

# Clause 4.6 Variation

COMMERCIAL FLOOR AREA  
68 -80 O'CONNELL STREET, CADDENS



QUALITY ASSURANCE	
<b>PROJECT:</b>	Clause 4.6 – Commercial floor area
<b>ADDRESS:</b>	68-80 O’Connell Street, Caddens
<b>LOT/DP:</b>	Lot 1 and 2 in DP 1268507
<b>COUNCIL:</b>	Penrith Council
<b>AUTHOR:</b>	Think Planners Pty Ltd

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## CLAUSE 4.6 DEPARTURE – COMMERCIAL FLOOR AREA

### BACKGROUND

This revised variation statement has been prepared in accordance with Clause 4.6 of the Penrith Local Environmental Plan 2010 to accompany a development application to undertake demolition, tree removal, relocation of car parking spaces, and construction of a staged Mixed Use Development comprising 5 retail premises and 469 residential apartments within 18 buildings at 68 - 80 O'Connell Street, Caddens.

The development incorporates part of the Caddens Corner shopping Centre and the Development is proposed to be constructed in four stages as follows:

**Stage 1:** Road Construction, Bulk Earthworks on this portion of the site and the construction of Buildings , B, C, H, J that are located in the north western corner of the site and contains 103 (previously 145) apartments comprising:

- 7 x 1br
- 53 x 2br
- 41 x 3br
- 2 x 4br

This stage is provided with 174 carparking spaces comprising 167 resident and 7 visitor spaces within basement carparks.

**Stage 2:** Bulk Earthworks on this portion of the site and the construction of Buildings D, E, F, G that are located in the northern portion of the site and contains 115 (previously 134) apartments comprising:

- 13 x 1br
- 45 x 2br
- 51 x 3br
- 6 x 4br

This stage is provided with 202 carparking spaces comprising 195 resident and 7 visitor spaces within basement carparks.

**Stage 3:** Bulk Earthworks on this portion of the site and the construction of Buildings K, L, M and N that present to both O'Connell Street and the new internal road of the site and contains 112 dwellings comprising:

- 6 x 1br

- 77 x 2br
- 29 x 3br

This stage is provided with 180 carparking spaces comprising 173 resident and 7 visitor spaces within basement carparks.

**Stage 4:** Relocation of at grade parking spaces for the Caddens Corner shopping Centre, Bulk Earthworks on this portion of the site and the construction of Buildings P, Q, R,S,T and U on the western portion of the site that contains 5 retail shops with 1,415m<sup>2</sup> of retail floor area that presents to a new internal open air plaza and contains 139 apartments (previously 173) comprising:

- 13 x 1br
- 88 x 2br
- 35 x 3br
- 3x 4br

This stage is provided with 260 residential carparking spaces comprising 225 resident and 35 visitor spaces within basement carparks. This stage of the development provides also provides 501 retail spaces comprising:

This variation statement relates to the maximum gross floor area of commercial premises of 10,000m<sup>2</sup> applicable to the site pursuant to Clause 7.12 of Penrith LEP 2010.

This development seeks to deliver 5 further retail tenancies on the site that contain 1,415m<sup>2</sup> of retail floor space.

## DEVELOPMENT STANDARD TO BE VARIED

Clause 7.12 of the Penrith Local Environmental Plan 2010 states in part:

*7.12 Maximum gross floor area of commercial premises*

*(1) The objective of this clause is to retain the existing hierarchy of Penrith's local commercial centres by imposing size limitations on certain commercial premises.*

(2) Development consent must not be granted to development for the purposes of commercial premises on any land specified in Column 1 of the table to this subclause unless the consent authority is satisfied that the total gross floor area of all buildings used for commercial premises will not exceed the gross floor area specified opposite that land in Column 2.

