

Clause 4.6 Variation

BUILDING HEIGHT

68 -80 O'CONNELL STREET,
CADDENS

MARCH 2024



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

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CLAUSE 4.6 DEPARTURE – HEIGHT

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 17 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 carpark.

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 carpark.

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 444 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 1,415m² 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.

The proposal has been the subject of discussions with Council's Design Excellence Panel and the variation to the built form is an appropriate urban design response to the site, particularly noting that the yield of the development is not increased by the height departure and the variation is predominantly driven by the topography of the site and the desire to deliver a well designed and balanced urban design outcome for this strategic site, that will accommodate public open space and new pedestrian connections.

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 15m 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)



EXTENT OF VARIATION

The development incorporates four stages and contains a total of 17 buildings. When utilising existing natural ground level all of the 17 buildings vary the 15m height control with these buildings having an overall height to the top of highest lift overrun of between 16.6m and 26.4m.

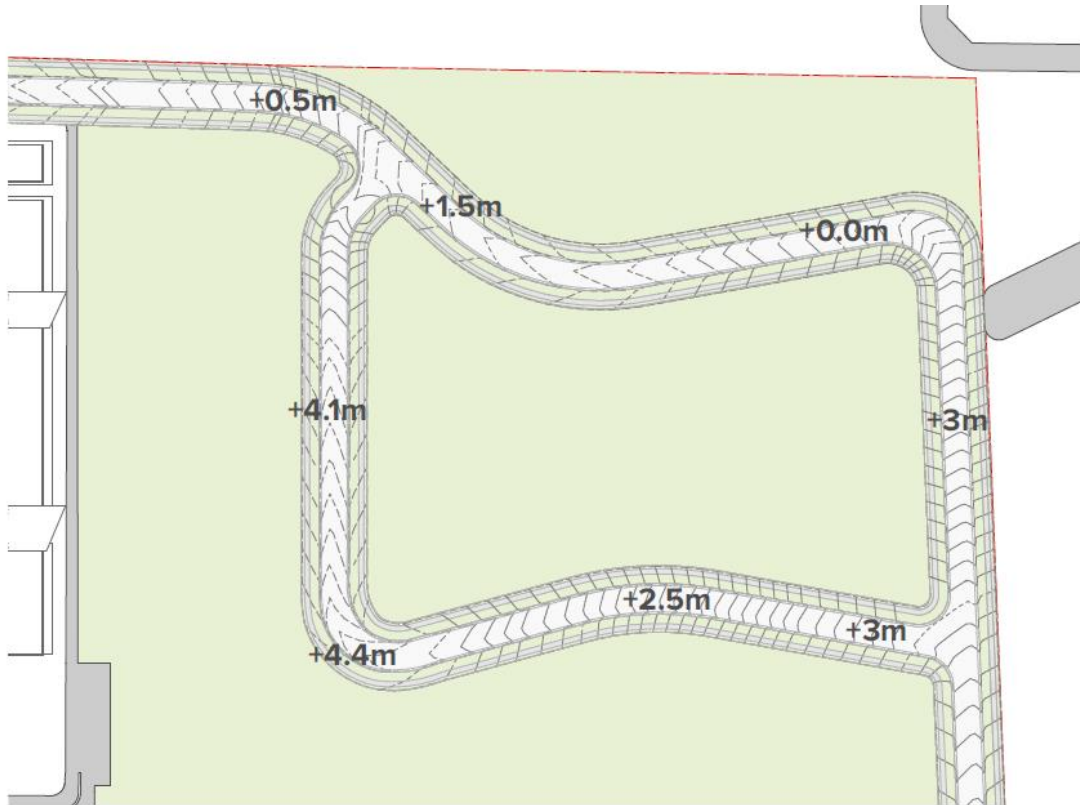
The extent of the noncompliance for each building based on existing natural ground level is outlined in the table below:

