

# Clause 4.6 Variation

BUILDING HEIGHT

15 JUNE 2021



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## CLAUSE 4.6 DEPARTURE – HEIGHT

### BACKGROUND

This variation statement has been prepared in accordance with Clause 4.6 of the Penrith Local Environmental Plan 2010 to accompany a development application for the construction of a 5 storey health service facility specialising in mental health at 34-36 Somerset Street and 2 Hargraves Street, Kingswood.

The key aspects of the proposal are as follows:

- 5 storey building with a rooms dedicated for mental health inpatients with large consulting rooms within the 4<sup>th</sup> floor above car parking over 2 basement level and lower-ground floor.
- The ground floor includes health consulting rooms, group rooms, consulting rooms and a gymnasium.
- The development is to deliver a roof terrace with seating area and includes a 3.6m high glass fence that is to run along the length of the roof terrace.

This variation statement related to the maximum building height of 21.6m application to the site pursuant to Clause 4.6.

The development application was lodged to Council and was also subject to an Urban Design Review Panel review. One of the key issues raised by the Urban Design Review Panel related to the impact of the proposal on the existing dwelling to the east. Subsequent revisions to the design scheme to address this issue results in the built form now being recessed along its eastern elevation up to 6m to minimise visual and overshadowing impacts to adjoining properties to the site's eastern boundary. The revised plans provided with this submission are the subject of this Clause 4.6 report.

### DEVELOPMENT STANDARD TO BE VARIED

Clause 4.3 of the Penrith Local Environmental Plan 2010 states:

#### **4.3 Height of building**

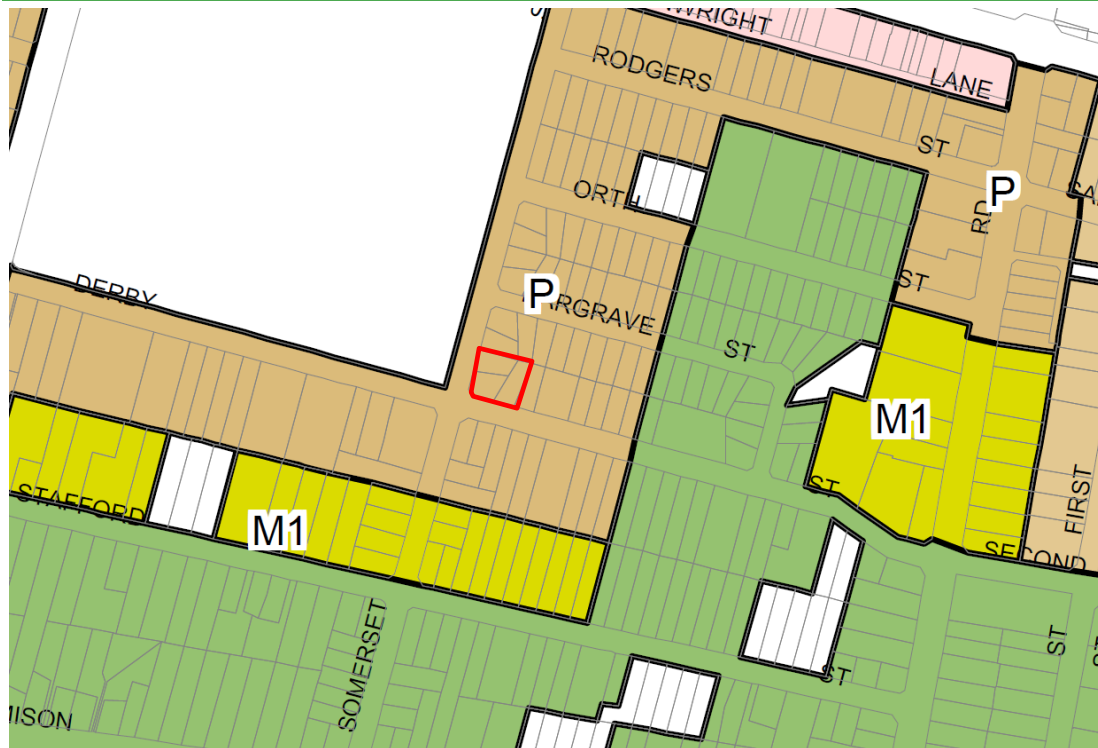
*(1) The objectives of this clause are as follows –*

- (a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,*
- (b) to minimise visual impact, disruption of view, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,*
- (c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,*
- (d) to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.*

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Building Map.

