URBIS

# CLAUSE 4.6 VARIATION REQUEST

Sun Access

184 Lord Sheffield Circuit, Penrith (DA2)

*Lodged concurrent with a Division 8.2 Review of DA1*

THORNTON OPERATIONS PTY LTD

26 March 2024

**URBIS STAFF RESPONSIBLE FOR THIS REPORT WERE:**

| | |
|---|---|
| Director | Andrew Harvey |
| Report Number | Final |



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# 1. EXECUTIVE SUMMARY

This Clause 4.6 Variation Request (the Request) has been prepared by Urbis for and on behalf of Thornton Operations Pty Ltd (the Applicant) in relation to DA2 (lodged separately, but concurrently with DA1) for the redevelopment of the subject site at 184 Lord Sheffield Circuit, Penrith.

This Request accompanies a Division 8.2 Review of the Determination of DA22/0213 (and DA22/0214) by the Sydney Western City Planning Panel ('the Panel') on 7 November 2023.

The Request relates to the development standard contained within Clause 8.2 of Penrith Local Environmental Plan 2010 (PLEP). The stated objective of Clause 8.2 is to "protect public open space from overshadowing", and the development standard at Clause 8.2(3) specifies that consent may not be granted "if the development would result in overshadowing of public open space to a greater degree than would result from adherence to the controls indicated for the land on the Height of Buildings Map".

In *Urban Apartments Pty Ltd v Penrith City Council [2023] NSWLEC 1094*, Commissioner Horton determined that Clause 8.2 of PLEP was a development standard [215]. Accordingly (and as noted in the Panel's Determination), in the circumstances of a breach of a development standard, Clause 4.6 of PLEP can be utilised to provide flexibility in its application.

The Panel accepted in their determination of the subject DAs that there could be justification for the overshadowing of the open space adjacent to the proposed development, but were not satisfied with the analysis of the shadow impacts – requesting that specifically more detailed drawings were needed clarifying the specific aspects of the development that causes the contravention of the development standard.

In response, and following the determination of the abovementioned applications, the applicant has sought to undertake more detailed solar access analysis, and also engaged an expert solar access consultant to provide guidance in relation to this matter.

As part of the Division 8.2 Review, the applicant has proposed a design amendment to DA1 to improve solar access to the Thornton Station Plaza area. This has ensured that cumulatively (or in aggregate) the solar access across the year has improved, compared to adherence to the controls indicated for the land on the Height of Buildings Map in PLEP. DA2 (the subject of this Clause 4.6 variation) has not required any design amendments.

As Clause 8.2(3) of PLEP does not nominate a point in time (in the year) at which overshadowing is to be determined, it could be interpreted that any additional overshadowing (at any point) could result in a breach to the standard as the Clause uses the phrase "the development would result in overshadowing". This would be despite the fact that in the circumstances of the proposed development that there is a net benefit in solar reception at public spaces compared to a compliant building envelope.

A legal opinion has been obtained by Adrian Galasso (SC) to review the proposed development and its relationship with Clause 8.2 of PLEP. The opinion states that "the fact of the overall net increase in solar reception at the public spaces compared to a development standard based assessment, and for that matter the fact of increases at certain times of the year, in my opinion, can be adopted and utilised as environmental planning grounds in the Clause 4.6 request: see for example *Merman Investments v Woollahra Municipal Council [2021] NSWLEC 1582* at [72] (by parity of reasoning". Further, in response to feedback from Council's consultant planner, a subsequent legal opinion has been obtained to clarify that the 'base case' modelled by the applicant is the correct (and only) way to compare the proposed development to the Height of Buildings Map under PLEP 2010.

In addition to the above, while the proposal creates a net benefit in solar access to the public open space over the whole year, the fact that there may be small times during the summer solstice where there may be decreases in solar access (i.e. in the afternoon periods), the applicants solar access expert is of the view that this is beneficial given then extreme summer heat in the Penrith City Centre (of which Penrith LGA has had some of the highest temperatures recorded globally at 48.9 degrees Celsius).

Importantly, more recently, PLEP 2010 was amended in 2022 to introduce Clause 7.30 which relates to 'Urban Heat' which has an express objective to ensure that buildings and "*outdoor spaces are thermally comfortable for people living and working in Penrith, particularly during summer*" and to promote '*cooling benefits*' in the LGA.

In the event that tower arrangements were amended to minimise the negligible shadow impact at the summer solstice, it would be likely to result in tower forms and location (which have been through a competitive design process and ongoing design review) changing to then inadvertently create more of a greater shadow impact in the mid-winter and equinox periods where protection of public open space from overshadowing is generally more needed.

