



**URBIS**

# **CLAUSE 4.6 VARIATION REQUEST - BUILDING HEIGHT**

180 Great Western Highway &  
26 Rodgers Street, Kingswood

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# 1. INTRODUCTION

This Clause 4.6 Variation Request (**'the Request'**) has been prepared on behalf of Iris Property (**'the applicant'**) and accompanies a Development Application ('DA') for the demolition of the existing structures on site and construction of two mixed use developments delivering a total of 133 residential apartments, basement parking and commercial tenancies at 180 Great Western Highway (Building A) & 26 Rodgers Street (Building B), Kingswood.

The Request seeks an exception from the *Height of Buildings* prescribed for the site under clause 4.3 of *Penrith Local Environmental Plan 2010 (PLEP)* The variation request is made pursuant to clause 4.6 of the LEP.

This Request demonstrates that compliance with the maximum height control prescribed for the site is unreasonable and unnecessary, demonstrating that there are sufficient environmental planning grounds to justify the requested variation and that the approval of the variation is in the public interest because it is consistent with the development standard and zone objectives.

In accordance with clause 4.6(3), the applicant requests that the height development standard be varied. The two sites are mapped as having a maximum height of 24 metres for 180 Great Western Highway (Building A) and 18 metres for 26 Rodgers Street (Building B), Kingswood. Furthermore, as detailed above, the site is located within the Penrith Health and Education Precinct and the proposed development seeks to utilise the additional building height incentives permitted under cl. 7.11 of the PLEP which provides the opportunity for an additional 20% height bonus if the floor to ceiling height of both the ground and first floors are equal to or greater than 3.5m. The maximum height permitted considering the bonus provisions for Building A is 28.8m and Building B is 21.6m

Most of the proposed development sits below the maximum height limit prescribed by cl. 7.11, with a small portion of the two apartment parapets and lift overruns exceeding the height limit by 12% or less. However, based upon advice from Council it is understood that the Request must capture the variation based upon the height prescribed under clause 4.3.

The request contains justified reasoning for the proposed variation to the building height standard and demonstrates that:

- The proposal is consistent with the height, bulk, and scale of the desired future character of the locality. While the Height of Buildings Map prescribes a base building height, Clause 7.11 provides the opportunity for additional building height in the Penrith Health and Education Precinct to "encourage a built form that is suitable for both residential and health services facilities" by specifically providing for higher floor to ceiling heights at the ground and first floors of the proposed development.
- The parapet of the proposed buildings is generally consistent with the heights permitted under Clause 7.11 with the extent of variation related specifically to isolated areas of lift overruns, plant and shade protection, which are well setback from the parapet of the buildings and provide for an accessible communal roof top area with appropriate sun protection to manage the very extreme heats and wind and to provide appropriate amenity throughout the entire year.
- Specifically, the design of the communal roof space has been through ongoing refinement and review by Council's Urban Design Review Panel (UDRP). Prior to the Development Application being lodged, the draft scheme was reviewed twice by the UDRP in January and June 2021. In addition, the lodged Development Application was reviewed a third time by the UDRP in January 2022. Through this reiterative process changes to the roof top communal open space areas were made to improve their function, amenity, and usability. The Panel were encouraging of these elements to provide improved amenity.
- The small areas of height exceedance do not create additional floor space at the roof level, and does not seek to vary the maximum FSR permitted on the site. Building A and Building B is subject to a maximum FSR of 4:1 and 3:1, respectively. In both cases, the buildings comply with the maximum FSR at 3.9:1 and 3:1. However, when modelling the floor to ceiling heights required at the ground and first floors under Clause 7.11 and a typical floor to ceiling height required under the ADG, to achieve compliance with the permitted heights under Clause 7.11 this would inadvertently require the removal of an entire floor level of each apartment building and result in a maximum floor space well below that permitted under Penrith LEP. The proposal provides very generous floor to floor heights in both buildings with 5 metres provided

(Building A) and 4.1 metres provided (Building B) at ground level and 3.9 metres across level one to respond positively to the intent of the objectives for the Penrith Health and Education Precinct.

- In accordance with Clause 4.3 (b) of PLEP the height breach does not give rise to any unreasonable visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas.
- There are recent examples of variations to clause 4.3 in the Penrith Health and Education Precinct, demonstrating the consent authority have recently determined similar variations to ensure that the objectives of Clause 7.11 can be met.
- The proposal aligns with the strategic growth of the area set out by Penrith Council delivering residential and commercial amenity to the Kingswood Core whilst providing high quality urban design aligning with the future identity of the precinct. Furthermore, the proposed development supports the state policy of increasing housing along transport corridors, being positioned adjacent to Kingswood train station. The development will additionally improve the residential amenity to the Health and Education precinct delivering more housing particularly to those working on the front line due to the proximity to the Nepean Hospital within the establish Health and Education Precinct.
- The proposed variation will not impact the ability for 1 Bringelly Road to redevelop the site. Hampton Property Services and the architect met with the neighbour to demonstrate potential future outcomes for the neighbouring site. The variation is will not impact the amenity and redevelopment potential of 1 Bringelly Road. The matter is considered in the proposed design by providing the setbacks and a 'cut-out' at south-west corner, the design anticipates 1 Bringelly Road having a building form continuing the block arrangement around a central opening.
- The non-compliance will not impact on the proposal's ability to protect and enhance the amenity of occupants and neighbours, protect, and enhance the natural and built environment, and will meet the future needs of the growing hospital precinct.

This report should be read in conjunction with the Statement of Environmental Effects prepared by Hampton Property Services and dated 6 December 2021.

To demonstrate the key reasons why there is sufficient grounds to support variation the height of buildings, this report has been structured as follows:

- **Section 2:** Description of the site and its local and regional context, including key features relevant to the proposed variation.
- **Section 3:** Brief overview of the proposed development as outlined in further detail within the SEE and accompanying drawings.
- **Section 4:** Identification of the development standard which is proposed to be varied, including the extent of the contravention.
- **Section 5:** Outline of the relevant assessment framework for the variation in accordance with clause 4.6 of the LEP.
- **Section 6:** Detailed assessment and justification of the proposed variation in accordance with the relevant guidelines and relevant planning principles and judgements issued by the Land and Environment Court.
- **Section 7:** Summary and conclusion.