Clause 4.3 of the Penrith LEP 2010 prescribes a maximum building height of 18m for the subject site and broader locality as demonstrated by Figure 1 below.

**Figure 1: Height of Building Map Sheet HOB\_012 Extract (Source: Penrith LEP 2010)**



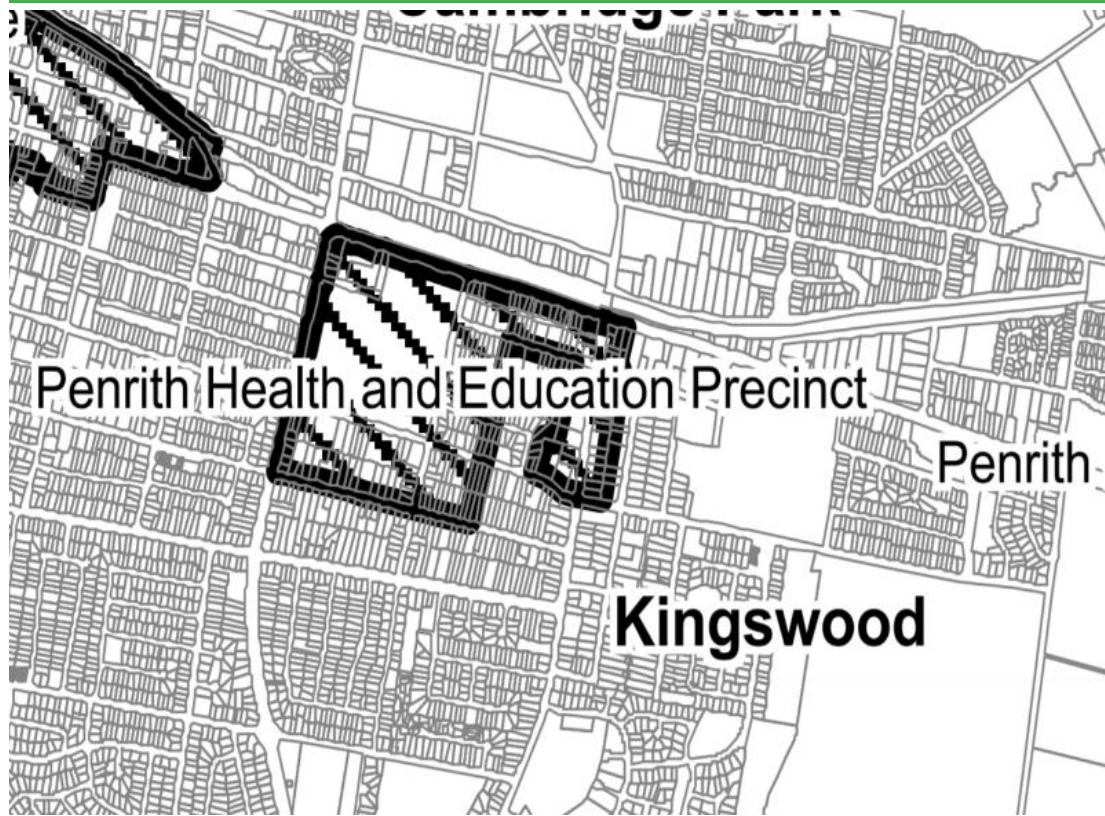
 **Subject Site**

As per Figure 2 below, Penrith Local Environmental Plan 2010 Clause Application Map identifies that the site is located within the Penrith Health and Educational Precinct and as such Clause 7.11 Penrith Health and Education Precinct applies to the subject site.

