



Clause 4.6 Variation Request Statement

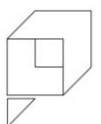
Floor Space Ratio Standard (Clause 4.4(2) of the LEP)

28 - 42 Pacific Highway, St Leonards

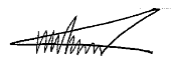


Prepared by Paro Consulting

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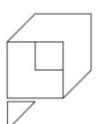
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1. Introduction

This Clause 4.6 variation request statement has been prepared in relation to the development standard for Floor Space Ratio contained within Part 4, Clause 4.4 'Floor space ratio' of the Lane Cove Local Environmental Plan 2009 (2010 EPI 49) (Lane Cove LEP).

Clause 4.6 of the Lane Cove LEP enables a consent authority to grant consent for a development even though the development contravenes a development standard of the LEP or another environmental planning instrument, such as in this case, the Lane Cove LEP.

This variation request is to accompany a Development Application (DA) at 28 – 42 Pacific Highway, St Leonards (the site) for a Mixed-Use, Hotel development comprising; commercial tenancy, 99 hotel units, communal living and communal outdoor areas, basement parking and facilities and associated works (the proposal).

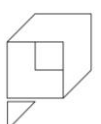
Clause 4.4(2) of the LEP prescribes that the maximum floor space ratio of a building on the land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio (FSR) Map. The FSR Map nominates a maximum Floor Space Ratio ('FSR') of 5.1:1. Due to the altered ground level of the site, the existing basement levels are technically considered to be located above "existing" ground level. These areas technically meet the LEP definition to be included as gross floor area. Consequently, these areas within the lower ground floor have been included in the calculation of FSR. The proposed development therefore includes an FSR of 5.24:1:1 (or 6,486.3m² GFA) which exceeds the 5.1:1 (or 6,305.64m² GFA) FSR Standard by 180.7m² (or a 2.9% variation) resulting in a non-compliance with Clause 4.4(2) of the Lane Cove LEP 2009.

This written variation request has been prepared pursuant to Clause 4.6 of the Lane Cove Local Environmental Plan 2009 (Lane Cove LEP) and forms a written request that justifies the contravention of the Height development standard based upon specific circumstances of this proposal. It is submitted that permitting the proposed variation to Clause 4.3(2) of the Lane Cove LEP will allow for improved planning outcomes at the site.

This request has been prepared in accordance with Clause 35B of the *Environmental Planning and Assessment Regulation 2021* (the Regulation) which requires that a DA involving contravention of development standard must be accompanied by a document that sets out the grounds that demonstrates compliance with the development standard is unreasonable or unnecessary in the circumstances, and that there are sufficient environmental planning grounds to justify the contravention of the development standard.

This request has been prepared having regard to the Department of Planning and Environment's Guide to Varying Development Standards (November 2023) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

This request is structured to explicitly address the matters required to be addressed by the applicant under Clause 4.6(3)(a) and (b) for which the consent authority must be satisfied has been demonstrated according to Preston CJ in *Wehbe v Pittwater Council* (2007) NSW LEC 827 ('Wehbe').



2. Relevant planning instrument, development standard and proposed variations

2.1 Environmental Planning Instrument to be varied

The Environmental Planning Instrument (EPI) to be varied is the Lane Cove Local Environmental Plan 2009 (Lane Cove LEP), *Clause 4.4 Floor Space ratio* of the Lane Cove LEP applies to the site. Following the 2023 planning reforms, Clause 4.6 of the relevant Local Environmental Plan (LEP) - in this case, the Lane Cove LEP - must be used to vary development standards within Environmental Planning Instruments (EPIs). Which in this case is the Lane Cove LEP 2009. The request is seeking to vary the maximum Height standard as it applies to the site and proposal.

2.2 Development standard to be varied

The development standard that is proposed to be varied is the maximum floor space ratio set out in Clause 4.4(2) of the Lane Cove LEP 2009.

Clause 4.4(2) Floor space ratio of the Lane Cove LEP 2009 states:

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

The Floor Space Ratio Map (**Figure 1** below) illustrates that a maximum Floor Space Ratio ('FSR') of **5.1:1** applies to the land.



Figure 1: Extract of the Floor Space Ratio Map of the Lane Cove LEP 2009 – the site is outlined in yellow (*Source: NSW Planning Portal Spatial Viewer*)

The Lane Cove LEP 2009 uses the standard definition of Gross Floor Area ('GFA'). FSR is a ratio of GFA to site area. The subject site area is 1,236.4m² (by survey). This results in a GFA of **6,305.64m²** as the FSR development standard as per Clause 4.4(2) of the LEP.