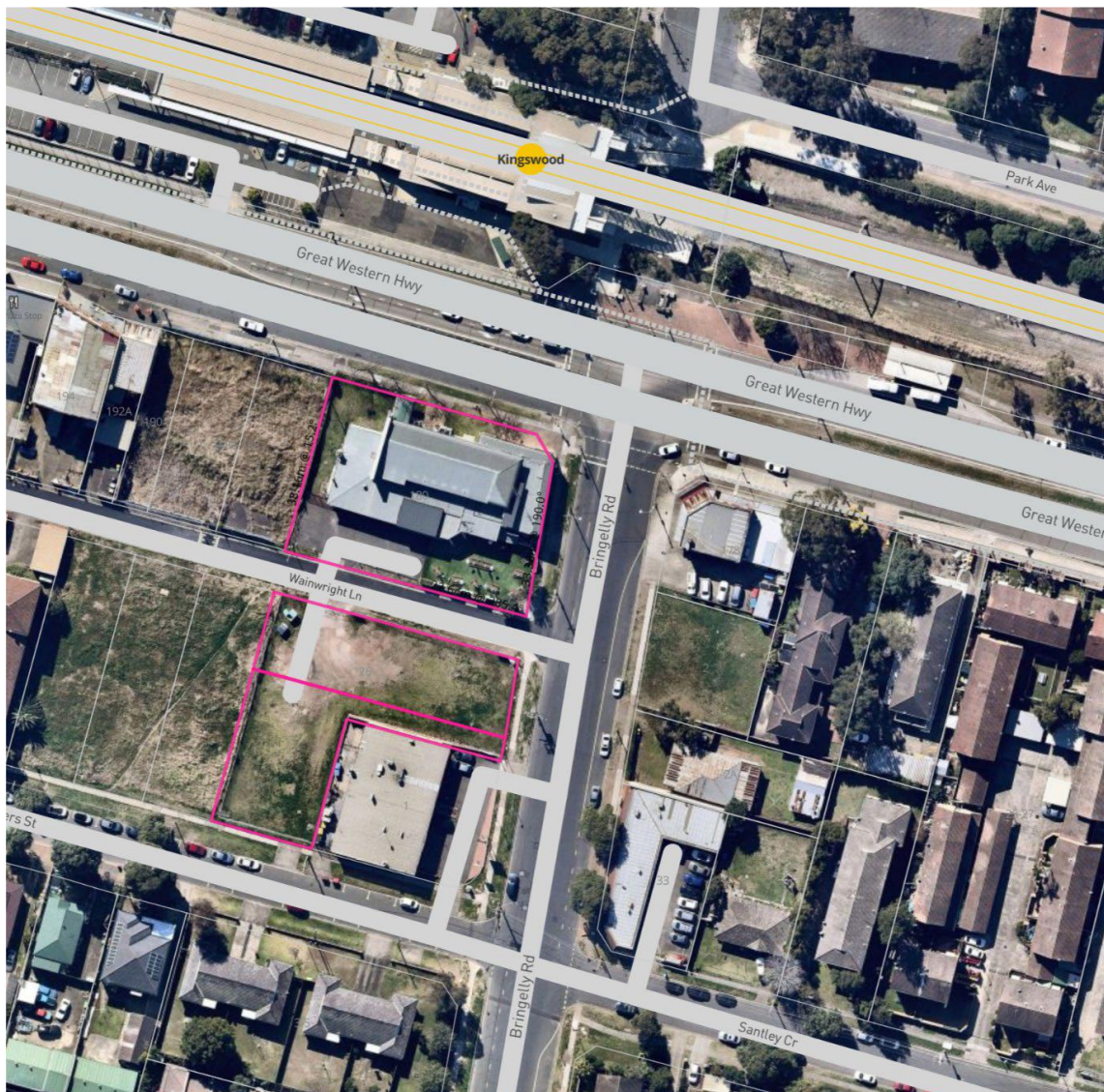
## 2. SITE CONTEXT

### 2.1. SITE DESCRIPTION

The two sites are located at 180 Great Western Highway, Kingswood legally described as Lot 56 in DP 1101143 (Building A) and 26 Rodgers Street, Kingswood legally described as Lot A in DP 406516 (Building B) within the local government area of Penrith. The site comprises two separate allotments; the northern allotment has an area of 1,940m<sup>2</sup> and the southern allotment, 1,828m<sup>2</sup>.

The 180 Great Western Highway sits as a corner allotment fronting three streets- Great Western Highway (primary frontage), Bringelly Road and Wainwright Road. 26 Rodgers Street is positioned on the southern side of Wainwright Lane being identified as an 'L' shaped allotment bordered by three streets – Wainwright Lane (primary frontage), Rodgers Street, and Bringelly Road.

Figure 1 Aerial Photograph



Source: Hampton Property SEE 2021



## 2.2. EXISTING DEVELOPMENT

180 Great Western Highway, Kingswood presently accommodates a two storey commercial premises called 'The Kingswood Hotel' which includes the fit out of a pub with ancillary amenities and hotel on the first floor. 26 Rodgers Street is a vacant lot having no history of buildings constructed on the empty parcel of land as seen in **Figure 2**.

Figure 2 Site Photos



Picture 1 180 Great Western Highway site

Source: Squillace Architects



Picture 2 180 Great Western Highway site

Source: Squillace Architects



Picture 3 26 Rodgers Street site

Source: Squillace Architects



Picture 4 26 Rodgers Street site

Source: Squillace Architects

## 2.3. CONTEXT

The site sits within the core of Penrith Health and Education Precinct recognised by Penrith City Council as one of *Australia's fastest growing economies striving to be a leading centre for health and education facilities and services*. The Precinct has seen an uplift in built form controls to attract and complement Nepean Hospital and its surrounds. The proposed development is of a compatible scale and form with existing recent developments that support the health relates uses in the Precinct.