Clause 7.11(3) stipulates that development on land identified as Penrith Health and Education Precinct on the Clause Application Map is subject to a maximum height bonus of up to 20% of that permitted under Clause 4.3 (21.6m) if the floor to ceiling height of both the ground and first floors are equal to or greater than 3.5 metres.



Figure 2: Clause Application Map Sheet CAP\_002 Extract (Source: Penrith LEP 2010)



## EXTEND OF VARIATION

The current proposal has a maximum height limit that sits at RL 25.26m at the highest point and the variation to the development standard is limited to the stairwell over-run (2.3m over the prescribed height limit), a portion of the louvre screen for services (3m over the prescribed height limit) and the lift core (3.66m over the prescribed height limit) as reflected via section plan extract below. The extend of the noncompliance is 3.66m or 16.9%.

Maximum Building Height Permitted	Proposed	Extent of variation
21.6m	3.66m to the lift core	16.9%
	2.3m to the stairwell	10.6%
	3m to the louvre screen for services	13.8%

Non-compliance to the height control is illustrated by Figure 3 (Section Plans) below and Figure 3 overleaf (West Elevation Plan).

**Figure 3: Section Plans Extract**

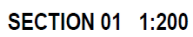
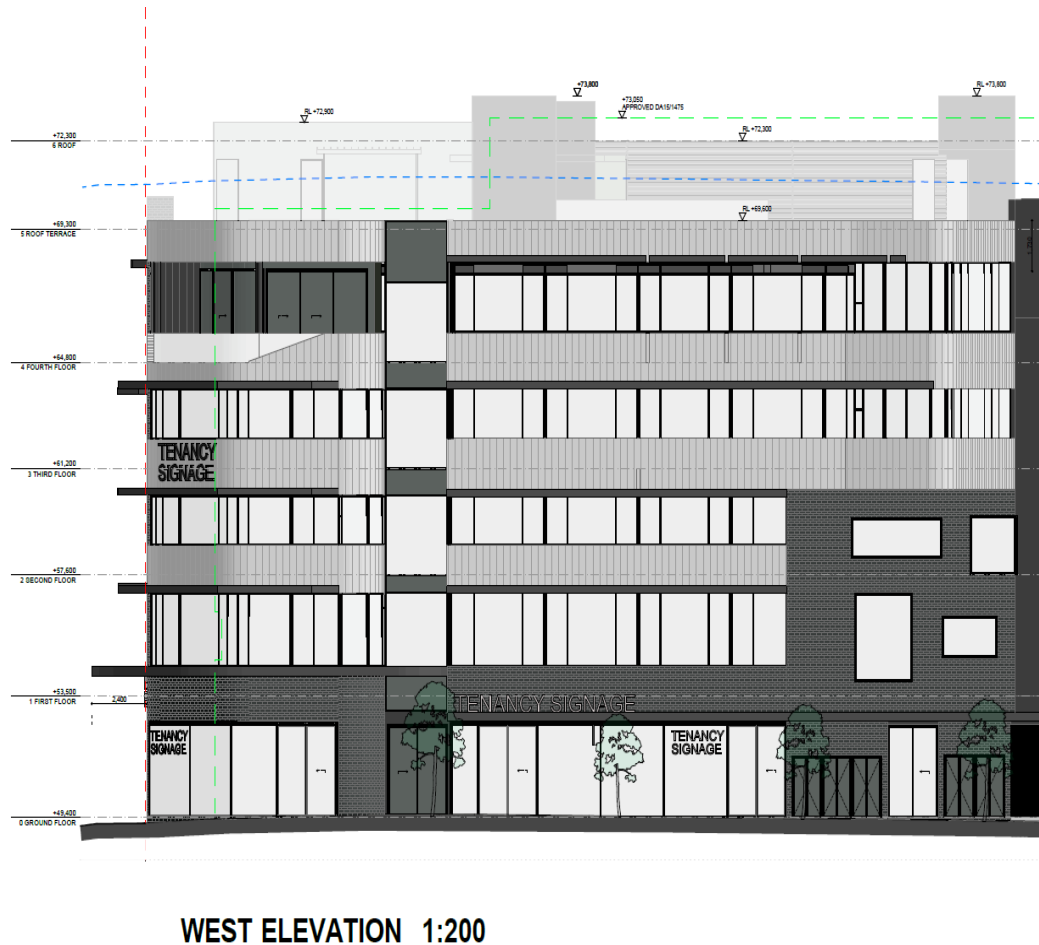