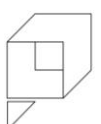
FSR calculation plans are included in the lodged plans by Tonkin Zulaikha Greer (TZG).

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The development standard to be varied is not excluded from the operation of clause 4.6 of the Lane Cove LEP 2009

2.3 Gross Floor Area (GFA) Definition

The Lane Cove LEP 2009 uses the standard definition of Gross Floor Area ('GFA') which stipulates:

“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

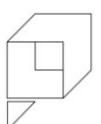
(i) terraces and balconies with outer walls less than 1.4 metres high, and

(j) voids above a floor at the level of a storey or storey above.”

Furthermore, the LEP and standard instrument defines basement as:

“basement means the space of a building where the floor level of that space is predominantly below ground level (existing) and where the floor level of the storey immediately above is less than 1 metre above ground level (existing).

Due to the altered ground level, the existing basement levels are technically considered to be located above “existing” ground level. These areas technically meet the LEP definition to be included as gross floor area. Consequently, these areas within the lower ground floor have been included in the calculation of FSR including the lower ground level plant rooms, comms rooms, bicycle park, end of trip facilities, amenities, storage, are above existing ground level are part of the FSR calculation.



3. Objectives and Provisions of Clause 4.6

The objectives and provisions of Clause 4.6 of the Lane Cove LEP 2009, are as follows:

(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.

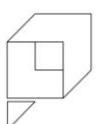
(7) (Repealed)

(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,

(ca) clause 4.1A,

(cb) Part 7, except clauses 7.1(4)(e) and 7.2.

It is noted that Clause 4.4 is not “expressly excluded” from the operation of Clause 4.6 in the Lane Cove LEP 2009.

4. Key questions

Is the Planning Control a Development Standard?

The standard to be varied is a Development Standard to which Clause 4.6 applies. Clause 4.4 of the Lane Cove LEP 2009 is contained within Part 4 which is titled Development Standards to be complied with and is a numeric development standard capable of being varied under clause 4.6 of LEP.

The standard instrument defines a ‘development standard’ as:

“development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of—

(a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,

(b) the proportion or percentage of the area of a site which a building or work may occupy,

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,

(d) the cubic content or floor space of a building,

(e) the intensity or density of the use of any land, building or work,

(f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,

(g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,

(h) the volume, nature and type of traffic generated by the development,

(i) road patterns,

(j) drainage,

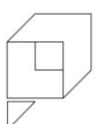
(k) the carrying out of earthworks,

(l) the effects of development on patterns of wind, sunlight, daylight or shadows,

(m) the provision of services, facilities and amenities demanded by development,

(n) the emission of pollution and means for its prevention or control or mitigation, and

(o) such other matters as may be prescribed.”



Based on the above definition, and with previous decisions of the Land & Environment Court in relation to matters which constitute development standards it is considered that the wording of the maximum FSR control for a building constitutes a “development standard” as it is described as a numeric measure of floor space.

Is the Development Standard Excluded from the Operation of Clause 4.6?

The development standard is not excluded from the operation of clause 4.6 as it is not listed within clause 4.6(6) or clause 4.6(8) of Lane Cove LEP 2009. It is also noted that Clause 4.3 is not “expressly excluded” from the operation of Clause 4.6 in Lane Cove LEP 2009. It is also noted that these clauses do not contain a provision which specifically excludes the application of clause 4.6.

On this basis it is considered that these clauses are development standards for which clause 4.6 applies.

4.1 Unreasonable and Unnecessary (Clause 4.6(3)(a))

In this Section, we demonstrate 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 Lane Cove LEP 2009.

Clause 4.6(3)(a) of the Lane Cove LEP 2009, requires the consent authority to be satisfied that the applicant’s written request has adequately addressed clause 4.6(3)(b), by demonstrating that:

“compliance with the development standard is unreasonable or unnecessary in the circumstances”

In *Wehbe V Pittwater Council (2007)* NSW LEC 827 (‘Wehbe’) Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. This list is not exhaustive. 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).”

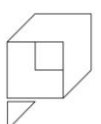
In *Wehbe*, Preston CJ identified five ways in which it could be shown that application of a development standard was unreasonable or unnecessary. However, His Honour said that these five ways are not exhaustive; they are merely the most commonly invoked ways. Further, an applicant does not need to establish all of the ways. The five methods outlined in *Wehbe* are as follows (with our emphasis placed on the **First Method** for the purposes of this Clause 4.6 variation statement):

“1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method).”

2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method).

3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Method).

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 (Fourth Method).



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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Method). Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary is the First Method”.

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.”

