

Clause 4.6 Variation Request Clause 4.1E Shops- Turner Road Precinct

38-44 LASSO ROAD, GREGORY HILLS

28 FEBRUARY 2025



QUALITY ASSURANCE	
PROJECT:	Clause 4.6 – CI 4.1E(1) Shops Turner Road Precinct
ADDRESS:	38-44 Lasso Road, Gregory Hills
COUNCIL:	Camden Council
AUTHOR:	Think Planners Pty Ltd

Date	Purpose of Issue	Rev	Reviewed	Authorised
August 2024	Co-ordination	Draft	EJ/JW	JW
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CLAUSE 4.6 DEPARTURE

BACKGROUND

This Clause 4.6 variation request has been prepared in relation to a mixed use development at 38-44 Lasso Road, Gregory Hills. This relates to Clause 4.1E(1) of the State Environmental Planning Policy (Precincts – Western Parkland City) 2021, notably Appendix 2 Oran Park and Turner Road Precinct.

Clause 4.1E Shops- Turner Road Precinct sets out:

4.1E Shops—Turner Road Precinct

(1) *The total area used for shops on all land within Zone B5 Business Development in the Turner Road Precinct must not exceed 2,500m².*

(2) *The total area used for shops in a particular development for that purpose on land within Zone B5 Business Development in the Turner Road Precinct must not exceed 500m².*

The proposal incorporates a retail premises at the ground floor with a total area of 177.1m² that complies with Clause 4.1E(2).

However it is noted that the extent of ‘shops’ in the broader B5 Zone in the Turner Road Precinct already exceeds 2,500m² and this minor additional retail gross floor area will further exceed this provision.

It is understood that a 2022 Audit by Camden Council has confirmed that there is approximately 15,997m² of retail floor space in the B5 zone. A series of departures have been previously endorsed as the cap for the floor space has largely been abandoned and it sits in contradiction of the large format retailing that is often sought in the B5 zone.

This has been confirmed based on a review of Camden Councils Clause 4.6 register that sets out two (2) recent approvals for exceedance of the cap, including the site immediately to the west that was granted consent for a mixed use development.

B5 BUSINESS DEVELOPMENT	Clause 4.1E - Shops - Turner Road Precinct	The development is consistent with the objectives of the B5 Business Development zone and the intent of the standards being to protect centres, satisfies projected retail demand from population growth, enhances on foot retail accessibility and reduce car dependency	211.5% and 640.6%	Sydney Western City Planning Panel	01/12/2022
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B5 BUSINESS DEVELOPMENT	Clause 4.1E - Shops - Turner Road Precinct	The development is consistent with the objectives of the B5 Business Development zone and the intent of the standard being to protect centres, satisfies projected retail demand from population growth, enhances on foot retail accessibility and reduce car dependency	211.50%	Sydney Western City Planning Panel	01/11/2022
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It is also noted that Council in its Camden Centres and Employment Land Strategy has committed to seeking removal of this 'cap' - with the Strategy noting:

A network of productive industrial and urban services land

12	Protect and retain the industrial and urban services land at Smeaton Grange, Gregory Hills and Narellan.	To retain and enhance the quantity and diversity of local jobs for the community.	The retention of existing employment lands will be considered as part of the assessment of planning proposals.	Ongoing
13	Remove the shop area cap provisions applying to the B5 Business Development zoned land in the Turner Road Precinct (Gregory Hills).	To address inconsistencies in the Growth Centre SEPP and Turner Road DCP .	Amendments to the Growth Centres SEPP and Turner Road DCP.	Short term

Therefore this control is a legacy control that is now redundant and is abandoned and it is only a matter of time before it is repealed.

THE DEVELOPMENT STANDARD TO BE VARIED

Clause 4.1E(1) of Appendix 2 of the State Environmental Planning Policy (Precincts – Western Parkland City) 2021, sets out:

4.1E Shops—Turner Road Precinct

(1) The total area used for shops on all land within Zone B5 Business Development in the Turner Road Precinct must not exceed 2,500m².