Building	No of storeys	Ceiling of uppermost level	Extent of variation	Parapet	Extent of variation	Lift Overrun or stair height	Extent of variation
B	4	16.8m	12.8%	17m	13.3%	19.7m	31.3%
C	5	18.7m	21.9%	19.3m	28.6%	20.5m	36.6%
D	5	17.5m	16.6%	19m	26.6%	20.4m	36%
E	5	17.8m	18.6%	18.6m	24%	17.1m	14%
F	6	22.4m	49.3%	23.2m	54.6%	24.9m	66%
G	5	19.2m	28%	20.7m	38%	20m	33.3%
H	5	20.4m	36%	22m	46.6%	22.2m	48%
J	5	18m	20%	18.7m	24.6%	19.8m	32%
K	5	18.8m	25.3%	19.7m	31.3%	20.6m	37.3%
L	6	21.3m	42%	22.2m	48%	21.1m	40.6%
M	6	17.8m	18.6%	18.7m	24.6%	16.6m	10.6%
N	6	20.9m	39.3%	21.8m	45.3%	19.2m	28%
P	6	23.5m	56.6%	24.3m	62%	25.3m	68.6%
R	5	21.4m	35.1%	22.4m	49.3%	26.4m	76%
S	5	17.4m	16%	19.2m	28%	19.2m	28%
T	5	16.3m	8.3%	18m	20%	19.2m	28%
U	4	15.9m	6%	17.7m	18%	18.8m	22.4%

Whilst from a legal perspective, the extent of the height departure needs to be based on existing natural ground level, this single development application seeks approval for bulk earthworks, road construction and the construction of a shop top and residential flat building complex.

As illustrated from the following diagram contained within the updated urban design report overleaf, the site is proposed to be filled by up to 4.4m to ensure it appropriately connects in with the existing road network that adjoins the site.

Figure 2: Extent of fill required to facilitate road connections into existing road network (Source Turner)



The required filling of the site to facilitate connections to the existing road networks and provide appropriate grades within the sites exacerbates the non-compliance that would be substantially reduced if approval for building construction was sought post completion of the road network and associated filling.

Given this a rationalized height version is included in the urban design report that assumes what the natural ground levels were before the modifications to topography for the drive in movie theatre and later shopping centre carpark

The extent of the noncompliance for each building based on a rationalised natural ground level is outlined in the table below:

Building	No of storeys	Ceiling of uppermost level	Extent of variation	Parapet	Extent of variation	Lift Overrun or stair height	Extent of variation
B	4	14.7m	N/A	15.4m	2.6%	17.6m	17.3%
C	5	14.2m	N/A	14.8m	N/A	16.3m	8.6%
D	5	13.5m	N/A	15m	N/A	14.2m	N/A
E	5	15m	N/A	15m	N/A	14.7m	N/A
F	6	16m	6.6%	16.8m	12%	19.8m	32%
G	5	13.8m	N/A	15.3m	2%	14.4m	N/A
H	5	16m	6.6%	17.6m	17.3%	16.9m	12.6%
J	5	14.8m	N/A	15.5m	3.3%	16.6m	10.6%
K	5	15m	N/A	15.9m	5.82%	16.1m	7.3%
L	6	16m	6.6%	16.9m	12.6%	17m	13.3%
M	6	13.1m	N/A	14m	N/A	14m	N/A
N	6	13.4m	N/A	14.3m	N/A	14m	N/A
P	6	14.2m	N/A	15m	N/A	14.7m	N/A
R	5	15.9m	6%	16.9m	12.6%	20m	33.3%
S	5	12.2m	N/A	14m	N/A	13.3m	N/A
T	5	14m	N/A	15.7m	4.6%	15.4m	2.6%
U	4	14.7m	N/A	16.5m	10%	16.2m	8%

The rationalised height is considered appropriate to consider the merits of the height departure.

As illustrated in the above table, 13 of the 17 buildings have no habitable floorspace above the 15m height limit utilising the rationalised height and 7 of the 17 buildings have no height departure to the highest point of the building utilising the rationalised height.

The non compliances to the 17 buildings are illustrated on the 3D height Planes and Sections on the following pages.