Penrith City Council has undergone rigorous community and stakeholder engagement to understand the place opportunities and establish an implementable strategic framework to improve the existing urban fabric of Kingswood whilst providing the opportunity to deliver more houses and employment opportunities within the catchment. An analysis of the City Strategy indicates *to achieve an increase to housing within the urban*



area 60% of new housing should be medium to high density development within 800 metres of a centre-being identified as Kingswood Core within the Health and Education Precinct.

Council has outlined as part of the new Housing Strategy; new developments will assist in delivering these objectives leveraging the existing transport lines and surrounding infrastructure.

The development proposed will assist in delivering more apartments to the vicinity of the area particularly to the frontline workers of medical facilities, whilst positively contributing to the employment growth. Both lots in their current form do not offer residential amenity to the Penrith community.

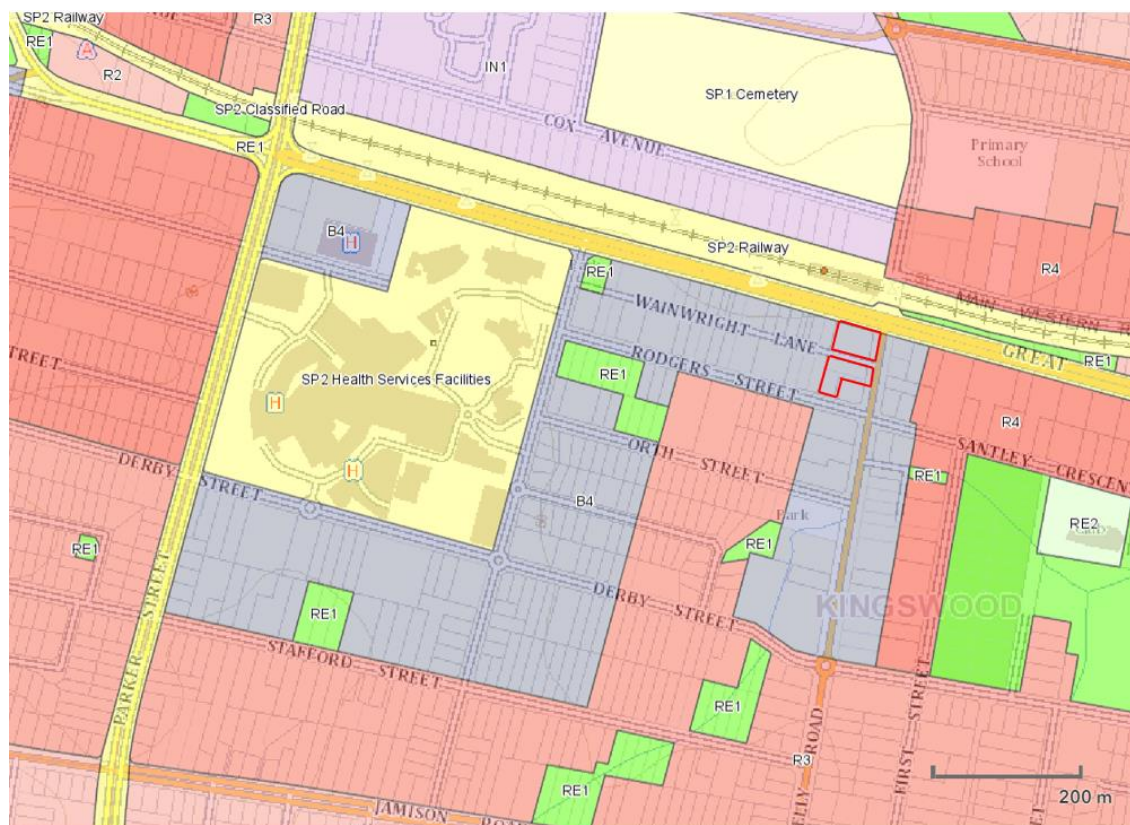
The 'Think Bold Kingswood Place Plan' identified 6,600 new homes and 12,000+ jobs are targeted by 2026. The development will extend the residential amenity within the core, whilst also providing the opportunity for future employment and the stimulation of the economy



*Excerpt from Think Bold Kingswood Place Plan*

The zoning map demonstrates the there is a desire for mixed use developments. Currently, the immediate vicinity surrounding the site is characterised by various single and multi-storey commercial buildings that are of dated architectural design.

Figure 3 Zoning of the Area



Source: NSW Spatial Planning 2023

Further along the road corridor sits various newly constructed contemporary residential development 6 - 7 stories high that demonstrates the transitioning nature of the locality in line with the strategic vision set out by Council. The site benefits from sitting directly adjacent to the Kingswood train station and rail network bordering along the southeast road corridor. The proposed development is representative of the mixed-use zone delivering both residential and commercial amenity to the area.

Multi-storey developments (both approvals and constructed) in the area include:

- Nepean Hospital Redevelopment – State Significant Development 8766 – 14 storey new hospital building approx. 67m high, completed with further works ongoing.
- 48-56 Derby Street (DA15/0773) – 5-8 storey residential flat building with ground floor medical use approx. 25.4m high, completed.
- 28-32 Somerset Street (DA16/0597) – 6 storey residential flat building with ground floor medical use approx. 22.5m high, DA approved.
- 10-12 Hargrave Street (DA17/0490) – 6 storey serviced apartments building approx. 21.6m high, completed.
- 84-88 Parker Street (DA18/0773) – 6 storey health facility approx. 23.9m high, completed.

The proposal subject to this variation is between 6 and 8 stories demonstrating consistency with surrounding approved and constructed mixed use developments in the context.

Figure 4 Examples of Existing Multi-storey developments within the Precinct



Picture 5 206-212 Great Western Highway

Source: Google Maps 2023



Picture 6 48-56 Derby Street

Source: Google Maps 2023

### 3. PROPOSED DEVELOPMENT

This Clause 4.6 Variation Request has been prepared to accompany a DA for the demolition of existing structures across both sites, construction of two separate buildings that contain the following:

- Demolition of all existing buildings and structures, including services are proposed across both sites.
- A mixed-use development comprising of a five-storey building with two levels of basement is proposed at 26 Rodgers Street, Kingswood. The development will consist of residential apartments, commercial tenancies, and parking space amenities.
- A mixed-use development comprising of a seven-storey building with three levels of basement is proposed at 180 Great Western Highway, Kingswood.