We note that there have been recent NSW Land and Environment Court decisions in Penrith City Centre which have sought to similarly vary this development standard. From our review of these decisions, these applications differed, as they have sought to reduce solar access and create additional shadowing in the autumn and vernal equinoxes (in the early morning periods), when temperatures are much cooler.

The Request includes a detailed assessment and justification of the proposed variation in accordance with the relevant guidelines and relevant planning principles and judgements issued by the NSW Land and Environment Court. In the circumstances of this case, flexibility in the application of Clause 8.2 should be accepted.

# 1. INTRODUCTION

This Clause 4.6 Variation Request (the Request) has been prepared on behalf of Thornton Operations Pty Ltd (the Applicant) and accompanies two Development Applications (DA 1 and DA 2) at 184 Lord Sheffield Circuit.

The Request seeks an exception from the sun access development standard prescribed for the site under Clause 8.2 of Penrith LEP 2010 (PLEP 2010). The variation request is made pursuant to clause 4.6 of PLEP 2010.

The following sections of the report include:

- **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 Statement of Environment Effects (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

*Development Application 1 (DA01)*

The legal property description of the site comprises Lot 3003 in Deposited Plan 1184498. It comprises an irregular shaped parcel of land and has a consolidated total area of 6,303 sqm.

The development site is vacant, with grass cover. The site is generally flat with a slight slope from south west to the north west) and is situated at an elevation of approximately 27m AHD. The Site Survey (at **Appendix B**) provides further topographical details.

The site presents the following boundaries and interfaces:

- Southern boundary – to a car parking area serving the Penrith train station (76.2 metres)
- Western boundary – to Dunshea Street (96.7 metres)
- Northern boundary – to Lot 3004 in DP 1184498 (58.5 metres)
- Eastern boundary – to the station entry public plaza and Lord Sheffield Circuit (94.8 metres)

Aerial photography of the site and immediate surrounding development is provided in **Figure 1**.

Figure 1 Aerial Photograph of Site


*Source: Urbis*

*Development Application 2 (DA02)*

The legal property description of the site is (part) Lot 3003, Lot 3004, and Lot 3005 in DP1184498. It comprises an irregular shaped parcel of land and has a consolidated total area of 4,721 sqm.

The development site is largely vacant, with temporary use as a bitumen car park and adhoc storage areas. The site is generally flat with a very slight slope to from north to south and is situated at an elevation of approximately RL27m (AHD). The Site Survey (at **Appendix B**) provides further topographical details.

The site presents the following boundaries and interfaces:

- Southern boundary – to Lot 3003 in DP1184498 (58.51 metres)
- Western boundary – to Dunshea Street (85.86 metres)
- Northern boundary – to Lord Sheffield Circuit (41.96 metres)
- Eastern boundary – to Lord Sheffield Circuit (86.49 metres)

Aerial photography of the site and immediate surrounding development is provided in **Figure 2**.

Figure 2 Aerial Photograph of Site


*Source: Urbis*

# 3. VARIATION OF SOLAR ACCESS STANDARD

This section of the report identifies the development standard 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.

## 3.1. THE DEVELOPMENT STANDARD

Clause 8.2 of PLEP 2010 states:

> *8.2 Sun access*
>
> *(1) The objective of this clause is to protect public open space from overshadowing.*
> *(2) (Repealed)*
> *(3) Despite clauses 4.3, 5.6 and 8.4, development consent may not be granted to development on land to which this Part applies if the development would result in overshadowing of public open space to a greater degree than would result from adherence to the controls indicated for the land on the Height of Buildings Map.*
> *(4) This clause does not prohibit development that does not alter the exterior of any existing building.*

## 3.2. PROPOSED VARIATION TO SOLAR ACCESS STANDARD

This Request seeks a variation to the development standard contained within Clause 8.2 of PLEP 2010 as follows.

The applicants' architects (Crone) have undertaken a detailed solar access analysis (attached) in relation to the key areas of 'public open space' adjacent to the east of the subject site in the 'Thornton Station Plaza'. This analysis has examined DA1 in isolation, but as DA2 will only be constructed after DA1 these two have been considered together for the purposes of solar analysis.

This analysis has examined the aggregate percentages of solar access in these spaces of the proposed development scheme compared to adherence to the controls indicated for the land on the Height of Buildings Map under PLEP. This has looked at the winter, spring, autumn and summer solstices.