Figure 4: West Elevation Plan Extract



## RELEVANT CASE LAW

There are a number of recent Land and Environmental case including *Four 2 Five v Ashfield* and *Micaul Holdings Pty Ltd v Randwick City Council* and *Moskovich v Waverley Council*, as well as *Zhang v Council of the City of Ryde*.

In addition, a recent judgement in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard. Therefore, this must be considered when evaluating the merit of the building height departure.

In particular a recent judgement in *Ricola Pty v Woollahra Municipal Council [2021] NSWLEC 1047* the emphasised on whether the impact anticipated by the numerical control is comparable to the impacts associated with the non-compliance, which in this case is against the height standards. This is closely link to the establishment of sufficient environmental planning grounds to justify the contravention.

Detailed comparison of the potential overshadow impacts from the proposal as compared to a fully compliant scheme are provided in the architectural package provided with the revised submission. The results reveal there is little difference in the overshadow impacts results from the comparison of the two schemes.

The visual impact of a compliant scheme as compared to the proposal results in no material effects on the existing dwelling to the east of the site. This is mainly due to the careful design of the areas where there is height protrusion in that these spaces are recessed behind the main building line thus there is no visual impact to the dwelling that sits to the east of the site. Noting also there are no tangible views that are impacted as a result of the proposed height variation as compared to a full height compliant scheme.

An assessment of the loss of privacy of the proposed scheme as compared to a full height compliant scheme reveals also there are not material effects. The building has been designed cognisant of the need to ensure the privacy of the dwelling at the east of the site is maintained. Through careful window placement the privacy of the adjoining site is maintained with not resulting privacy concerns.

Further a decision in *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245* has adopted further consideration of this matter, requiring that a consent authority must be satisfied that:

- The written request addresses the relevant matters at Clause 4.6 (3) and demonstrates compliance is unreasonable or unnecessary and that there are sufficient environmental planning grounds; and
- The consent authority must consider that there are planning grounds to warrant the departure in their own mind and there is an obligation to give reasons in arriving at a decision.

Accordingly, the key tests or requirements arising from the above judgements is that:

- The consent authority be satisfied the proposed development will be in the public interest because it is “consistent with” the objectives of the development standard and zone is not a requirement to “achieve” those objectives. It is a requirement that the development be compatible with the objectives, rather than having to ‘achieve’ the objectives.
- Establishing that ‘compliance with the standard is unreasonable or unnecessary in the circumstances of the case’ does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe “test” 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in *Wehbe v Pittwater*.



- There are planning grounds to warrant the departure, and these planning grounds are clearly articulated as reasons in arriving at a decision.
- The proposal is required to be in 'the public interest'.

In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the maximum building height control and on that basis that compliance is unreasonable or unnecessary;
- Demonstrating that the impact anticipated by the numerical control is comparable to the impacts associated with the non-compliance
- Demonstrating consistency with the B4 zoning;
- Establishing compliance is unreasonable and unnecessary;
- Demonstrating there are sufficient environmental planning grounds to justify varying the standard; and
- Satisfying the relevant provisions of Clause 4.6.