Figure 3: 3D Height Plane based on existing natural ground levels (Source: Turner)

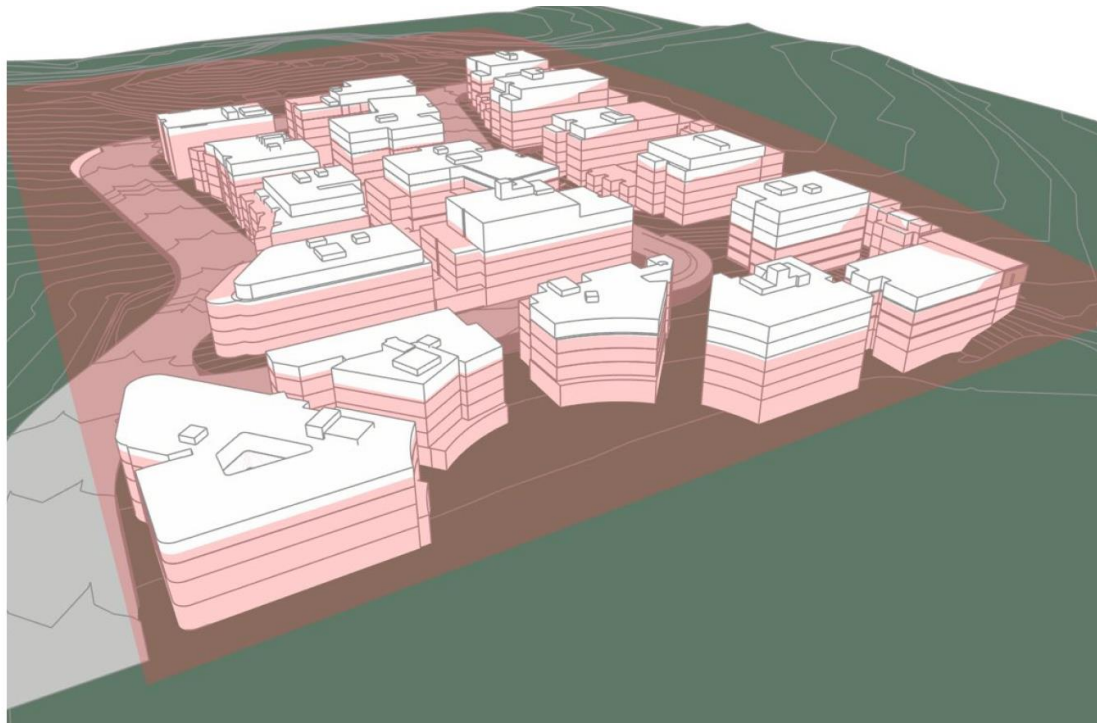


Figure 4: 3D Height Plane based on rationalised ground levels (Source: Turner)