(2) The total area used for shops in a particular development for that purpose on land within Zone B5 Business Development in the Turner Road Precinct must not exceed 500m².

The proposal incorporates a retail premises with a total area of 177.1m² that complies with Clause 4.1E(2).

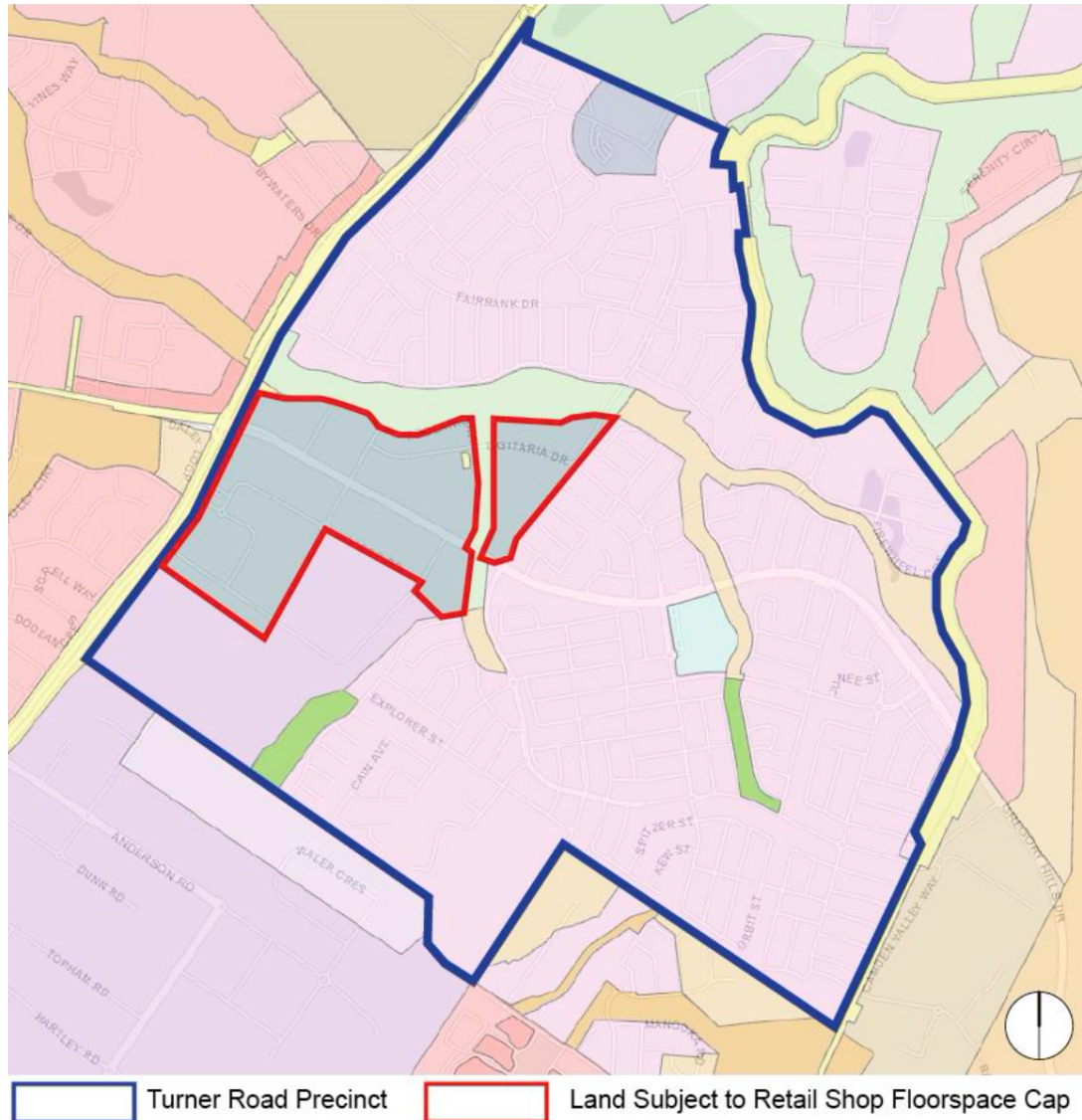
However it is noted that the extent of ‘shops’ in the broader B5 Zone in the Turner Road Precinct already exceeds 2,500m² and this minor additional retail gross floor area will further exceed this provision.