A summary of the proposed bedrooms across both sites are detailed below. The self-contained apartments have been designed in accordance with The Apartment Design Guide ensuring compliance with the requirements of solar access, cross ventilation, and private open space.

Table 1 Apartment Summary

Bedrooms Offered Per Apartment	Number of Apartments	
	180 Great Western Highway Building A	26 Rodgers Street Building B
1 Bedroom	13	12
1 Bedroom + Study	12	-
2 Bedroom	6	35
2 Bedroom + Study	42	-
3 Bedroom	6	7
<b>Total</b>	<b>79 Apartments</b>	<b>54 Apartments</b>

Source: Squillace Architects

A detailed description of the proposed development is provided in the Statement of Environmental Effects prepared by Hampton Property Services and dated 6 December 2021. The proposal is also detailed within the architectural and engineering drawings that form part of the Development Application.



## 4. EXTENT OF CONTRAVENTION

This section of the report identifies the development standard, which is proposed to be varied, including the extent of the contravention. A detailed justification for the proposed variation is provided in **Section 6** of the report.

### 4.1. DEVELOPMENT STANDARD SEEKING VARIATION – MAXIMUM BUILDING HEIGHT

The two sites are restricted by two maximum height provisions under Clause 4.3 of the *Penrith Local Environmental Plan 2010*. The relevant height of buildings map **Figure 5** stipulates a maximum building height of 24m for 180 Great Western Highway (Building A) and 18m for 26 Rodgers Street (Building B).

The two building heights have been measured in accordance with the PLEP Definition

**building height (or height of building)** means –

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,

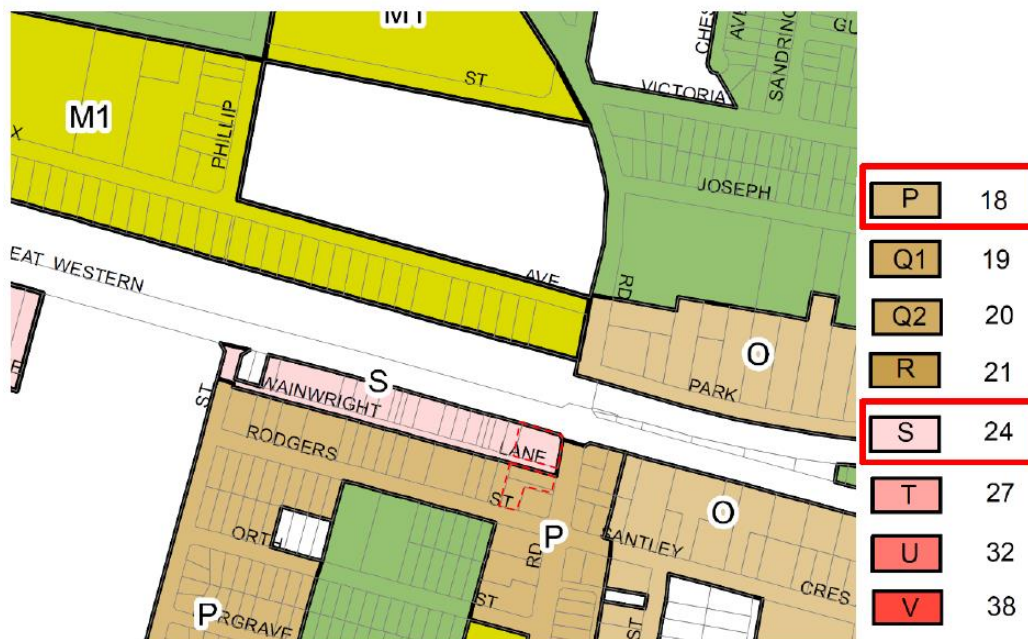
including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

Further, the sites are located within the Penrith Health and Education Precinct and the proposed development takes advantage of the additional building height incentives afforded by cl. 7.11 of the PLEP and providing a 20% height bonus. The maximum height permitted for Building A is 28.8m and Building B is 21.6m in accordance with the PLEP.

Most of the proposed development sits below the maximum height limit prescribed by cl. 7.11, with a small portion of the two apartment parapets and lift overruns exceeding the height limit by 12% or less.

However, based upon advice from Council it is understood that the Request must capture the variation based upon the height prescribed under clause 4.3.