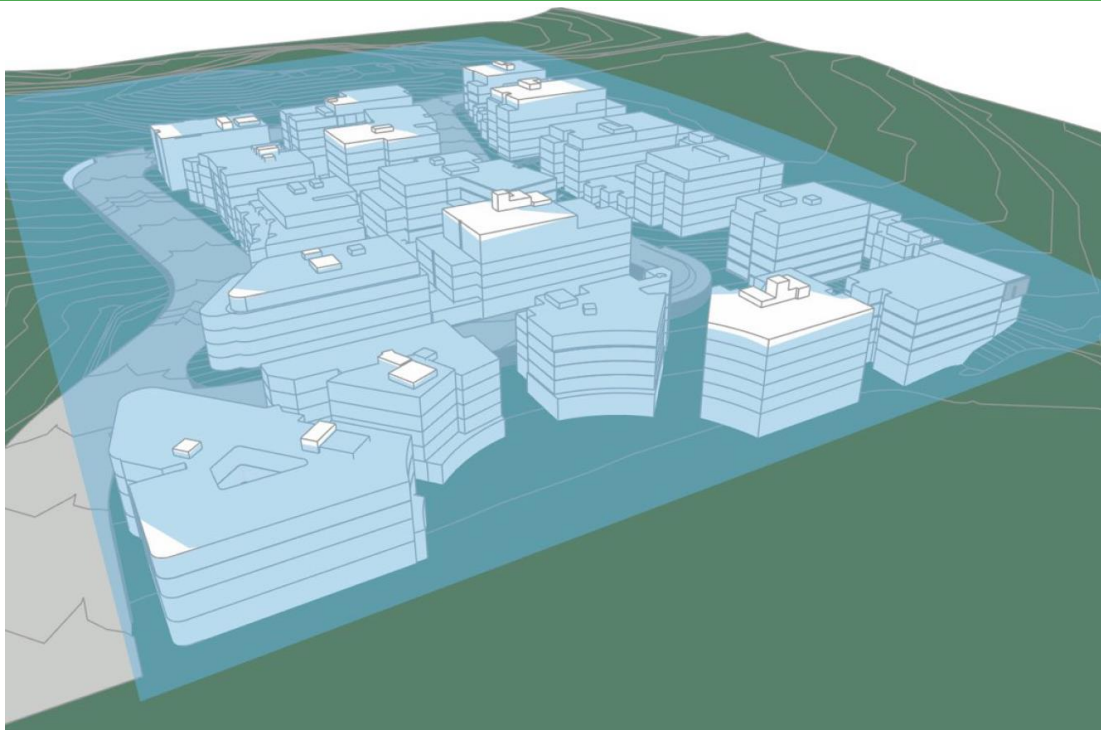


Figure 5: Section through Buildings D,G and M, from the northern boundary to the southern boundary

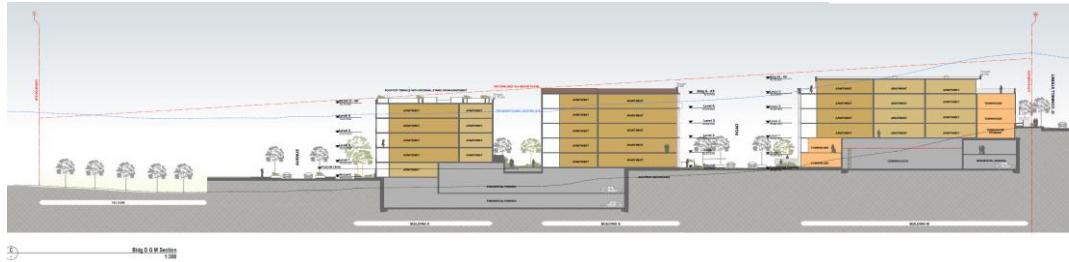
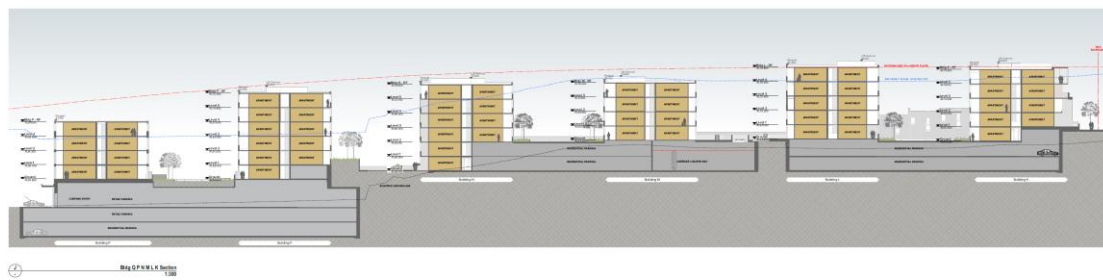


Figure 6: Section through Buildings Q,P N L K, fronting O'Connell Street



The development site has varying topography and contains endangered ecological vegetation communities.

Based on the existing ground levels it is acknowledged that all 17 buildings vary the 15m height control.

When utilising a rationalized height version that assumes what the natural ground levels were before the modifications to topography for the drive in movie theatre and later shopping centre carpark, 7 of the 17 buildings have no height encroachments and 13 of the 17 buildings have no habitable floorspace above the 15m height limit

RELEVANT CASE LAW

There are a number of relevant Land and Environmental cases that assist with preparing a clause 4.6 objection 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 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 judgement in *Ricola Pty v Woollahra Municipal Council [2021] NSWLEC 1047* emphasised 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 linked to the establishment of sufficient environmental planning grounds to justify the contravention.

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*.

