by providing residential opportunities near the commercial, cultural and community uses in the CBD, which will promote the use of active and public transport modes to the future residents and ensure sustainable outcomes for Chatswood. The proposed development will have a positive economic impact through delivering employment opportunities during the construction works and operation.
Ensure Chatswood's future	The proposal provides a balance of residential, commercial, and retail uses to create a high-

OBJECTIVE	DISCUSSION
as an Employment Centre is protected whilst allowing capacity for strong residential growth at the edge of the CBD (pg. 11 of CBD Strategy).	density residential environment at the edge of the CBD with convenient access to local transport and services, shops and employment opportunities for residents. The proposal is consistent with the strategic objectives for density, built form and land use controls that would be expected of a mixed-use development in this location. The provision of employment floorspace at the southern edge of the CBD in conjunction with residential land use also maximizes the opportunity for people to live close to work, which serves to protect Chatswood's future as an Employments Centre. The proposal ensures residential growth in this location (being an extension to the CBD) and will also serve to promote the commercial core of Chatswood. Residents of the proposed apartments will both economically support and work in the core of Chatswood CBD and this will maintain its strong position as an employment hub with a variety of offices and major retail facilities. Despite the numerical shortfall in non-residential floorspace, the design allows for the orderly development of the site to cater for onsite waste disposal whilst still activating three street frontages with employment generating uses. (see also arguments submitted in relation to first objective stated above)
Deliver sufficient floor space appropriate to the projected growth requirements for Chatswood CBD (pg. 11 of CBD Strategy).	(See arguments submitted in relation to first objective stated above) The projected growth requirements are contained in the Chatswood CBD strategy and are reflected in the relevant planning controls that apply to this site. The proposed development ensures a substantially compliant mixed- use development in accordance with these strategic and statutory objectives and controls. The proposed non-residential floor space provision represents a significant and reasonable contribution to the employment floor space along with the provision of high-quality residential accommodation which invariably supports the vitality of the Chatswood CBD and responds to the market conditions that favor residential uses.

As demonstrated in Table 1 above, the assumed underlying objectives of the non-residential FSR development standard are achieved notwithstanding the proposed variation.

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

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

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

The underlying objective or purpose is relevant to the development and therefore is not relied upon.

5.3. The objective would be defeated or thwarted (undermined) if compliance was required with the consequence that compliance is unreasonable;

The consequence of not exercising flexibility in the application of the FSR standard in this instance is that it would reduce the economic viability of the proposal when compared with alternate land uses and residential development.

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

The standard has not been abandoned by Council actions in this case and so this reason is not relied upon.

5.5. The zoning of the land is unreasonable or inappropriate.

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

6. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

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

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

The environmental planning grounds to justify the variation of the non-commercial floor space development standard are set out in the preceding sections in detail. As discussed in the above sections, the variation is attributed to several site constraints as stated within this submission, however the variation does not result in any meaningful additional adverse environmental impact.

Additionally, the proposed development, notwithstanding the non-compliance with the non-residential FSR development standard, does not undermine relevant statutory goals (when compared with a compliant development and the existing development).

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

- The proposed development results in an optimum outcome having regard to the full suite of controls that apply to the site and along with the site constraints identified above, the specific control relating to the Hammond Lane frontage are considered to represent predeterminants to the delivery of compliant non-residential floor space. In accordance with the requirements of the specific land-based controls for Nos 629-637 Pacific Highway, Chatswood and Nos 613-627 Pacific Highway, Chatswood, the applicant has made reasonable efforts towards investigating a single access point via a consolidated basement and undertaken enquiries and offers towards this aim. These negotiations have been unsuccessful and documentation demonstrating the applicants' efforts in relation to addressing this section has been detailed within the accompanying RFI response dated 19th May 2025.
- Despite the variation, the retail tenancies on ground level are functional and have been orientated to address the street frontages of the Pacific Highway, Gordon Avenue and approximately 25-30% of Hammond Lane, facilitating excellent street activation and social interaction between the tenancies and the local community. These spaces still provide reasonable, attractive, desirable, and accessible commercial floor space and employment opportunities in a mixed-use location set under the strategic planning documents for the southern edge of the Chatswood CBD.
- The quantum of non-residential floor space is still consistent with that anticipated under the SGS advice and current planning controls notwithstanding the proposed variation. Accordingly, the objective achieves objective 1.3 (g) of the EP&A Act, "to promote good design and amenity in the built environment".
- The proposed non-residential floor space includes two (2) satisfactorily sized retail tenancies fronting the Pacific Highway and a café on ground level, and a commercial floor plate on Level 1, promoting commercial and retail activities in the southern part of the Chatswood CBD. The proposal will provide a suitable level of employment floor space with a total of 1176.6m² of non-residential floor space within the two-storey podium of the development. While the proposed non-residential floor space provision is below the minimum 17% requirement, the extent of variation is numerically small, being a variation of just 1.3% (approximately [15.05m²]). In accordance with the above objective, no habitable residential floorspace is proposed within the building podium. Level 1 of the proposed development has been dedicated as 100% commercial floorspace, providing flexibility for a variety of employment uses. The floorplate can be divided into separate

tenancies to meet the operational needs of the future businesses occupying the level.