Figure 5 Height Control of the Site PLEP



## 4.2. PROPOSED VARIATION TO CLAUSE 4.3

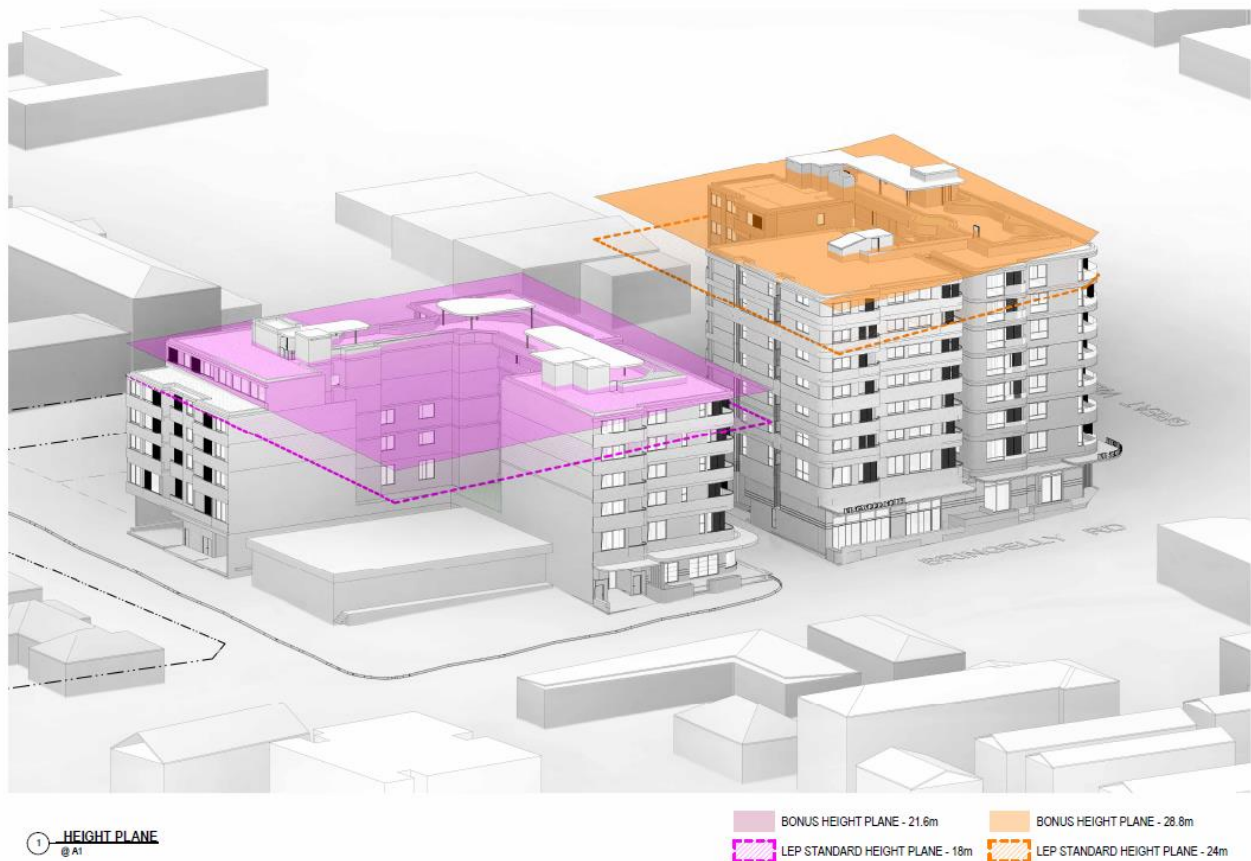
The site is mapped as having the maximum height of 24m (Building A) and 18m (Building B). Being a provision of the PLEP in relation to the carrying out of development, under which a requirement is fixed in respect to height of buildings in the relevant zone, clause 4.3(2) of the PLEP is a development standard.

The proposal is consistent with the stated objectives of the zone, in that the proposal provides for development that is compatible with the promotion of business activity along the Great Western Highway including the enhancement of the existing food and drink premises and the provision of temporary delivering housing diversity.

The variation heights are illustrated below in Table 2 and 3. This comparison illustrates the variations when the bonus is included and excluded.

Figures 6 - 8 clearly illustrate that most of the site sits below the maximum height limit (if considering the bonus provision). The variation above the bonus provision is limited to the lift core, parapet, pergola, and planter.

Figure 6 Height Plane



Source: Squillace Architects

Figure 7 180 Great Western Highway (Building A) South Elevation



**NORTH BUILDING - ELEVATION - SOUTH**  
1:100 @ A1

Source: Squillace Architects

Figure 8 26 Rodgers Street (Building B) South Elevation



**SOUTH BUILDING - ELEVATION - SOUTH**  
1:100 @ A1

Source: Squillace Architects



Table 2 Proposed Building Height and Non-Compliance based on cl. 4.3 and cl. 7.11 of the PLEP.

	<b>Proposed Height (m)</b>	<b>Non-Compliance (m)</b>	<b>Percentage of Non-Compliance against Cl 4.3 (%)</b>	<b>Percentage of Non-Compliance against Cl 7.11 (%)</b>
<b>180 Great Western Highway (Building A) <i>Permitted Height 24 metres</i></b>				
<u>Section A</u>				
Lift Overrun	30.6	+ 6.6	27.5	7.6
Pergola	30.0	+ 6.0	25.0	6.3
Planter	27.9	+ 3.9	16.3	-
Parapet	27.5	+ 3.5	14.5	-
Top of Building	26.6	+ 2.6	10.8	-
<u>Section B</u>				
Lift Overrun	30.2	+ 6.2	25.8	4.9
Pergola	29.6	+ 5.6	23.3	2.7
Planter	28.2	+ 4.2	17.5	-
Parapet	28.7	+ 3.7	15.4	-
Top of Building	26.9	+ 2.9	12.1	-
<b>26 Rodgers Street (Building B) <i>Permitted Height 18 metres</i></b>				
<u>Section A</u>				
Lift Overrun	24.1	+ 6.1	33.9	11.5
Pergola	23.1	+ 5.1	28.3	6.9
Planter	21.9	+ 3.9	21.7	1.4
Parapet	21.8	+ 3.8	21.1	0.9
Top of Building	21.5	+ 3.5	19.4	0.05
<u>Section B</u>				
Lift Overrun	24.4	+ 6.4	33.9	12.9
Pergola	23.1	+ 5.1	28.3	6.9
Planter	22.2	+ 4.2	23.3	2.7
Parapet	21.8	+ 3.8	21.1	0.9
Top of Building	21.5	+ 3.5	19.4	-

Source: Hampden Property SEE Report

Table 3 Proposed Building Height and Non-Compliance based on cl. 7.11 of the PLEP Bonus Height

	Proposed Height (m)	Non-Compliance (m)	Percentage of Non-Compliance (%)
180 Great Western Highway (Building A) <i>Permitted Height 28.8 metres</i>			
<u>Section A</u>			
Lift Overrun	30.6	+ 1.8	7.6
Pergola	30.0	+ 1.2	6.3
Planter	27.9	-	-
Parapet	27.5	-	-
Top of Building	26.6	-	-
<u>Section B</u>			
Lift Overrun	30.2	+ 1.4	4.9
Pergola	29.6	+ 0.8	2.7
Planter	28.2	-	-
Parapet	28.7	-	-
Top of Building	26.9	-	-
26 Rodgers Street (Building B) <i>Permitted Height 21.6 metres</i>			
<u>Section A</u>			
Lift Overrun	24.1	+ 2.5	11.5
Pergola	23.1	+ 1.5	6.9
Planter	21.9	+ 0.3	1.4
Parapet	21.8	+ 0.2	0.9
Top of Building	21.5	+0.1	0.05
<u>Section B</u>			
Lift Overrun	24.4	+ 2.8	12.9
Pergola	23.1	+ 1.5	6.9
Planter	22.2	+ 0.6	2.7
Parapet	21.8	+ 0.2	0.9
Top of Building	21.5	-	-

Source: Hampden Property SEE Report

The parapet of the proposed buildings is generally consistent with the heights permitted under Clause 7.11 with the extent of variation related specifically to isolated areas of lift overruns, plant and shade protection, which are well setback from the parapet of the buildings and provide for an accessible communal roof top area with appropriate sun protection to manage the very extreme heats and wind and to provide appropriate amenity throughout the entire year.