## THE VARIATION & DESIGN RESPONSE

The development is subject to a maximum building height of 21.6m as per Clause 4.3 – Height of Building & Clause 7.11 – Penrith Health and Education Precinct under the Penrith Local Environmental Plan 2010.

The current proposal has maximum height that sits at RL 25.26m at the highest point and the variation to the development standard is limited to a portion of the 3.6m glass fence that is to wrap around the rooftop communal area (1.9m above the prescribed height limit), stairwell over-run (2.3m over the prescribed height limit), a portion of the louver screen for services (3m over the prescribed height limit) and the lift core (3.66m over the prescribed height limit) as reflected via section plan extract below. The extend of the noncompliance is 3.66m or 16.9%.

The development is compliant with the FSR controls with no part of the main built form is encroaching upon the 21.6m height limit. This indicates that the proposed health services facility is not an overdevelopment as it adheres to the FSR control and that the encroachment is not simply a means of achieving additional development yield on the site, but a consequence of the desire to make use of the rooftop area and provide access to the rooftop terrace and service requirements need to service the building.

These departures are a function of providing suitable access to the rooftop terrace, noting that the nature of the land use: health service facility specialising in the mental health sector. The delivery of a useable and functional open roof top terrace plays an important role in delivering a high standard of care for the health, wellbeing and treatment of patients, and therefore the rooftop terrace and ancillary safety glass fence

that is 3.6m glass is fundamental to the development. The access to fresh air and sunlight greatly enhances patient experiences and makes a positive contribution to the future patients as well as the staff.

If the roof terrace were removed then the encroachment to the height provision associated with the lift core and stairwell could be reduced, however this would remove a vital component in the operation of the health service facility that delivers high quality open space that receives excellent solar access and series of function and usable space for the treatment and wellbeing of patients.

It is also worth noting that the original design scheme has been revised in accordance with the advice provided via the Urban Design Review Panel, in particular the building has been recessed to its eastern elevation by up to 2m or a total of 6m in-order to provide appropriate setback to an adjoining residential allotment to the site's immediate eastern side boundary.

The revision to the design scheme will also contribute towards minimising bulk and massing of the building whilst also rectifying the inadequate setback that was previously provided to a residential land parcel to the site's eastern side boundary and increasing additional landscaping.

The reduction to the bulk and scale of the building with the additional separation will also minimise the potential impacts associated with the encroachment to the building height controls to the neighbouring property in terms of visual impacts, privacy, overshadowing and overbearing.

## ADDRESS OF CLAUSE 4.6 PROVISIONS

A detailed discussion against the relevant provision of Clause 4.6 is provided below.

Clause 4.6 provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular subclause 3-5 which provide:

*(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written requires from the applicant that seeks to justify the contravention of the development standard 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.*

(4) *Development consent must not be granted for development that contravenes a development standard unless:*

*(a) the consent authority is satisfied that:*

- (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
- (ii) 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, and*

*(b) the concurrence of the Director-General has been obtained.*

(5) *In deciding whether to grant concurrence, the Director-General must 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 standards, and*
- (c) any other matters required to be taken into consideration by the Director-General before granting concurrence.*

Each of these provisions are addressed individually below.

#### **CLAUSE 4.6(3): COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE**

In *Wehbe v Pittwater* [2007] NSWLEC 827 ('**Wehbe**'), Preston CJ identified a variety of ways in which it could be established demonstrated that compliance with a development standard is unreasonable or unnecessary in the case. This list is not exhaustive. It states, inter alia:

*"An objective 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 the compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard."*

While *Wehbe* relates to objection made to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the reasoning can be similarly applied to variations made under Clause 4.6 of the standard instrument.

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 objectives 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).”*

Perston CJ in the judgement then expressed the view that there are at least 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1, 2 and 3 for the purposes of this Clause 4.6 variation [our underline]):

- The objectives of the standard are achieve notwithstanding non-compliance with the standard;
- The underlying objectives or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
- The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
- 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;
- - The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

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], *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].