TEST 1: The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

The first test of Wehbe requires demonstration that the objectives of a development standard can be achieved notwithstanding non-compliance with that particular standard. Notwithstanding variation to the FSR control in the LEP, the objective and aims of the standard are achieved as outlined below.

The Objective of Clause 4.4 Floor Space Ratio of the Lane Cove LEP stipulates:

“(a) to ensure that the bulk and scale of development is compatible with the character of the locality.”

The compatibility with the desired future character of the locality is addressed in the submitted SEE and elaborated upon here.

The proposal relates to construction of a Mixed-Use, Hotel development comprising; commercial tenancy, 99 hotel units, communal living and communal outdoor areas, basement parking and facilities and associated works.

With regards to the character of the locality, the strict terms of clause 4.4 of the LEP does not define the desired future character or character of the locality (*Woollahra Municipal Council v SJD DB2 Pty Ltd [2020] NSWLEC 115 at [53]*). The desired future character of the locality or character of the locality establishes the bulk and scale on land in the locality and not the other way around (cf *SJD DB2 Pty Ltd at [56]*). This means that the floor space ratio limit set out under clause 4.4 alone does not establish the desired future character and can be evaluated by reference to matters other than the strict provisions of clause 4.4 (cf *SJD DB2 Pty Ltd at [59]*).

Furthermore, in *Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115 [63]* Preston CJ states:

“...the desired future character of the neighbourhood or area can be shaped not only by the provisions of WLEP, including the development standards themselves, but also other factors, including approved development that contravenes the development standard”.

The existing and approved development within a locality therefore forms part of the desired future character of the area in terms of building bulk and scale.

The proposed development, even with the floor space ratio variation, is considered to be compatible with the bulk and scale of the character of the locality, noting that compatible is interchangeable with the word consistent which does not mean ‘sameness’ (*Project Venture Developments Pty Ltd v Pittwater Council [2005] NSWLEC 191*). The proposed development, even with the floor space ratio variation, will appear compatible with the bulk and scale of surrounding properties.

To consider the development compatibility with character of the locality it is appropriate to consider the existing, evolving and likely character of the area, as well as the stated intentions within the relevant planning framework documents that apply to the land and proposal.



The proposal is of a bulk and scale that is compatible with the character of the locality, as:

- The extent of the 2.9% FSR variation and additional GFA are located in an area of the development that would not be readily visible nor contribute to the building bulk and scale as viewed from the public domain or neighbouring properties. That is, the area of non-compliance with the FSR standard does not contribute to adding to building bulk or scale. It is only as a result of the technical definition of GFA and interplay with the definition of “existing” ground level that results in a variation.
- The proposed bulk and scale of the building is compatible with the evolving character of the Crows Nest Transit-Oriented Development Precinct and aligns with the intended urban form under the Lane Cove LEP 2009 and Crows Nest TOD Design Guide.
- The proposal achieves the visual and environmental objectives the floor space ratio limit is intended to support noting that areas below natural ground level do not contribute to building bulk or scale noting that these levels are largely subterranean and do not impact the perceived scale or bulk of the proposed development.
- The St Leonards centre is generally characterised by a range of built forms reflecting a mix of building types and scale with no specific period reflected in the built form. The immediate locality along Pacific Highway comprises a mix of subpar commercial development of various forms and densities. Despite this, with its placement in the Crows Nest TOD Precinct, the immediate area can be described experiencing rapid urban renewal, with high-rise mixed-use developments replacing older structures and increasing overall density. The proposed development is consistent with the vision of the precinct and the building will make a positive contribution to the character of Pacific Highway and Marshall Lane through its effective built form, sympathetic design materials and compatibility with emerging development.

For the above reasons, I am of the view that the variation requested, and the resultant development is consistent with the objective of the development standard and an appropriate degree of flexibility is warranted. Consequently, I conclude that strict compliance with the development standard is unreasonable and unnecessary.

In accordance with the decision in *Wehbe*, compliance with a development standard is demonstrated to be unreasonable or unnecessary in this one way alone. On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

Summary

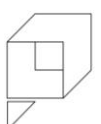
In accordance with the decision in *Wehbe*, compliance with a development standard is demonstrated to be unreasonable or unnecessary in two ways (Test 1). On this basis, the requirements of Clause 4.6(3)(a) are satisfied. Notably, under Clause 4.6(3)(b) a consent authority must now be satisfied that there are sufficient planning grounds for the contravention of a development standard. Clause 4.6(3)(b) is addressed in the Section below.

4.2 Sufficient Environmental Planning Grounds (Clause 4.6(3)(b))

In this Section, we demonstrate there are sufficient environmental planning grounds to justify contravening the FSR development standard as required by clause 4.6(3)(b) of the LEP. In *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 2018*, 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.