Most of the proposed development sits below the maximum height limit prescribed by cl. 7.11, with a small portion of the two apartment parapets and lift overruns exceeding the height limit by 12% or less.

## 5. RELEVANT ASSESSMENT FRAMEWORK

Clause 4.6 of *Penrith Local Environmental Plan 2010 (PLEP)* includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 of the PLEP are:

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

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

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

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

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

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

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

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

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

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

In accordance with clause 4.6(3), the applicant requests that the height of buildings development standard be varied.

## 6. ASSESSMENT OF CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standards relating to the height of buildings development standard in accordance with *clause 4.3* of the LEP.

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

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

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

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

The height of building development standard prescribed by *clause 4.3* of the LEP is a development standard capable of being varied under *clause 4.6(2)* of the LEP.

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

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

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

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

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

The Request also addresses the third method, that the underlying objective or purpose of the development standard would be undermined, defeated or thwarted if compliance was required with the consequence that compliance is unreasonable (*Initial Action* at [19] and *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]). Again, this method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The Request also seeks to demonstrate the ‘unreasonable and unnecessary’ requirement is met because the burden placed on the community by not permitting the variation would be disproportionate to the non-existent or inconsequential adverse impacts arising from the proposed non-complying development. This disproportion provides sufficient grounds to establish unreasonableness (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

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

The specific objectives of the Height of Buildings as specified in *clause 4.3* of PLEP are detailed in **Table 4** below. An assessment of the consistency of the proposed development with each of the objectives is also provided.

Table 4 Assessment of Consistency with Clause 4.3 Objectives

Objectives	Assessment
(a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,	<p>The Precinct has seen an uplift in built form controls to attract and complement Nepean Hospital and its surrounds. The proposed development is of a compatible scale and form with existing recent developments that support the health relates uses in the Precinct. The proposed development is of a compatible scale and form with existing recent developments that support the health relates uses in the Precinct.</p>
(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,	<p>The detailed assessment in the Statement of Environmental Effects and reports that accompany the DA for the subject site provides supporting information on how the development has been designed to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas.</p> <p>The architectural plans accompanying the DA provide a very comprehensive analysis of the shadow impacts from the proposed development</p>
(c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,	<p>There are no heritage items, conservation area and areas of scenic or visual importance identified that could be impacted by the proposed development.</p>
(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.	<p>The subject site is not on the interface with an area of lesser intensity, as surrounding properties have similar zone, FSR and height controls. Further refinements to the design have been involved to provide an enhanced common open space at roof level with the inclusion of shading structures imposing the building height control.</p> <p>The project satisfies the clause by providing a development that is adaptable and suitable for uses other than residential, ensuring residential buildings are future-proofed so that it can be adapted to a non-residential use, complementing the health services facilities. The development proposed endeavours to enhance and future proof the site so that the Health and Education Precinct comprises a mix of uses, support its functionality and vibrancy.</p> <p>Furthermore, the structures that will breach the height controls will not generate any significant additional amenity impacts with regards to overshadowing, visual and acoustic privacy or view loss. The shadow diagrams demonstrate the</p>



Objectives	Assessment
	<p>additional shadows cast by the rooftop amenities will mostly fall within the footpath and Great Pacific Highway.</p> <p>The development displays design excellence and is strategically located in an area that is best suited to provide a transition in built form and land use intensity from the development in the Nepean Hospital falling within the Health and Education Precinct delivering supporting developments within the surrounding mixed use zone.</p>

### Clause 7.11 Objectives

The site is located within the Penrith Health and Education Precinct and therefore Clause 7.11 of the LEP can be utilised. This clause allows additional height (up to 20% of the applicable standard) if the prerequisites and objectives are met.

*(3) Despite clause 4.3, development consent may be granted to development on land that exceeds the maximum height shown for that land on the Height of Buildings Map by up to 20% if the floor to ceiling height of both the ground and first floors are equal to or greater than 3.5 metres.*

The objective of the clause is to provide buildings that are adaptable and suitable for uses other than residential, and to ensure that residential buildings are future-proofed so that they are able to be adapted to non-residential uses, for the purpose of health services facilities. The intent of the clause is to promote and future proof buildings so that the Health and Education Precinct comprises a mix of uses to support its functionality and vibrancy.

Table 5 Assessment of Consistency with Clause 7.11 Objectives

Objectives	Assessment
(a) to encourage a built form that is suitable for both residential and health services facilities,	The proposed development has been designed in a way that is both adaptable and suitable for uses other than being strictly residential. The development has considered future-proofing requirements delivering a site that accommodates for the residential amenity whilst also providing spaces for commercial tenancies.
(b) to encourage adaptive reuse of residential buildings for health services facilities in the Penrith Health and Education Precinct where the residential use within the building ceases in the future.	<p>The proposed development will contribute to the function and character of the Penrith Health and Education precinct. The proposed commercial use is defined as a non-residential use, and therefore supports the precinct, delivering commercial tenancies. The proposed 5m and 4.1m floor to ceiling height at First Floor level is generous enough to accommodate a range of commercial uses across the site.</p> <p>26 Rodgers Street is currently a vacant lot that does not service residential or non-residential amenity. The development proposed allows for a</p>

Objectives	Assessment
	<p>better utilisation of site enhancing the offering to residents in the future whilst aligning with the strategic goals set out by Penrith Council.</p> <p>The site as a whole will accommodate employment opportunities, inherently strengthen the economy within the region and provide amenities to the precinct</p>

The objectives of the development standard are achieved, notwithstanding the non-compliance with the standard in the circumstances described in this variation report.