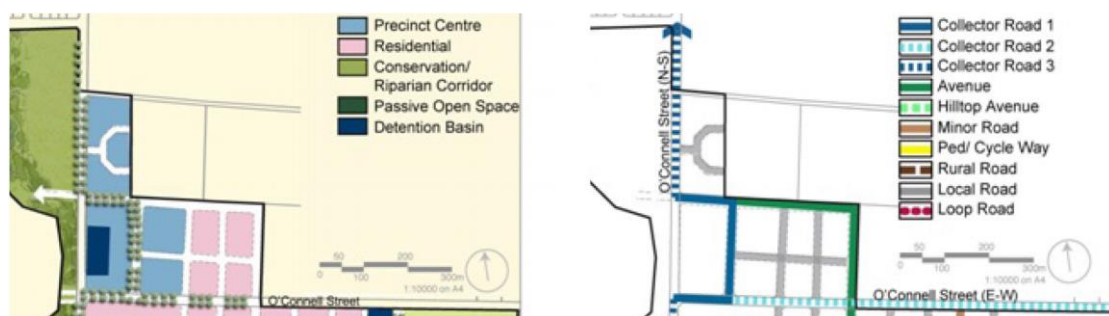
- There are planning grounds to warrant the departure, and these planning grounds are clearly articulated as reasons in arriving at a decision.
- The proposal is required to be in 'the public interest'.

In relation to the current proposal the key points to be established 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 R4 High Density Residential and E1 Local Centre 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 DESIGN RESPONSE

The development of this site is subject to considering the guiding principles established within the site specific development control plan which includes a structure plan and road network plan – that are reproduced below:



There are three key site constraints that have emerged through the detailed analysis of the site and the current planning controls which are:

1. The structure plan does not accommodate for the retention of Cumberland Plain Woodland on the site,
2. The DCP road layout has been refined due to the existing approved and constructed shopping centre and the need to conserve EEC vegetation; and

3. The land has been historically re-modelled several times resulting in an uneven and challenging land profile that needs to be rationalised to facilitate vehicle movements and connections to the existing road network.

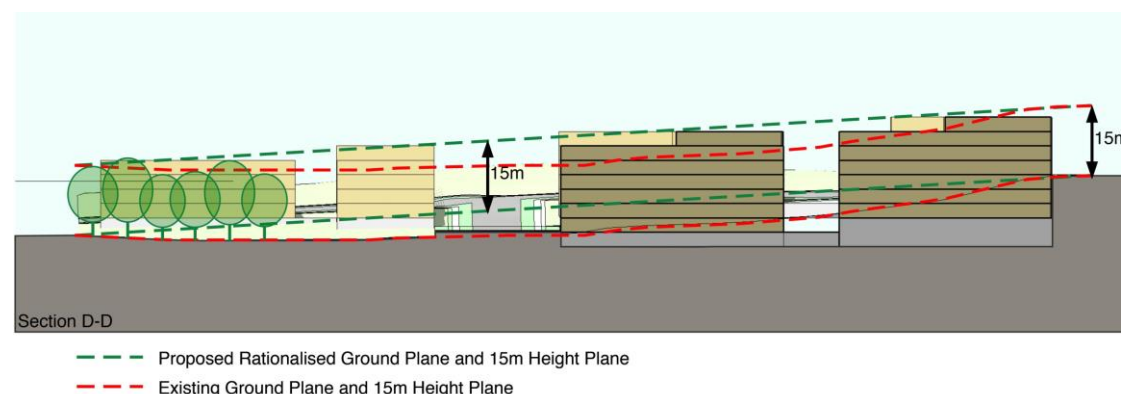
The shopping centre as it has now been constructed differs from the retail precinct centre concept plan that is included within the site specific DCP. The proposal has therefore been prepared to respond to the current site and surrounding precinct to more appropriately integrate the proposal.

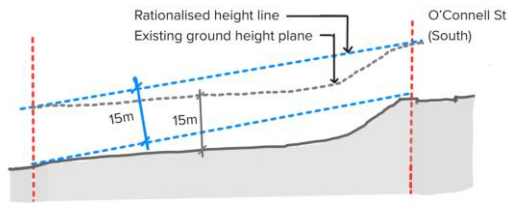
Road Layout

During the design development it has been found there is an area of Shale Plains Woodland which forms part of the Cumberland Plain Woodland family which effectively prevents a road on the northern site boundary. To ensure the conservation of the vegetation it is proposed to create a natural recreation zone in this area to complement the proposed public square as shown in the concept plans and realign the roads also as shown in the concept plan.