**The objectives of the standard are to be achieved notwithstanding non-compliance with the standard**

This Clause 4.6 variation statement establishes that compliance with the maximum building height development standard is considered unreasonable or unnecessary in the circumstances of the proposed development because the underlying objectives of the standard are achieved despite the non-compliance with the numerical standard .

The objectives of Clause 4.3(2) Height of Buildings pursuant to the Penrith Local Environmental Plan 2010 are responded to as follows:

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

*(a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,*

*(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,*

*(c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,*

*(d) to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.*

The proposal, despite the numerical non-compliance identified, is consistent with the objectives of cl. 4.3 – Height of Buildings of LEP 2010. Each objective is considered below and within the following pages.

- **Objective (a):** The locality is in a state of transition from existing low density of high density mixed use development related to the health sector up to 4-5 storeys. As such the current proposal would be compatible and consistent with the evolving skyline within Penrith's premier health precinct.

The building is compatible with the height, bulk and scale of the desired future character when having regard to recent development constructed in the locality – including adjoining health service facility, and to the suite of applicable planning controls. The desired future character within the health precinct, as evidenced by the planning controls and zone objectives, is predominantly health related higher density mixed use developments. The proposed development is compatible with the height, bulk and scale of development constructed under the current planning controls, in particular a recently constructed hospital that bounds the site's southern boundary, adopts highly articulated facades and built to boundary built form, noting that the development has a height, bulk and scale that is harmonious and sympathetic to development along Somerset Street and the broader health precinct.

The lift core and stairwell overruns and louver screens which encroaches the height limit are recessed and will not be highly visible when viewed from the street level. Furthermore, the security fencing along the edges of the rooftop terrace is to be of clear class and as such will not obstruct views.



- **Objective (b):** The additional height associated with the lift core and stairwell overruns nor the louvers screens and the 3.6m glass fencing does not generate any additional amenity impacts with regards to overshadowing, visual privacy, acoustic privacy, or view loss.

It is noted that the original design scheme has been revised in accordance with the advice provided via the Urban Design Review Panel, in particular the building has been recessed to its eastern elevation by up to 2m or a total of 6m in-order to provide appropriate setback to an adjoining residential allotment to the site's immediate eastern side boundary. As such the revision to the design scheme will also contribute towards minimising bulk and massing of the building whilst also rectifying the inadequate setback that was previously provided to a residential land parcel to the site's eastern side boundary and increasing additional landscaping.

The reduction to the bulk and scale of the building with the additional separation will also minimise the potential impacts associated with the encroachment to the building height controls to the neighbouring property in terms of visual impacts, privacy, overshadowing and overbearing.

As such the non-compliant portion of the building do not increase the shadows cast by the building.

In regard to visual impacts, the lift core and stairwell overrun which contravenes the development standards are to be recessed from Somerset Street and therefore is not highly visible from the street level.

The building will continue to present a modern five storey to the public domain.

The proposal will not impact on views enjoyed from the public domain or adjoining properties.

- **Objective (c):** The subject property is not proximate to *heritage items, heritage conservation areas and areas of scenic or visual importance*. The objective is not relevant to the proposed development.
- **Objective (d):** The subject property is not on the interface with an area of lesser intensity, with surrounding and adjoining properties being similarly zoned and having similar restrictions on height and FSR. The subject height has not been nominated to provide a transition on the subject property to an area of lesser intensity.

The proposed development has been designed to provide visual interest and a high quality urban form. The facades have been articulated by building

modulations, material selection and location and design of the windows and openings.

Objective (d) is satisfied by the proposed development, notwithstanding the variation to the numerical standards, noting all portion of the building is contained below the height control. The variation is of a minor scale and does not jeopardies development on adjoining properties from complying with the objective and providing high quality developments which are harmonious with the proposed development.