**The underlying object or purpose would be undermined, if compliance was required with the consequence that compliance is unreasonable** (the third method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43] as applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24])

Not relied upon.

**The burden placed on the community (by requiring strict compliance with the FSR standard) would be disproportionate to the (non-existent or inconsequential) adverse consequences attributable to the proposed non-compliant development** (cf *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

Not relied upon.

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

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

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

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

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

#### Visual Impact

A very small portion of the site exceeds the height limit, whilst a significant portion of the site sits well below the height limit. The highest point of the building has been positioned appropriately to align with the highest natural point of the site.

The design effectively utilises various elements such as increased setbacks, undulating facades, fenestration, landscaped features, and materiality to minimise the apparent bulk and scale when viewed from the public domain, thereby mitigating the visual impact. The primary area of non-compliance pertains to the rooftop level, extending beyond the permissible building height envelope. The proposed height deviation will not negatively affect the privacy, daylight access, or views of the adjacent properties, and therefore, will not compromise their use and enjoyment. In addition to replacing outdated buildings that have reached their

end-of-life, the development will also enhance the existing streetscape, aligning with the desired future character of the locality aligning with the growth of the precinct.

### **Loss of Privacy**

The non-compliant elements of the building are limited to the upper portion of the rooftop level and have been designed to maintain the privacy of adjacent properties, as well as the relationship between the two buildings. The architectural plans include increased setbacks at the rooftop level, exceeding the Design Criteria outlined in the Apartment Design Guide. If strict compliance with the maximum building height were to be enforced, the privacy impact on neighbouring properties would remain unchanged as the proposal complies with relevant separation criteria. The height breach does not increase the extent of overlooking, which is primarily due to the high floor-to-ceiling height at the ground level. Thus, the non-compliant elements have no greater impact on privacy than the compliant elements.

### **Solar Access**

The building elements exceeding the height limit do not cause any notable additional overshadowing to neighbouring properties or the public domain when evaluated against the relevant planning regulations. The non-compliant height is set back and surrounded by a built form that complies with the height of buildings development standard. The elements of the building that exceed the height limit would have minimal additional effects on overshadowing of neighbouring properties between 9am and 3pm at midwinter, as evidenced by the shadow diagrams.

### **View Loss**

The proposed development's non-compliance with the height limit will not result in any significant loss of views or outlook compared to a compliant building. Importantly, neighbouring properties or the public domain do not currently enjoy any significant views across the subject site due to the close proximity to the train network. The existing buildings are underdeveloped relative to the maximum permitted building height, and therefore, it is considered unreasonable to expect to retain any views. Despite the additional height of the proposed buildings, the development remains consistent with this objective.

### **Design Excellence and Urban Design**

The proposed development is a valuable contribution to the community generally and will support the growth of the Nepean Health Precinct outlined by Council activating the Core of Kingswood delivering more residential amenities whilst further activating the commercial offering to the area.

The non-compliant section of the proposed development is setback well within the site, minimizing the impact of the non-compliance on the surrounding street frontages and associated public domain while maintaining a consistent scale with the locality. The proposed variation of the standard does not affect the achievement or consistency with this objective. The proposed development is a culmination of strategic planning studies and urban design analysis for the site, providing significant public benefits and demonstrated design excellence.

The proposed height variation does not result from a need to vary the floor space ratio (FSR) control. The provision of additional height allows the FSR to be realised on the site, which illustrates a misalignment between the prescribed FSR and height controls.

The proposal provides generous floor to floor heights in both buildings with 5 metres provided (Building A) and 4.1 metres provided (Building B) at ground level and 3.9 metres across level one. If the proposal was required to comply with the height limit, it would result in an undesirable experience for future users. The generous floor to floor heights to each building provides greater amenity. Ultimately the proposed scale is assumed and intended under the height control, complying would result in the loss of a large floor space component on the site and be well under the maximum FSR.

The proposal has been purposefully designed to protect the amenity of the neighbouring properties; however, it is noted that this pre-existing character will be replaced over time outlined by the Penrith City Council strategic reports emphasising the transitioning nature of the locality. The proposal is considered to achieve a planning purpose of providing a high quality building in a suitable locality in close proximity to services and transport. These benefits are in the absence of any significant additional adverse streetscape or amenity impacts, particularly relating to solar access and amenity.

Based on the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed building height non-compliance in this instance.

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

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

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

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

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

The consistency of the development with the objectives of the development standard is demonstrated in Table 6. The proposal is also consistent with the land use objectives that apply to the site under PLEP. The site is located within the B4 Mixed Use zone. The proposed development is consistent with the relevant land use zone objectives as outlined in the table below.

Table 6 Assessment of Compliance with Land Use Zone Objectives

Objective	Assessment
To provide a mixture of compatible land uses.	<p>The site is located within the Penrith Health and Education Precinct which has seen an overall uplift in the built form controls to attract and complement the Nepean Hospital and its surrounds. Recent Developments within the area have resulted in various multi-storey non-residential and residential buildings which has changed the streetscape appearance and built form character of the area.</p> <p>The proposed development is of compatible scale, use and form with the recent developments. The proposed development presents a well-balanced mix of residential and non-residential uses. The project's design includes a combination of retail tenancies and residential accommodations, strategically located for easy access, enabling local inhabitants to have increased employment opportunities in the area. This aspect of the development will create a self-contained community that will foster social cohesion and contribute to the sustainable growth of the locality. The proposed development does not detract from</p>