It is understood that a 2022 Audit by Camden Council has confirmed that there is approximately 15,997m² of retail floor space in the B5 zone. A series of departures have been previously endorsed as the cap for the floor space has largely been abandoned and it sits in contradiction of the large format retailing that is often sought in the B5 zone.

It is noted that the existing cap is exceeded by 639%, and the proposed addition of 177.1m² of floor space will increase the extent of departure to 646%- being an 11% increase in the Precinct.

Land subject to retail ‘shop’ floorspace cap within Turner Road Precinct is reflected below at Figure 1.

Figure 1: Turner Road Precinct Retail Cap



PROVISIONS OF CLAUSE 4.6

Clause 4.6 of Schedule 2 of SEPP (Precincts- Western Parkland City) 2021 provides that development consent may be granted for development even though the development would contravene a development standard.¹ That clause is in the following terms:

4.6 Exceptions to development standards

- (1) *The objectives of this section are—*
 - (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
 - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) *Consent may, subject to this section, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this section does not apply to a development standard that is expressly excluded from the operation of this section.*
- (3) *Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant for development consent has demonstrated that—*
 - (a) *compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
 - (b) *there are sufficient environmental planning grounds to justify the contravention of the development standard.*

Note—

The Environmental Planning and Assessment Regulation 2021 requires the development application to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

- (4) *The consent authority must keep a record of its assessment carried out under subsection (3).*
- (5) *(Repealed)*
- (6) *Consent must not be granted under this section for a subdivision of land within Zone E4 Environmental Living if—*
 - (a) *the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
 - (b) *the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*
- (7) *(Repealed)*

¹ Clause 4.6(2)

RELEVANT MATTERS TO BE DEMONSTRATED IN CLAUSE 4.6

As Clause 4.6 provides:

4.6 Exceptions to development standards

(2) Consent may, subject to this section, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this section does not apply to a development standard that is expressly excluded from the operation of this section.

(3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant for development consent has demonstrated that—

(a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and

(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

The request deals with each relevant aspect of clause 4.6 on the following pages.

NSW CASE LAW

Consideration on justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827; and
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.
3. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (*Initial Action*); and
4. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (*Al Maha*).
5. *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511;
6. *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386; and
7. *Moskovich v Waverley Council* [2016] NSWLEC 1015.
8. *Baron Corporation Pty Ltd v The Council of the City of Sydney* [2018] NSWLEC 1552 (*Baron Corporation*).

This request also addresses several relevant Land and Environment Court cases including, *Micaul Holdings Pty Ltd v Randwick City Council*, *Moskovich v Waverley Council* and *Initial Action Pty Ltd v Woollahra Municipal Council*.

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*;
- When pursuing a clause 4.6 variation request it is appropriate to demonstrate *that there are sufficient environmental planning grounds to justify contravening the development standard*, and

It is important to note that the Chief Judge of the Land and Environment Court in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) has further clarified the correct approach to the consideration of clause 4.6 requests including that the clause does not require that a development that contravenes a development standard must have a *neutral or better* environmental planning outcome than one that does not.

An extract of this judgment is provided below:

Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development.

In relation to the current proposal the keys are:

- Demonstrating that compliance with the development standard is unreasonable or unnecessary in the circumstances;
- Demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard;
- Satisfying the relevant provisions of Clause 4.6.

These matters are addressed overleaf, noting that the applicant says that the development standard has been abandoned first and foremost.

COMPLIANCE UNREASONABLE OR UNNECESSARY

Clause 4.6(3)(a) emphasises the need for the proponent to demonstrate how the relevant development standard is unreasonable or unnecessary in the circumstances. The ways in which compliance with a development standard may be held to be “unreasonable or unnecessary” are well established. In *Wehbe v Pittwater Council* [2007] NSWLEC 827 (Wehbe), Preston CJ provided a non-exhaustive list through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary.