A variation of the height standard in this instance would not force development on adjoining properties to also vary the height standards as the non-compliance relates to the delivery of vital service in this case stairwells and services and therefore would also provide appropriate and compatible development in the streetscape.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable.

#### **CLAUSE 4.6(3)(B): SUFFICIENT ENVIRONMENTAL GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD**

Clause 4.6(3)(b) of the Penrith Local Environmental Plan 2010 requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard.

The following factors demonstrate that sufficient environmental planning grounds exist to justify the proposed variation to the maximum building height standard in Clause 4.3.

It is reminded at the outset that as confirmed by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [24], the focus 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 revised design scheme which increases building separation to its eastern elevation will minimise amenity impacts including solar access and privacy to adjoining residential allotments to the site's immediate eastern side boundary.
- The development is compliant with the FSR controls with no part of the building encroaching upon the 21.6m height limit the development is subject to. This indicates that the proposed health service facility is not an overdevelopment as it adheres to the FSR control and that the encroachment is not simply a means of achieving additional development yield on the site, but a by-product of compliance with access including access to the rooftop terrace and service

requirements need to service the building. These departures are a function of providing suitable access to the rooftop terrace, noting that the nature of the land use: health service facility specialising in the mental health sector. As such the delivery of a useable and functional open roof top terrace plays an important role in the health, wellbeing, and treatment of patients, and therefore the rooftop terrace and ancillary safety 3.6m glass fence is considered fundamental to the development and as such contribute to the overall development.

- The visual impact of the building element that exceeds the maximum building height standard is limited and will not be highly discernible from the street given that the lift core is recessed, the plant rooms are to be screened and the fencing associated with the rooftop communal area is to be of glass and therefore will not obstruct views.
- The reduction to the bulk and scale of the five-storey building will reduce overshadowing impacts to adjoining properties, noting that the attached shadow diagrams demonstrate that the adjoining properties receive appropriate levels of solar access to living areas and private open space areas and that the additional overshadowing caused by the building elements above the maximum building height development standard do not have an adverse impact.
- The proposal will support the ongoing development of Penrith's premier health precinct by delivering a contemporary hospital specialising in mental health with ancillary uses to positively support the function and operation of the Health Precinct, noting that the minor encroachment to the maximum height provision will not result in increasing additional amenity impacts to adjoining properties.
- The variation to the maximum building height standard enables the 'Objects' of the EP&A Act to be achieved, specifically:

(c) to promote the orderly and economic use and development of land,

- The proposal is not located within a low-density area and the proposal represents an appropriate built form on the site.
- The absence of adverse environmental, social or economic impacts.

Therefore, the current proposal is a preferred outcome from an environmental planning perspective and demonstrates that there is merit in varying the height control to achieve a better design outcome on the site through the delivery of valuable rooftop terrace vital for the wellbeing and integral part in the treatment of future patients of the health service facility without impact on the amenity of adjoining properties in terms of privacy and overshadowing, as such demonstrating sufficient environmental planning grounds to support the departure.

It is also worth noting that particular a recent judgement in *Ricola Pty v Woollahra Municipal Council* [2021] NSWLEC 1047 the emphasised on whether the impact anticipated by the numerical control is comparable to the impacts associated with the

non-compliance, which in this case is against the height standards. As such this must also be considered when establishing sufficient environmental planning grounds to justify the contravention.

- No part of the building encroaching upon the 21.6m height limit.
- With the reduction to the bulk and scale of the building, predominantly towards its eastern elevation, impact including privacy and shadows including the additional overshadowing caused by the building elements above the maximum building height development standard are to also be reduced.

This indicates that the impacts anticipated by the numerical controls is compared to the impacts associated with the non-compliance. As such the above discussion demonstrates that there are sufficient environmental planning grounds to justify the proposed variation to the maximum building height standard.