Building Height

The subject site was the former Kingswood Drive-in which means that historically the site has been re-modelled to create the drive-in cinema and again to create the Caddens Corner Shopping Centre. There is evidence to show the site has been excavated near O'Connell Street with areas of fill in the middle of the site. This has resulted in an uneven and challenging profile for the building height plane. In this proposal, the application seeks to rationalise the ground plane to establish the 15m height plane. This is completed by creating a 15m high 'mesh' around the boundary points of the site as shown in example section in the extracts below.





Further details can be found in the revised architectural plans and revised Design Report prepared by Turner that accompany this submission.

Merits, infrastructure and community benefits

The key benefits of the current proposal include:

- Creation of a road layout that will enable existing vegetation to be conserved and align with existing approved road layouts and the topography of the land;
- The creation of a new public square and natural recreation zone to enhance community and resident outcomes and deliver new opportunities for additional landscaping and through site permeability; and
- Creation of a rationalised approach to the topography of the land that has historically been re-modelled several times and allows for appropriate connections to adjoining sites.
- The proposed design that has been prepared for the site and accompanies this DA submission demonstrates that the departure from the height control will not deliver a density beyond that planned for the site and will deliver a more appropriate design led response that will facilitate the introduction of increased public open space opportunities and protect established remnant vegetation within the site. The alternative and complying design response would not deliver the positive design and community outcome proposed with this application.

Urban Design Review Panel Advice,

It is noted that the Penrith Urban Design Review Panel considered the proposal at the pre-lodgement phase of the development at its meeting of 20 July 2022 and advised in respect of Height and Context that:

2. Height and Context

Contextually responsive distribution has resulted in a 'give-and-take' variation of the Local Environmental Plan's (LEP) permissible maximum height which, given the scale of this Site, is essential to achieve a sufficient diversity of building forms in order to address place-making principles that are relevant to new medium density villages.

The proposed variation of building heights (which include localised non-compliances) has no impacts that would be contrary to the LEP's objectives for Height of Buildings and does not result in a total gross floor area (GFA) which exceeds that of a nominally compliant development scheme.

Most importantly, by comparison with a nominally-compliant development scheme, the current concept contributes to a much more-varied and richer pattern of open spaces throughout the development – which will contribute to strategically-beneficial outcomes such as conservation of a remnant EEC, more-open outlooks from apartments, a diversity of recreation opportunities and streetscape characters, and finally, highly-effective accommodation of this Site's irregular topography.

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 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.

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 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 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 precinct is in transition from rural/educational; land to urban land. The buildings on the site vary in height from three to six storeys. As outlined above the site has varying topography with a substantial portion of the site being below the Road level of O'Connell Street. Given this and as outlined

from the section plans below when viewed from O'Connell Street and in particular low density properties on the southern side of O'Connell Street the development presents as a four storey residential flat building complex. Given this the complex is compatible with the desired future character of the area which is four to five storey buildings.

- The development is consistent with the R4 zone objectives that aim to provide a high density residential development on the site;

The development is consistent with the E1 zone objectives including the aim 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.*

- The complex contains 17 buildings. The buildings around the more sensitive northern and eastern perimeter of the site are generally four and five storey in height. This is consistent with the intent of the 15m height control within the LEP;
- Building F that is a 6 storey building is located in a depression on the site. This results in this building being compatible with the desired future character;
- As illustrated by the proposal, the density of the complex is not increased by the proposed height departures. A development that strictly complied with the height control and DCP layout would achieve the same yield however would not deliver the superior urban design outcomes of this scheme.
- **Objective (b):**
- The site is large and the impacts arising from overshadowing, visual impact and loss of privacy have been acknowledged as part of the building and site design process and have no significant impact on adjoining properties or open space areas with the extent of overshadowing not considered to be unreasonable;
- The overall height of the development presents as a compatible form of development given the anticipated high density residential development of this part of the precinct;
- The proposal provides an appropriate building form that is consistent with the desired future character of the locality and is reflective of the objectives for the zone and locality generally- noting the uneven topography and the alternative built form that delivers additional open space, public plaza, EEC retention and

improved pedestrian connections are the key drivers of the height variation rather than a desired to achieve greater yield on the site;