Column 1

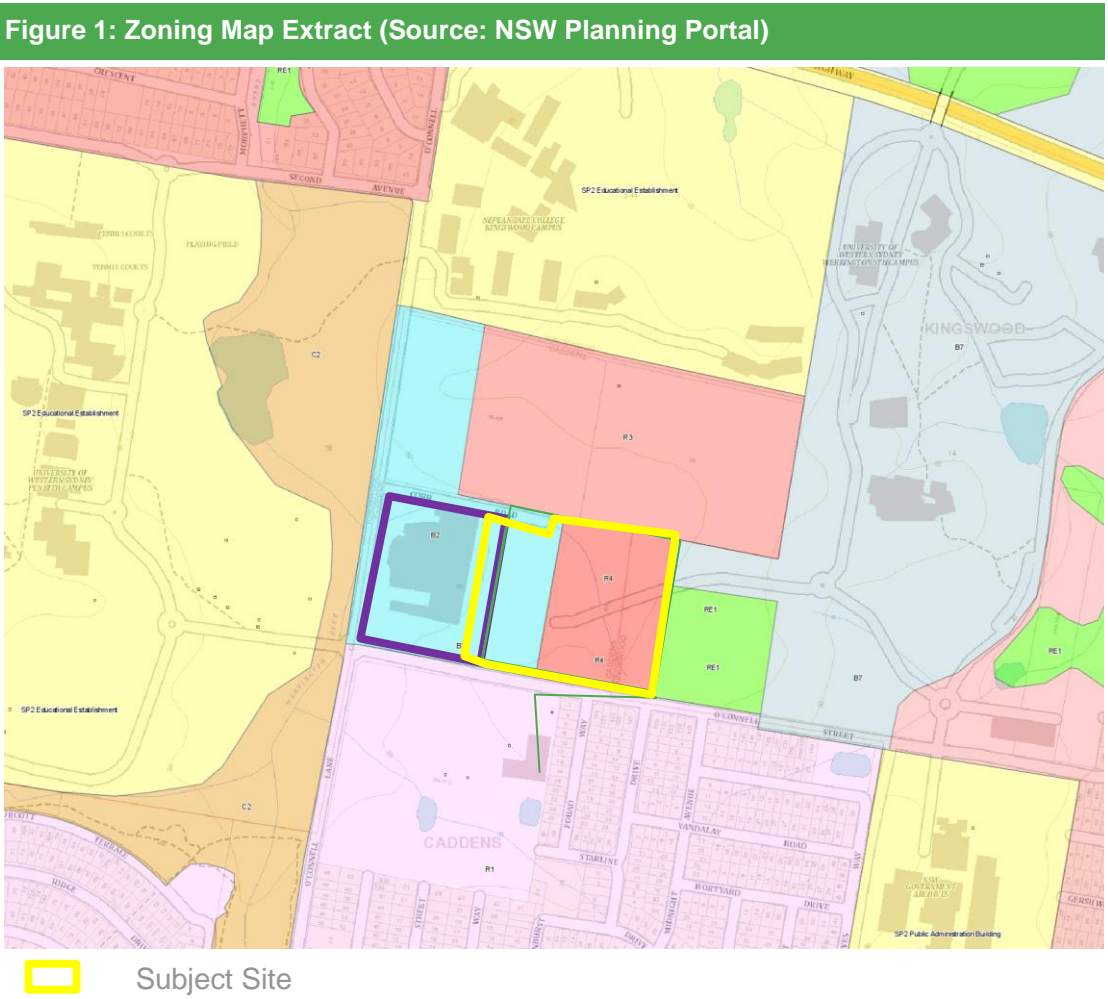
Column 2

Land

Maximum GF

46–66 O’Connell Street, Caddens, being Lot 3, DP 1103503 and certain land at 10,000 square metres  
Western Sydney University, Great Western Highway, being Lot 100, DP 1194481

Although the property description is outdated this development is located on the site identified above. The land that is intended to be covered by this clause is considered to be E1 zoned land that is illustrated in the zoning extract below.





Commercial premises are defined by the LEP As being:

***commercial premises*** means any of the following—

- (a) *business premises,*
- (b) *office premises,*
- (c) *retail premises.*

The site contains the existing Caddens Corner Shopping Centre.

Caddens Corner was approved via DA17/0995 and constructed circa 2020 with an approved retail GFA of 10,127m<sup>2</sup> that exceeded the 10,000m<sup>2</sup> cap. Notwithstanding the above there are two tenancies within the shopping centre that are not defined as commercial premises being a medical centre (237m<sup>2</sup>) and a Gym (398m<sup>2</sup>).