Objective	Assessment
	the existing and desired future character of the area.
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.	The site is ideally positioned adjacent to Kingswood Train station allowing for walking distance access to the transport node. Its strategic location is highly accessible through the existing public transport infrastructure. Furthermore, the development includes provisions for bicycle spaces, promoting sustainable modes of transportation and reducing reliance on private vehicles. The proposed development maintains the site's flexibility for a range of uses, including residential and commercial premises.
To minimise conflict between land uses within the zone and land uses within adjoining zones.	<p>The proposed mixed use is compatible with the desired future character and medically related expansion within the locality. It is understood that Kingswood is undergoing a period of change – with the identified expansion of hospital and surrounding services.</p> <p>The subject site and its adjoining properties are all zoned consistently, enabling the proposed development to feature a range of uses, including retail, pub, and residential apartments that will complement the Precinct.</p> <p>The proposal has undergone comprehensive application management, with a plan of management in place to regulate future site usage and control any potential impacts on the site and adjoining properties. As a result, the development is expected to have minimal effects on existing uses within and around the site.</p>
To create opportunities to improve public amenity.	<p>The proposed development has been meticulously designed to ensure a positive urban design outcome, with a clear definition of street edges and public domain surrounding the site.</p> <p>The proposal integrates desirable public domain attributes such as outdoor dining areas with greenery and landscape treatments, all in the context of a coordinated approach to improve the broader precinct.</p> <p>The resulting development promotes a degree of vibrancy along the street frontage, with the retail tenancy on Wainwright Lane serving to reinforce the activity associated with these public domain</p>

Objective	Assessment
	areas. The design also features an engaging ground floor interface on all street frontages, with multiple building entrances and ground floor commercial premises. The balcony elements on the facades fronting the street, and window openings overlooking the surrounding street network, provide a strong and vibrant relationship with the public domain, which will assist in creating a safe and local environment, and foster a sense of place.
To provide a wide range of retail, business, office, residential, community and other suitable land uses.	The proposed development presents a well-balanced mix of residential and non-residential uses to complement the Precinct.

The proposed development comprehensively meets the height of buildings development standards and B4 Mixed Use zone objectives, as demonstrated above. Providing residential accommodation, it will significantly contribute to the market and bolster the employment area's viability, resulting in economic benefits.

Despite non-compliance, the development's implementation ensures optimal utilisation of existing resources while complying with relevant objectives and creating a superior outcome due to the site's constraints. The provision of additional housing stock, high-quality communal open space, and alternative ground-level uses in a coveted location carries substantial social benefits that merit consideration in the variation request.

Denying the variation and requiring the removal of communal open space or apartments, given the proposal's minor impact, would be a loss to the community and contrary to the public interest. The proposed variation to the maximum building height will not result in unreasonable impacts. In this case, clause 4.6's flexibility will produce a better environmental planning outcome than strict compliance.

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

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

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

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

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

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

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

- The proposed development achieves the objectives of the building height development standard and the B4 Mixed Use land use zone objectives despite the technical non-compliance.
- There is no material impact or benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard.



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

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

## 7. CONCLUSION

For the reasons set out in this written request, strict compliance with the building height development standard contained within clause 4.3 of *Penrith Local Environmental Plan 2010* is unreasonable and unnecessary in the circumstances of the case. Further, there are sufficient environmental planning grounds to justify the proposed variation and it is in the public interest to do so.

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

- The proposal is consistent with the height, bulk, and scale of the desired future character of the locality. While the Height of Buildings Map prescribes a base building height, Clause 7.11 provides the opportunity for additional building height in the Penrith Health and Education Precinct to “encourage a built form that is suitable for both residential and health services facilities” by specifically providing for higher floor to ceiling heights at the ground and first floors of the proposed development.
- The parapet of the proposed buildings is generally consistent with the heights permitted under Clause 7.11 with the extent of variation related specifically to isolated areas of lift overruns, plant and shade protection, which are well setback from the parapet of the buildings and provide for an accessible communal roof top area with appropriate sun protection to manage the very extreme heats and wind and to provide appropriate amenity throughout the entire year.
- Specifically, the design of the communal roof space has been through ongoing refinement and review by Council's Urban Design Review Panel (UDRP). Prior to the Development Application being lodged, the draft scheme was reviewed twice by the UDRP in January and June 2021. In addition, the lodged Development Application was reviewed a third time by the UDRP in January 2022. Through this reiterative process changes to the roof top communal open space areas were made to improve their function, amenity, and usability. The Panel were encouraging of these elements to provide improved amenity.
- The small areas of height exceedance do not create additional floor space at the roof level and does not seek to vary the maximum FSR permitted on the site. Building A and Building B is subject to a maximum FSR of 4:1 and 3:1, respectively. In both cases, the buildings comply with the maximum FSR at 3.9:1 and 3:1. However, when modelling the floor to ceiling heights required at the ground and first floors under Clause 7.11 and a typical floor to ceiling height required under the ADG, to achieve compliance with the permitted heights under Clause 7.11 this would inadvertently require the removal of an entire floor level of each apartment building and result in a maximum floor space well below that permitted under Penrith LEP. The proposal provides very generous floor to floor heights in both buildings with 5 metres provided (Building A) and 4.1 metres provided (Building B) at ground level and 3.9 metres across level one to respond positively to the intent of the objectives for the Penrith Health and Education Precinct.
- In accordance with Clause 4.3 (b) of PLEP the height breach does not give rise to any unreasonable visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas.
- There are recent examples of variations to clause 4.3 in the Penrith Health and Education Precinct, demonstrating the consent authority have recently determined similar variations to ensure that the objectives of Clause 7.11 can be met.
- The proposal aligns with the strategic growth of the area set out by Penrith Council delivering residential and commercial amenity to the Kingswood Core whilst providing high quality urban design aligning with the future identity of the precinct. The proposed development supports the state policy of increasing housing along transport corridors, being positioned adjacent to Kingswood train station. The development will additionally improve the residential amenity to the Health and Education precinct delivering more housing particularly to those working on the front line due to the proximity to the Nepean Hospital within the establish Health and Education Precinct.
- The proposed variation will not impact the ability for 1 Bringelly Road to redevelop the site. Hampton Property Services and the architect met with the neighbour to demonstrate potential future outcomes for the neighbouring site. The variation is will not impact the amenity and redevelopment potential of 1 Bringelly Road. The matter is considered in the proposed design by providing the setbacks and a ‘cut-out’ at south-west corner, the design anticipates 1 Bringelly Road having a building form continuing the block arrangement around a central opening.

- The non-compliance will not impact on the proposal's ability to protect and enhance the amenity of occupants and neighbours, protect, and enhance the natural and built environment, and will meet the future needs of the growing hospital precinct.

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

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