- A Design Excellence Competition was undertaken for the development. The amended design still substantially reflects the conceptual design that was selected and was deemed to be an outcome that represented the highest quality of architectural, urban and landscape design for the redevelopment of the site.
- The planning proposal and concept scheme that was developed throughout the design excellence competition was based on a non-residential floor space requirement recommended under the Chatswood CBD strategy of 1:1. This ratio results in a lesser amount of non-residential floor space compared to the site area in comparison to the 17% calculation which is based against the overall gross floor area of the proposed development.
- The proposed amount of non-residential floor space development is well designed and will address all contemporary building requirements and standards. Importantly, the variation to the non-residential FSR development standard is consistent with the intent of the Chatswood CBD Strategy in that it provides a wholly non-residential podium with two levels of commercial uses, contributing to the reasonable supply of employment floor space that is expected across the core business area and peripheral mixed-use localities that comprises the Chatswood CBD. Accordingly, the proposal achieves the objective in section 1.3(c) of the Environmental Planning and Assessment Act 1979 (EP&A Act), “to promote the orderly and economic use and development of the land”.
- The proposed variation to the non-residential floor space standard, does not affect the proposal’s ability to provide a substantially conforming mixed-use development. Notably, the proposal is compliant with the 90m building height and conforms with the maximum overall FSR of 6:1 development standard, which will deliver a high-density mixed-use development that is reflective of the desired future character of the Chatswood CBD.
- Strict compliance with the non-residential floor space standard would result in a poorer design and would necessitate the following:
 1. The reduction or reallocation of residential floor space or space dedicated to ancillary services to the provision of non-residential floor space which would undermine the overall building design or the high-quality residential apartment designs within the tower component (i.e. top of podium), or
 2. The removal of desirable communal open space and landscaping that currently ensures exceptional amenity to residents and users of the commercial and retail spaces, or
 3. A reduction to setbacks and floor plates that are fundamental to the overall design.
 4. Compromising the on-site waste collection and reduction of the ground level loading bay.

These options would result in a poorer design outcome as they would either diminish the top-of-podium residential amenity and podium articulation, remove communal open space, or landscape area or potentially compromise setbacks developed in accordance with the ADG and DCP and key design criteria encouraged by the Design Excellence Jury. Further, such amendments would likely compromise on-site waste collection and result in a reduction of the loading bay areas, on-street collection of be limited to smaller waste vehicle collection by private contractors. Council’s specialist staff have assessed alternatives as less preferable as they would undermine the design excellence of the scheme.

- The proposal represents a significant opportunity for renewal of the southernmost (extended) edge of the Chatswood CBD. The design has been informed by considerable research in relation to the desirable building typologies sought under the Planning proposal and Competition Brief and specifically in relation to the social, economic, landscape and built form objectives and controls contained in the WLEP and Site specific DCP for this site. The design incorporates a reasonable non-residential floor space at 1176.6m², a recognisable slender tower and provides an articulated and clearly planned

podium and ground plane. The bulk and scale of the development is compatible with that envisaged for this location.

- The proposed non-residential floor space at 1176.6m² still represents a significant contribution to employment floor space in the mixed-use area, which will support the economic growth and reinforce the commercial role of the Chatswood CBD core. The extent of variation is considered minor and will still provide contemporary and functional commercial and retail spaces.

For completeness, we note that the size of any variation which in the circumstances of this case amounts to 15m² (1.3%) is not in itself, a material consideration as to 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 common place numerical variation to development standards 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 *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 *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 *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 short, clause 4.6 is a performance-based control so it is possible (and not uncommon) for variations to be approved in the right circumstances.

7. PUBLIC INTEREST

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

In section 4 it was demonstrated that the proposed development overall achieves the objectives of the development standard notwithstanding the variation of the development standard (see comments under "public interest" in Table 1).