Clause 4.6(3)(b) of the Lane Cove LEP, requires the consent authority to be satisfied that the applicant's written request has adequately addressed clause 4.6(3)(b), by demonstrating that:

“there are sufficient environmental planning grounds to justify contravening the development standard”.



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 (Initial Action) (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 environmental planning grounds relied on in the written request under Clause 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as summarised in Initial Action.

On the above basis, the following environmental planning grounds are submitted to justify contravening the maximum building height:

1. Technical breach due to altered ground level

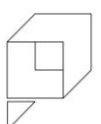
- a) The exceedance results solely from the interpretation of “ground level (existing)” and the presence of existing basement levels having altered the ground level on site. Due to the altered ground level, the existing basement levels are technically considered to be located above “existing” ground level. These areas technically meet the LEP definition to be included as gross floor area. Consequently, these areas within the lower ground floor have been included in the calculation of FSR including the lower ground level plant rooms, comms rooms, bicycle park, end of trip facilities, amenities, storage, are above existing ground level are part of the FSR calculation.
- b) The extent of the 2.9% FSR variation and additional GFA are located in an area of the development that would not be readily visible nor contribute to the building bulk and scale as viewed from the public domain or neighbouring properties. That is, the area of non-compliance with the FSR standard does not contribute to adding to building bulk or scale. It is only as a result of the technical definition of GFA and interplay with the definition of “existing” ground level that results in a variation.

2. Consistent Streetscape and Built Form Outcome

- a) The building bulk and scale of the building is compatible with the evolving character of the Crows Nest Transit-Oriented Development Precinct and aligns with the intended urban form under the Lane Cove LEP 2009 and Crows Nest TOD Design Guide.
- b) The proposal achieves the visual and environmental objectives the floor space ratio limit is intended to support noting that areas below natural ground level do not contribute to building bulk or scale noting that these levels are largely subterranean and do not impact the perceived scale or bulk of the proposed development.

3. Compatibility with Desired Future Character

- a) The St Leonards centre is generally characterised by a range of built forms reflecting a mix of building types and scale with no specific period reflected in the built form. The immediate locality along Pacific Highway comprises a mix of



subpar commercial development of various forms and densities. Despite this, with its placement in the Crows Nest TOD Precinct, the immediate area can be described experiencing rapid urban renewal, with high-rise mixed-use developments replacing older structures and increasing overall density. The proposed development is consistent with the vision of the precinct and the building will make a positive contribution to the character of Pacific Highway and Marshall Lane through its effective built form, sympathetic design materials and compatibility with emerging development.

4. Topographic Response

- a) The form steps down in response to the site's fall from Pacific Highway to Marshall Lane, mitigating perceived bulk and scale from lower ground elevations.
- b) Basement parking is fully contained within the building footprint, minimising excavation impacts visible from the street.

5. The non-compliance will have no material impacts on surrounding development

- a) 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:
 - The design supports functional environments for future occupants,
 - The FSR breach does not result in additional overshadowing, privacy or view loss impacts to adjoining development when considered against the backdrop of a compliant building envelope formulated by the 38m height limit above the natural ground level.
 - The built form respects the intended massing outcome and achieves the visual and environmental objectives the FSR limit is intended to support.

6. The proposal meets aims and objectives of key planning documents

- a) The proposed development meets the objectives of the development standard and meets the objectives of the E2 Commercial Centre zone (detailed in the accompanying Statement of Environmental Effects);
- b) 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 proposed works provide short-term accommodation that better meet the needs and significantly improve the amenity opportunities of the future users and occupants of the hotel (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)).

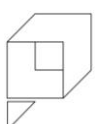
The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development.

Insistence on compliance with the floor space ratio development standard will result in the proposal failing to meet the development of a built form outcome envisaged by the overarching Crows Nest TOD Precinct planning framework.

Insistence on compliance with the FSR development standard will not result in a noticeable change to the visual bulk of the building. Specifically, the FSR breach does not significantly impact the amenity of surrounding properties when considered against the backdrop of the planning controls and has been designed to address the public domain and ensure the non-compliance is not visual jarring from the public domain or neighbouring properties.

It is noted that in Initial Action, 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:

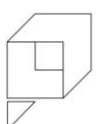
86. *The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant*



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 compared to a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.



5. Conclusion

Having regard to all of the above, it is our opinion that this Clause 4.6 variation request demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention;
- The development achieves the objectives of the development standard;
- The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard; and
- The variation does not raise any matter of State or Regional Significance.

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