- The additional height does not generate any additional adverse amenity impacts given the form and layout of the proposed design and its sensitive integration with surrounding land uses;
- The proposal has been carefully designed to ensure that no adverse visual or acoustic amenity impacts will be created by the proposed building height along site boundaries as the upper levels are recessed behind the building perimeter
- The proposal has been designed to ensure that privacy impacts are mitigated against and that the proposal will not obstruct existing view corridors;
- Given the sites orientation, and the nature of the height departure the additional height will not have any additional adverse overshadowing impacts on nearby residential developments;
- The proposal will sit comfortably in the streetscape relative to the desired future character of the locality;
- The proposal will not unacceptably impact on views enjoyed from the public domain or adjoining properties.
- **Objective (c)**
- The site is not identified as containing a heritage item and it is not located within a heritage conservation area, however beyond the Caddens Shopping Centre to the west of the site is a local heritage item (I670 – Teacher’s residence), as illustrated by the heritage extract map overleaf.

Figure 5: Heritage Map Sheet HER_013 Extract (Source: Penrith LEP 2010)



The Caddens Shopping Centre and O'Connell Street will provide sufficient separation together with the contemporary buildings within the university itself. As such, the proposal will have no unacceptable impact on the heritage curtilage of local heritage item 670.

- **Objective (d):**
- The buildings around the more sensitive northern and eastern perimeter of the site are generally four and five storey in height. This is consistent with the intent of the 15m height control within the LEP that results in buildings typically being four to five storeys in height. This deliberate design outcome is intended to sensitively ensure the proposed development is compatible with surrounding properties.
- The proposed development has been designed to provide visual interest and a high quality urban form. Together with a broad variation in building height and separation, the facades have been articulated by building modulation, material

selection and location and the careful and considered design of windows and openings.

- As outlined by Council's Urban Design Panel the development is:

Contextually responsive distribution has resulted in a 'give-and-take' variation of the Local Environmental Plan's (LEP) permissible maximum height which, given the scale of this Site, is essential to achieve a sufficient diversity of building forms in order to address place-making principles that are relevant to new medium density villages.

The proposed variation of building heights (which include localised non-compliances) has no impacts that would be contrary to the LEP's objectives for Height of Buildings and does not result in a total gross floor area (GFA) which exceeds that of a nominally compliant development scheme.

Most importantly, by comparison with a nominally-compliant development scheme, the current concept contributes to a much more-varied and richer pattern of open spaces throughout the development – which will contribute to strategically-beneficial outcomes such as conservation of a remnant EEC, more-open outlooks from apartments, a diversity of recreation opportunities and streetscape characters, and finally, highly-effective accommodation of this Site's irregular topography.

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 unique attributes of the site being uneven and difficult topography and a development that will need to sensitively transition from a commercial centre towards lower density residential development;

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

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 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 dual zoning of the site are as follows:

Zone R4 High Density Residential

1 Objectives of zone

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that a high level of residential amenity is achieved and maintained.*
- *To encourage the provision of affordable housing.*
- *To ensure that development reflects the desired future character and dwelling densities of the area*

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 and R4 zones, 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 both zone objectives noting that:

- It provides for the housing needs of the community within a high density residential setting;
- It provides a mix of apartment types and a range of different bedrooms to provide a variety of housing types;
- It provides other landuses that meet the day to day needs of residents including the on-site commercial landuses.
- The development is consistent with the desired future character of the area and layout of the complex ensures that a high level of residential amenity will be achieved for future residents;
- The development provides a range of retail, business, entertainment and community uses that will serve the needs of people who live in, work in and visit the local area; and
- The development will provide employment opportunities in an accessible location;

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.

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 although consideration ought to be given to the matters in subclause 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 as well as the underlying zone objectives of both the R4 and E1 zones 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 R4 and B2 zone.

The variation is well founded and should be upheld.