In summary, the following conclusions can be drawn from the analysis for DA1/DA2 specifically:

- **Overall increase of solar access across the whole year in net positive/aggregate (i.e. a 0.9% increase from the base case)**
- 5.7% increase in solar access in the winter solstice
- 3.1% increase in solar access in the spring solstice
- 2.9% increase in solar access in the autumn solstice
- 7.9% decrease in solar access in the summer solstice (specifically late afternoon 1pm-3pm)

| | BASE CASE (32M) | | | |
|---|---|---|---|---|
| | Winter Solstice (JUN 21) | Summer Solstice (DEC 21) | Spring Equinox (SEP 23) | Autumn Equinox (MAR 20) |
| 9:00 AM | 3.9% | 57.4% | 66.2% | 23.0% |
| 10:00 AM | 62.7% | 74.3% | 91.4% | 66.2% |
| 11:00 AM | 87.0% | 81.2% | 92.1% | 91.4% |
| 12:00 PM | 46.7% | 92.7% | 66.3% | 92.1% |
| 1:00 PM | 12.9% | 87.6% | 36.0% | 66.3% |
| 2:00 PM | 0.0% | 58.9% | 8.1% | 36.0% |
| 3:00 PM | 0.0% | 35.4% | 0.2% | 8.1% |
| | 35.5% | 81.3% | 60.1% | 63.9% |
| AGGREGATE | 60.2% | | | |

| | DA PROPOSAL (DA01) | | | |
|---|---|---|---|---|
| | Winter Solstice (JUN 21) | Summer Solstice (DEC 21) | Spring Equinox (SEP 23) | Autumn Equinox (MAR 20) |
| 9:00 AM | 3.9% | 57.4% | 66.2% | 23.0% |
| 10:00 AM | 62.7% | 74.3% | 91.4% | 66.2% |
| 11:00 AM | 87.8% | 81.2% | 92.1% | 91.4% |
| 12:00 PM | 71.2% | 92.7% | 74.4% | 92.1% |
| 1:00 PM | 49.0% | 86.0% | 40.7% | 74.4% |
| 2:00 PM | 12.1% | 36.5% | 12.9% | 40.7% |
| 3:00 PM | 0.0% | 12.0% | 1.6% | 12.9% |
| | 47.8% | 73.4% | 63.2% | 66.8% |
| AGGREGATE | 62.8% | | | |

| | DA PROPOSAL (DA01 + DA02) | | | |
|---|---|---|---|---|
| | Winter Solstice (JUN 21) | Summer Solstice (DEC 21) | Spring Equinox (SEP 23) | Autumn Equinox (MAR 20) |
| 9:00 AM | 3.9% | 57.4% | 66.2% | 23.0% |
| 10:00 AM | 62.7% | 74.3% | 91.4% | 66.2% |
| 11:00 AM | 87.8% | 81.2% | 92.1% | 91.4% |
| 12:00 PM | 43.4% | 92.7% | 74.4% | 92.1% |
| 1:00 PM | 37.1% | 86.0% | 40.7% | 74.4% |
| 2:00 PM | 12.1% | 36.5% | 12.9% | 40.7% |
| 3:00 PM | 0.0% | 12.0% | 1.6% | 12.9% |
| | 41.2% | 73.4% | 63.2% | 66.8% |
| AGGREGATE | 61.1% | | | |

# 4. RELEVANT ASSESSMENT FRAMEWORK

Clause 4.6 of WLEP 2012 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 of WLEP 2012 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 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*
*(b) the public benefit of maintaining the development standard, and*
*(c) 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 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.

This Request demonstrates that compliance with the solar access standard prescribed for the site in Clause 8.2 of WLEP 2012 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 standard be varied.

# 5. 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 solar access development standard in accordance with Clause 8.2 of PLEP 2010.

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 sections 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.

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

The solar access control prescribed by Clause 8.2 of PLEP 2010 is a development standard capable of being varied under clause 4.6(2) of PLEP 2010.

This has been confirmed in a recent NSW Land and Environment Court decision on a similar key site in Penrith City Centre (*Urban Apartments Pty Ltd v Penrith City Council [2023] NSWLEC 1094)* where the Commissioner noted that Clause 8.2 of Penrith LEP 2010 is a development standard that can be varied under Clause 4.6:

> *215- I accept that the provision at cl 8.2 fixes a standard in a manner consistent with the definition of a development standard. While a numerical control is not specified at cl 8.2(3), the provision provides the means by which an objectively calculable quantum may be arrived at. Namely, that the degree of overshadowing, resulting from the development the subject of the development application, should not be greater than the overshadowing that would otherwise result from the standard at cl 4.3 of the PLEP.*
>
> *216- The provision enables a calculation, in the first instance, and a comparison, in the second, to arrive at a conclusion as to the siting, bulk and scale of the proposed development and an assessment of its effects on patterns of sunlight and shadows that result.*
>
> *217- Accordingly, the provision at cl 8.2 is capable of variation by cl 4.6 of the PLEP, if the contravention of the standard at cl 8.2 is justified.*

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 WLEP 2012.