While *Wehbe* related to objections made pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), in *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 (Initial Action) the Court held that the common ways of demonstrating that compliance with a development standard is unreasonable or unnecessary as outlined in *Wehbe* are equally applicable to clause 4.6.

Further, in *Initial Action* the Court 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. The five common methods for demonstrating that compliance with a development standard is unreasonable or unnecessary as outlined in *Wehbe* are:

- 1) Demonstrating that the objectives of the development standard is achieved, despite the noncompliance [42]
- 2) Establishing that the underlying objective or purpose is not relevant and compliance is therefore unnecessary [45]
- 3) Showing that the underlying objective or purpose would be defeated or thwarted if compliance required, confirming that compliance is unreasonable [46]
- 4) Establishing that the standard has been virtually abandoned or destroyed through council’s own actions. Therefore given council’s granting of consents that depart from the standard, compliance is unnecessary and unreasonable [47]
- 5) Demonstrating that the zoning of the land is unreasonable or inappropriate, meaning that compliance with the development standard is also unreasonable or unnecessary [48]

Of the five common methods above, this Cl.4.6 applies Method 4.

Method 4- The Standard has Been Abandoned

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case because the standard has been abandoned.

This is clearly the case given the most recent departure authorised a 639% departure to the standard, and by the Councils own intent to remove the Clause from the SEPP.

It is clear that the provisions of the cap have been substantially exceeded over a period of time and well before any full redevelopment of the Precinct.

It is clear the 2500m² cap was not intended to apply to general retail and the continued departure represents the abandonment of the control.

Method 1- Underlying Objectives are Achieved

If Method 4 is not accepted then Method 1 is considered to be satisfied as well.

The SEPP does not provide any specific objectives for the development standard at Clause 4.1E(1). In the absence of specific objectives, we consider that the standard intends to support the objectives of the B5 Business Development Zone, being:

- ☐ *To enable a mix of business and warehouse uses and specialised retail uses that require a large floor area, in locations that are close to, and that support the viability of, centres.*
- ☐ *To provide for a wide range of employment generating development.*
- ☐ *To provide for a mix of ancillary uses to support the primary function of providing employment generating development.*
- ☐ *To maintain the economic strength of centres by limiting the retailing of food, clothing and convenience shopping.*
- ☐ *To provide for a range of uses, including recreational uses and function centres, that complement other permissible employment generating land uses within the zone.*

The retail 'shop' floorspace cap imposed under Clause 4.1E(1) has the intended effect of supporting the overarching objective to "*maintain the economic strength of centres by limiting the retailing of food, clothing and convenience shopping*" in the B5 Business Development Zone.

The relevant objectives are achieved.

- To enable a mix of business and warehouse uses and specialised retail uses that require a large floor area, in locations that are close to, and that support the viability of, centres

In relation to these objectives the subject site is located within a key bulky goods and employment precinct situated on the eastern side of Camden Valley Way and focused around the intersection with Gregory Hills Drive. Immediately surrounding the Lasso Road site are key uses including bulky goods, industrial and commercial uses and key tenants along Lasso Road including Bunnings, Red Rooster, Oporto's and McDonalds.

The proposed retail floorspace is ancillary to a business premises comprising just 2.2% of the proposed GFA. It will support the operation of the proposed business premises and will not be of a size that is sufficient to compete with the viability of nearby centres.

It is therefore considered that the proposal meets the objective of enabling a mix of business uses which supports the viability of nearby centres.