Accordingly the current GFA of the site is 9,492m<sup>2</sup>, noting that this includes vacant premises. There are no other approvals for commercial premises within the E1 portion of the precinct.

The shopping centre layout and tenancy mix is outlined overleaf.



**Figure 2: Caddens Corner Shopping Centre layout (Source: Caddens Corner Website)**



This development seeks to deliver 5 further retail tenancies on the site that contain 1,415m<sup>2</sup> of retail floor space.

Accordingly after completion the approved commercial GFA for the precinct would be 10,907m<sup>2</sup> (9492m<sup>2</sup> existing plus 1,415m<sup>2</sup> proposed) which would exceed the cap by 907m<sup>2</sup> or 8.31%.

Given that the 10,000m2 Commercial Floor Area control is a development standard a clause 4.6 departure is required to seek to vary this standard.

A detailed discussion against the relevant provisions of Clause 4.6 are provided overleaf with further discussion against the relevant case law ‘tests’ set down by the Land and Environment Court.



## LAND AND ENVIRONMENT CASE LAW

The decision by Chief Judge Preston in a judgement dated 14 August 2018 in the matter of *Initial Action Pty Ltd v Woollahra Council* confirmed that the absence of impact was a suitable means of establishing grounds for a departure and also confirmed that there is no requirement for a development that breaches a numerical standard to achieve a 'better outcome'. However more recent developments in the law in ***RebelMH Neutral Bay Pty Limited v North Canterbury Council* [2019] NSWCA 130** have set out to confirm that the approach taken in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 ('**Al Maha**') is also relevant. In simple terms, Al Maha requires that a Clause 4.6 departure will have only adequately addressed Clause 4.6(3) if the consent authority is satisfied the matters have been demonstrated in the Clause 4.6 request itself- rather than forming a view by the consent authority itself. This Clause 4.6 request demonstrates the matters of Clause 4.6 (3).

The key tests or requirements arising from recent 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*.
- When pursuing a clause 4.6 variation request it is appropriate to demonstrate environmental planning grounds that support any variation; and
- 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 Business, Office and Retail Floor Area standard;
- Demonstrating that the development is compatible with the locality;
- Demonstrating compliance with objectives of the E1 zone; and
- Satisfying the relevant provisions of Clause 4.6.

This Clause 4.6 Variation request deals with the maximum Commercial Floor Space matters in turn below.

## **ADDRESSING CLAUSE 4.6 PROVISIONS – COMMERCIAL PREMISES**

Clause 4.6 of the Penrith LEP 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 request 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)."*

Preston 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 one and two for the purposes of this Clause 4.6 variation [our underline]):

- The objectives of the standard are achieved 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 commercial floor space development standard is considered unreasonable or unnecessary in the circumstances of the proposed development because the underlying objective of the standard are achieved despite the non-compliance with the numerical standard.

The objective of the Commercial Floor Area control is:

*(1) The objective of this clause is to retain the existing hierarchy of Penrith's local commercial centres by imposing size limitations on certain commercial premises.*

The current development proposal is consistent with the underlying intent of the control based on the following key points:

- The development seeks approval for 5 additional commercial tenancies on the site. These small tenancies will increase offerings to existing residents of the precinct and will not by themselves generate the majority of patrons from the broader region such as might occur if a cinema complex or discount department store was proposed. Given this, residents of Penrith would need to continue to utilise larger centres to access the wider range of service these existing centres provide;
- An economic analysis has been prepared by Atlas Economics for this development application. This report indicates that within the Penrith LGA there is a critical shortfall of commercial floorspace to cater for expected population and employment growth to service the Penrith LGA by 2031 of around

70,000m<sup>2</sup>. This development will assist with delivering a small portion of this (1,415m<sup>2</sup>) and the report indicates that:

*Overall, the Proposal will deliver a small quantum of retail floorspace within the Precinct Centre, which will have an immaterial impact in the broader market, whilst helping to meet the needs of a growing neighbourhood population.*