## 5.2. 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 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 development standard as specified in Clause 8.2 of PLEP 2010 are detailed in **Table 3** below. An assessment of the consistency of the proposed development with each of the objectives is also provided.

**Table 1 -** Assessment of Consistency with Clause 8.2 objectives

| Objectives | Assessment |
|---|---|
| *(1) The objective of this clause is to protect open space from overshadowing* | Cumulatively, the proposed development improves the solar access (and reduces overshadowing) on the identified open space adjacent to the site across the year.<br><br>As discussed earlier in this report, **there is an overall net gain of 0.7% additional solar access in the public open space cumulatively over the four solstices (when DA1/DA2 are considered together)** throughout the year. In our view, this responds directly and positively to the objective of the clause which seeks to protect open space from overshadowing.<br><br>The solar access peer review notes that typically, most applications should look at the worst time of the year, being the June solstice to ensure that no additional overshadowing is caused. In this case, the proposed development will result in a 5.7% increase in solar access at this time compared to a compliant development (when DA1/DA2 are considered together).<br><br>While there is a very negligible reduction of solar access in the summer solstice (i.e. December 21), this is isolated to the afternoon period between 1pm-3pm where the protection of open space from severe heat is typically encouraged in the context of the significant heat loads and weather events in Penrith LGA. However, this reduction is offset by the other improvements to solar access across the rest of the solstices.<br><br>It is worth noting that the shadow diagrams have not modelled large tree planting and vegetation area along a large portion of the north/south axis of the square which has the overt objective of shading large parts of the square to the east during severe hot weather.<br><br>In addition there is a large shaded bus stop (referred to as the 'public shade pavilion' adjacent to Lord Sheffield Circuit which similar has an extended shade structure to similarly manage heat loads in the summer periods.<br><br>Accordingly, the objective to protect open space from overshadowing. |

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 height 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.

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

The LEC 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 are sufficient environmental planning grounds to justify the proposed variations to the development standard. These include:

- As shown in the solar access analysis by Crone (and accompanying solar access expert report) a detailed examination of each development application has been undertaken to determine what elements of the proposed development in excess of 32m (the current mapped height standard on the land) impact on the solar access of the public open space.

- As discussed elsewhere, this analysis demonstrates that the proposed development will have a net positive aggregate impact across the entire year, when assessed against the four solstices (i.e. a 0.7% increase in solar access to the public open space when DA1/DA2 are considered together). However, there is a portion of the DA1 towers that (in isolation) create additional shadow of the public open space (beyond a compliant height) in the afternoon period in the summer solstice (between 1-3pm).

- The fact that there is a net positive impact overall of solar access over the year (in particular in winter, autumn and spring), albeit that there is a few hours of a reduction in summer in isolation caused by DA1 is a sufficient planning ground to justify a contravention of the development standard. This is discussed in further detail below.

- The overarching principle of Clause 8.2 of PLEP 2010 is to 'protect' open space from overshadowing. Without additional wording in the objective about what is being protected, Clause 8.2(3) not defining specific time periods of protection, nor Penrith DCP 2014 providing any further detailed guidance on this matter, we observe that the 'protection' may relate principally to ensuring that the amenity and useability of the open space can be maintained (or enhanced) in development proposals that exceed the 32m height standard for the site.

- The amenity of open space, or indeed what is being protected, will depend on the conditions both within that space currently and what may be proposed adjacent to it that will impact on it as part of a proposed development. Further, within the context of Penrith LGA, the amenity of this space may vary considerably based on the environmental conditions and climate affecting it. For example, in mid-winter and in the equinox periods the objective is likely to be to minimise overshadowing and increase solar access to protect the open space, however in the middle of summer (particularly where extreme weather events occur) an open space is likely to benefit from shade and cooling to enhance or indeed protect open space in the middle of the day or afternoon periods when the heat gain is the most severe.

- While there is an overall net benefit in terms of solar access across the year, the fact that Clause 8.2(3) doesn't specify a specific time of the year for overshadowing to occur, the proposed development does have a very negligible shadow impact which occurs for a very small timeframe (mainly 1pm-3pm) in the summer solstice, which is the hottest time of the year in summer which in Penrith City Centre has consistent extreme UV and heat loads which Council's LEP and strategic policies overtly seek to minimise and encourage shading and cooling given extreme heats during these periods. Specifically, there were highs of 48.9 degrees Celsius at the summer solstice in 2022/2023.