#### **CLAUSE 4.6(4)(A)(ii): CONSISTENCY WITH OBJECTIVES OF THE STANDARD AND THE ZONE AND THE PUBLIC INTEREST**

Clause 4.6(3)(b) of the Penrith Local Environmental Plan 2010 requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify contravening.

As the provisions of Clause 4.6(4)(ii) requires, the Consent Authority must be satisfied that the proposed development will be in the public interest because it is consistent with:

1. the objectives of the particular standard and
2. the objectives for development within the zone in which the development is proposed to be carried out.

In respect of the first matter, it has already been established above that the proposal achieves the objectives of the objectives of the maximum building height development standard, or alternatively that the underlying objective or purpose of the standard is not relevant to the development and/or that the underlying objective or purpose of the standard would be defeated or thwarted if compliance was required.

In respect of the second matter, the objectives of the B4 zone Mixed Use zone are as follows:

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*
- *To minimise conflict between land uses within this zone and land use within adjoining zones.*
- *To create opportunities to improve public amenity.*

- *To provide a wide range of retail, business, office, residential, community and other suitable land uses.*
- *To ensure low intensity of land use other than land uses that are primary industry enterprises.*

The proposal is consistent with the objectives of the B4 zone, insofar as the development is not antipathetic to the zone objectives (per *Schaffer Corporation v Hawkesbury City Council (1992) 77 LGRA 21*).

The development is otherwise consistent with the B4 zone objectives noting that:

- The proposal will contribute to the function and operation of the Health Precinct by the delivery of a new hospital specialising in mental health.
- The development will provide a contemporary hospital in a strategic location within proximity Kingswood Train Station and bus stops that will maximise public transport patronage and to encourage walking and cycling.
- The development is to deliver not specialised mental health services within Penrith, noting that there is a distinct absence of mental health infrastructure in Penrith but also a pharmacy which will play a supporting role within the health precinct.
- The non-compliance is minor in nature with the majority of the building being compliant with the building height control and only overrun associated with the lift core stairwell, fencing associated with the rooftop terrace and screen louvers at the roof level encroaching upon the prescribed height control and as such its impact to the streetscape is negligible as it will be visually unnoticeable when viewed from the street level, noting that both the overrun and louver screens are recessed from the site's frontages.
- Due to the minor nature of the variation, it will not have any adverse amenity impacts. In this regard it is noted:
  - The variation will have no adverse impact on the physical bulk, height, or scale of the development, noting that the revised scheme will future reduce the bulk and scale of the building.
  - The variation will not lead to a reduction in solar penetration on site or to adjoining properties nor will it lead to sunlight loss or overshadowing.
  - The proposed variation will not lead to view loss or interrupt views to and from the site.
  - The proposed variation will not lead to a reduction in privacy afforded to neighbouring properties.



For those reasons, the consent authority would be satisfied the development is in the public interest.

## CONCURRENCE OF THE SECRETARY

Subclause 4.6(4)(b) of the Penrith Local Environmental Plan 2010 requires that the concurrence of the Planning Secretary be obtained for development consent to be granted to development that contravenes a development standard.

S 39(6) of the Land and Environment Court Act 1979 gives the Court the power to grant development consent without obtaining the concurrence of the Secretary, although consideration ought to be given to the matters in subcl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard.

The points in Clause 4.6 (5) are responded to as follows:

- The contravention of the maximum building height development standard does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal.
- There is no public benefit in maintaining the maximum building height development standard as it relates to the current proposal. The proposed variation is acceptable in the circumstances given the underlying objectives of the control are achieved and it will not set an undesirable precedent for future development within the locality as any future development on another site would require consideration of the relevant merits and circumstances of the individual application.

## CONCLUSION

For the reason set out above, the Applicant says that:

1. the matters canvassed in this request have adequately addressed the requirements of Clause 4.6(3) and
2. The Consent Authority should be satisfied that the proposed development is in the public interest, as it is consistent with both the objectives of the development standard, and the objective of the B4 zone.

The variation is well founded and should be upheld.