- The precinct specific DCP indicates that that 12,500m<sup>2</sup> of commercial floorspace is appropriate for the precinct and this development will assist with delivering 1,415m<sup>2</sup> of additional retail to the precinct that is consistent with what the DCP envisages for the precinct;
- The breach to the commercial floor area standard does not result in the development representing an overdevelopment of the site but rather a suitable contextual response to the locational characteristics on the site in order to achieve a suitable design outcome that will assist with residents of this precinct accessing services.
- The proposal provides residential and commercial accommodation opportunities, the proposal will strongly contribute towards providing employment opportunities both during the construction phase and at the completion of the proposal. The development will provide augmented patronage in the locality thus both components will contribute towards boosting the local economy of Caddens;
- The development facilitates the delivery a community plaza within the complex that is largely located where an existing at grade carpark is provided. The benefits of this plaza that will be a focal point for the precinct is a key environmental planning ground that supports the departure;
- The population of the WELL precinct was identified as likely to be 6,650 in 2004. Since this time, housing supply has evolved from single detached dwelling on larger blocks, to dwellings on smaller lots, an increase in dual occupancy development, small lot housing developments and increased demand for apartments given the current housing shortage in Australia. Given this Atlas Economics note that the population of the precinct based on the 2021 Census was 5,490 residents and that having regards to other approved developments and this proposed development, the population of the WELL Precinct will likely be 8,010 residents. This additional population will lead to an increased demand for commercial premises within the precinct.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable in the circumstances. The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

#### **Clause 4.6(4)**

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3). As addressed the proposed development is in the public interest as it remains consistent with the objective of the Commercial Floor area control. In addition, the proposal is consistent with the objectives of the B2 zone, being:

#### **Zone E1 Local Centre**

##### *1 Objectives of zone*

- *To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area.*
- *To encourage investment in local commercial development that generates employment opportunities and economic growth.*
- *To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.*
- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
- *To provide retail facilities for the local community commensurate with the centre's role in the local and regional retail hierarchy.*
- *To create opportunities to improve the public domain and encourage the integration of centres with public transport and pedestrian networks.*
- *To promote development that is of a size and scale that is appropriate to meet local needs and does not adversely affect the amenity or character of the surrounding residential neighbourhood.*

The proposal is consistent with the objectives of the E1 zone, insofar as the development is not antipathetic to the zone objectives (per *Schaffer Corporation v Hawkesbury City Council (1992) 77 LGRA 21*).

The proposal is consistent with the zone objectives as it:

- Provides 5 tenancies that will serve the needs of people who live or work in the surrounding residential properties;
- The modest 5 tenancies and proposed uses are compatible with the amenity of surrounding properties and will reduce car dependency in the precinct;
- The development contributes to the economic and social vitality of the overall development;

- The residential development does not prevent the provision of active non-residential uses at street level and will assist with the passive surveillance of adjoining streets;
- The residential development is subservient to the primary use of the site for non-residential purposes and this is reflected in the footprint of the development which devotes the majority of the footprint to non-residential landuses and the plaza that will be a focal point for the community;
- The development facilitates surrounding residents walking to obtain services;
- The proposed landscaped plaza is a key design feature of the development and will be a natural meeting point that will provide opportunities for casual social interaction between residents; and

#### **Clause 4.6(5)**

The Secretary (of Department of Planning and Environment) can be assumed to have concurred to the variation. This is because of 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*. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The points contained in Clause 4.6 (5) are a matter for consideration by the consent authority however the following points are made in relation to this clause:

- a) The contravention of the business, office and retail floor area standard does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal and the site specific design response to the allotment configuration and orientation.
- b) There is no public benefit in maintaining the development standard as it relates to the current proposal when noting that non-compliance will not reduce the viability of other centres. The departure from the control 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

The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The design response aligns with the intent of the control and provides for an appropriate transition to the adjoining properties.

The proposal promotes the economic use and development of the land consistent with its zone and purpose.

The objection is well founded and taking into account the absence of adverse environmental, social or economic impacts, it is requested that Council support the development proposal.

Strict compliance with the prescriptive maximum business, office and retail floor area standard requirement is unreasonable and unnecessary in the context of the proposal and its circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The objection is well founded and considering the absence of adverse environmental, social or economic impacts, it is requested that Council support the development including the departure to the maximum business, office and retail floor area standard control.