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

Table 2: Consistency with MU1- Mixed Use Zone

OBJECTIVES OF MU1- MIXED USE ZONE	DISCUSSION
To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.	The proposed development integrates a range of suitable business, retail and office uses 1176.6m² in an accessible location to maximize public transport patronage and encourage walking and cycling. This is indicative of the desired future character of the locality Mixed -use zones even though new development tends to be towards residential land uses. The commercial focus of the proposal is consistent with the desired future character of the locality and will generate employment opportunities through both construction and future tenancies. The proposal is compatible with its context and responds to the character of the extended southern CBD locality. Specifically, the proposal seeks to retain a retail and economic physical presence in a changing context. The proposed variation does not undermine the attainment of this objective.
To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.	The proposed development will have active and diverse street frontages through delivering an attractive streetscape and inviting façades and entryways to the Pacific Highway, Gordon Avenue & Hammond Lane. The proposed design is highly articulated and features a mix of materials, colours and landscaping which make it visually attractive to pedestrians. Footpaths are located on Pacific Highway, Gordon Avenue and Hammond Lane frontages and will provide direct pedestrian access to major destinations within Chatswood CBD. The Gordon Avenue walkway provides a direct connection to Frank Channon Walk which is 100m east of the site and provides a pedestrian friendly connection to Chatswood CBD. The proposed variation does not undermine the attainment of this objective. The proposed development is carefully massed at street and podium level and will relate sympathetically to the existing neighbouring buildings and likely future development. The proposal is substantially compliant with the street façade height controls and has adopted carefully designed primary façades to the Pacific Highway and

OBJECTIVES OF MU1- MIXED USE ZONE	DISCUSSION
	Gordon Avenue which result in a harmonious but vibrant streetscape presentation. The proposed variation does not undermine the attainment of this objective. The proposal eliminates now activates Hammond Lane by providing a colonnade walkway and ensures a shared pedestrian and vehicular zone in accordance with the thru site linkages expected under the WDCP and Councils strategic documents.
To minimise conflict between land uses within this zone and land uses within adjoining zones.	The proposed development is permissible with development consent in the Mixed-use zone. The proposal provides substantial compliance with the built form and land use objectives and controls and as such will be compatible with the existing and future array of land uses and the future character of the southern edge of the Chatswood CBD. The proposal provides a high-quality mixed-use building which exhibits a built form and massing which is considered to positively contribute to the quality and transitioning identity of the locality. In particular: - • The proposal satisfies the objectives of SEPP No. 65. • The skillful design of the development ensures adequate privacy and solar access is achieved for the surrounding residential uses. • The proposal provides for high-quality residential dwellings in a development that is compatible with the character of the surrounding area. • The proposed development provides a reasonable amount of accessible commercial/retail space in accordance the WLEP & WDCP. • The subject site has been found to be suitable for the proposed development; and The proposed development is consistent with the desired future character of the southern edge of the Chatswood CBD. The proposed variation does not undermine the attainment of this objective.
To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.	The proposed development provides for a reasonable amount of retail/commercial space at ground floor level which will encourage commercial viability on the southern edge of the Chatswood CBD. The proposed design is

OBJECTIVES OF MU1- MIXED USE ZONE	DISCUSSION
	highly articulated and features a mix of materials, colors and landscaping which make it visually attractive to pedestrians and the community. The proposed variation does not undermine the attainment of this objective.
To allow for city living on the edges of the city centre of Chatswood, which encourages public transport use, shopping and the use of businesses and recreational services that contribute to the vitality of the city, without undermining its commercial role.	The proposed development will provide high quality residential living on the southern edge of the city centre of Chatswood. The proposed development satisfies the objective requirements in relation to providing retail/commercial floor space. The Gordon Avenue walkway provides a direct connection to Frank Channon Walk which is 100m east of the site and provides a pedestrian friendly connection to Chatswood CBD and transport interchange. Bus stops are located on the Pacific Highway approximately 35m north of the site and 250m south of the site. The location of the site also encourages the use of the wide array of business and recreational services within the Chatswood CBD core. The proposed variation does not undermine the attainment of this objective.

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

8. STATE OR REGIONAL ENVIRONMENTAL PLANNING

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

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

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

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

9. CONCLUSION

This submission requests a variation, under clause 4.6 of the *Willoughby Local Environmental Plan 2012*, to the non-residential FSR building development standard and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development.
- The development achieves the assumed objectives of the development standard and is consistent with the objectives of the 'MU1 – Mixed Use zone.
- There are sufficient environmental planning grounds to justify the contravention.
- The variation does not raise any matter of State or Regional Significance.

The Consent authority can be satisfied of the above and that the development achieves the objectives of the development standard and is consistent with the objectives of the MU1 – Mixed Use zone notwithstanding non-compliance with the non-residential FSR development standard and is therefore in the public interest.

There are sufficient environmental planning grounds to justify the variation. These planning grounds are based in consistency with the objectives of the standard, consistency with the objectives of the zone, lack of adverse environmental impacts, consistency with the relevant objects of the Environmental Planning and Assessment Act 1979, and consistency with the relevant aims of the WLEP 2012.

This proposal is of an appropriate scale and form for the site and achieves the desired future character envisaged by the planning controls. The development will provide a catalyst for future development and encourage further economic activity and employment opportunities at the southern edge of the Chatswood CBD.

It is therefore considered appropriate in these circumstances to grant the clause 4.6 variation request. The concurrence of the Secretary can be assumed in accordance with Planning Circular PS 18-003.

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