- Specifically, it is worth noting that Clause 8.2 pre-dates Clause 7.30 of PLEP 2010 which relates to 'Urban Heat' and was a recent amendment to the LEP, given the ongoing challenges with extreme heat in Penrith LGA. Two of the key objectives of Clause 7.30 are:

  *b) To ensure that buildings and **outdoor spaces are thermally comfortable** for people living and working in Penrith, **particularly during summer***

  *c) **promote cooling benefits** of green infrastructure and water in the landscape*

- Penrith City Council have released planning policies such as 'Cooling the City: Planning for Heat Issues Paper' which acknowledges that extreme heat has been identified as a key climate risk and "priority shock facing the Penrith community". Specifically, the Policy notes that Council is committed to addressing this shock and supporting its community to achieve a cool, liveable city by undertaking action and advocating for change within the state planning system to ensure that adaptation to heat and cooling principles and practices are incorporated into the planning, design and development.

- Lastly, further to recent discussions with Council's consultant planner (GYDE), it can be observed that there are a range of permitted land uses in the current zone. By way of example, in the circumstances that an applicant lodged a commercial office building (one of the permitted land uses) this would be likely to result in a continuous, built to boundary form, up to 32m. Comparative to the proposed development, which has a lower, stepped podium arrangement with generous setbacks and separation, this has clear benefits that have resulted in a more positive shadow impact when considered across the entire year. Accordingly, this demonstrates that the proposed development in the circumstances of the case, provides a better planning outcome.

In summary, it has been demonstrated that there are sufficient environmental planning grounds to justify the non-compliance, and having regard to the above, the proposal will result in a better planning outcome compared to a compliant building envelope despite the minor non-compliance with the height control.

## 5.4. 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.

## 5.5. 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.

Consistency of the development with the objectives of the development standard is demonstrated in the table above. The proposal is also consistent with the land use objectives that apply to the site under PLEP 2010. The proposed development is consistent with the relevant land use zone objectives as outlined in the table below.

**Table 2** - Assessment of compliance with land use zone objectives

| Objective | Assessment |
|---|---|

| | |
|---|---|
| *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.* | The proposed development provides a mix of compatible land uses, including retail, and business, and community uses that serve the needs of people who live in, work in, and visit the local area; |
| *To encourage investment in local commercial development that generates employment opportunities and economic growth.* | The proposed development facilities employment generation in a highly accessible location within the Penrith CBD. |
| *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 proposed development provides residential land uses with a diversity of typologies and which is compatible with the economic and employment functions of the CBD and reflects the desired future character and density of the area. |
| *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.* | The proposal provides a range of land uses and other non-residential uses at the ground floor. |
| *To provide retail facilities for the local community commensurate with the centre's role in the local and regional retail hierarchy.* | As noted above the proposed development provides a diverse mix of retail facilities, including being anchored by a supermarket. |
| *To create opportunities to improve the public domain and encourage the integration of centres with public transport and pedestrian networks.* | The proposal provides a range of public domain improvements, including the creation of a publicly accessible through-site link connecting the Public Square to the commuter car park. |
| *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 proposed development is of a size and scale anticipated under the Council's planning controls and the site's identification as a 'key site'. |

The proposal is considered to be in the public interest as the development is consistent with the objectives of the development standard, and the land use objectives of the zone.

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

Concurrence of the Secretary to the variation can be assumed in accordance with 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 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 contravention 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 development standard and the 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. Conversely, the proposed development ensures that overall a higher degree of overall solar access can be achieved compared to a compliant development.

- **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.

# 6. CONCLUSION

For the reasons set out in this written request, strict compliance with the solar access development standard contained within clause 8.2 of PLEP 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 solar access standard to the extent proposed for the reasons detailed within this submission and as summarised below:

- The proposal is compliant with clause 4.6(3)(a) because a strict compliance with the development standard is unreasonable and unnecessary in the circumstances of the case. The proposal achieves the objectives of the development standard as provided in Clause 8.2 of PLEP 2010 and is consistent with the objectives for development within the B2 Local Centre Zone despite non-compliance.

- There are sufficient environmental planning grounds to justify contravening the development standard.

- The scale of development in the surrounding area demonstrates that compliance with the development standard is not required in order to achieve the desired future character of the area.

- Flexibility with the standard will ensure the proposal achieves the best outcome for the site and local community.

For the reasons outlined above, the 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 standard should be applied.

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