- Provide for a wide range of employment generating development
- Provide for a mix of ancillary uses to support employment generating development

In relation to these objectives the objectives for the B5 Business Development Zone establish the intent to “provide for a wide range of employment generating development”. The proposal incorporates:

AREA BREAKDOWN PER LEVEL		
LEVEL	GFA	SPACE TYPE
GROUND FLOOR		
GROUND FLOOR	675.8 m ²	BUSINESS NON-RETAIL
GROUND FLOOR	177.6 m ²	RETAIL
GROUND FLOOR	269.0 m ²	HOSPITALITY
GROUND FLOOR	204.5 m ²	HOSPITALITY
1st FLOOR		
1st FLOOR	503.6 m ²	BUSINESS PREMISES
1st FLOOR	433.1 m ²	BUSINESS PREMISES
1st FLOOR	250.2 m ²	BUSINESS PREMISES
2nd FLOOR		
2nd FLOOR	757.1 m ²	BUSINESS PREMISES
2nd FLOOR	507.1 m ²	BUSINESS PREMISES
3rd FLOOR		
3rd FLOOR	732.5 m ²	BUSINESS PREMISES
3rd FLOOR	434.8 m ²	BUSINESS PREMISES
4th FLOOR		
4th FLOOR	733.2 m ²	BUSINESS PREMISES
4th FLOOR	423.4 m ²	BUSINESS PREMISES
5th FLOOR		
5th FLOOR	705.2 m ²	BUSINESS PREMISES
5th FLOOR	424.1 m ²	BUSINESS PREMISES
6th FLOOR		
6th FLOOR	660.0 m ²	HOSPITALITY
6th FLOOR	150.5 m ²	HOSPITALITY
Grand total	8041.7 m ²	

AREA BREAKDOWN TOTALS		
LEVEL	GFA	SPACE TYPE
BUSINESS NON-RETAIL		
GROUND FLOOR	675.8 m ²	BUSINESS NON-RETAIL
	675.8 m ²	
BUSINESS PREMISES		
1st FLOOR	503.6 m ²	BUSINESS PREMISES
1st FLOOR	433.1 m ²	BUSINESS PREMISES
1st FLOOR	250.2 m ²	BUSINESS PREMISES
3rd FLOOR	732.5 m ²	BUSINESS PREMISES
3rd FLOOR	434.8 m ²	BUSINESS PREMISES
2nd FLOOR	757.1 m ²	BUSINESS PREMISES
2nd FLOOR	507.1 m ²	BUSINESS PREMISES
4th FLOOR	733.2 m ²	BUSINESS PREMISES
4th FLOOR	423.4 m ²	BUSINESS PREMISES
5th FLOOR	705.2 m ²	BUSINESS PREMISES
5th FLOOR	424.1 m ²	BUSINESS PREMISES
	5904.3 m ²	
HOSPITALITY		
GROUND FLOOR	269.0 m ²	HOSPITALITY
6th FLOOR	660.0 m ²	HOSPITALITY
6th FLOOR	150.5 m ²	HOSPITALITY
GROUND FLOOR	204.5 m ²	HOSPITALITY
	1284.1 m ²	
RETAIL		
GROUND FLOOR	177.6 m ²	RETAIL
	177.6 m ²	
Grand total	8041.7 m ²	

As noted by Macroplan

- **Commercial office** – The total additional demand for commercial office space in the catchment is 160,601 sq.m GFA over the period 2023 – 41, with the potential for 74,990 sq.m of additional supply, presenting an undersupply of 85,611 sq.m. In the short-term (to 2026) there is an undersupply of 1,627 sq.m and from 2026 – 2031 an undersupply of 11,589 sq.m of office floorspace is projected.
- **Retail** – Up to 1,350 sq.m of retail floorspace is deemed supportable at the subject site by 2026, including a food catering tenancy of up to 858 sq.m and retail services/general retail provision of up to 490 sq.m. The estimated retail trading impacts arising from the planned retail provision on the surrounding area are considered small and unlikely to threaten their viability.
- **Economic impacts** – The subject site development is expected to yield the following:
 - Initial construction investment of \$53.8 million is likely to generate an additional \$65.4 million of indirect construction output elsewhere in the wider economy, totalling \$119.2 million of total output (including direct and indirect) to the economy during the 2-year construction phase.
 - Approximately 121 direct construction FTE jobs on site and an additional 163 indirect FTE jobs elsewhere in the economy, totalling 283 construction related FTE jobs over the 2-year construction period.
 - The total direct and indirect employment generated during the operational phase is estimated at approximately 750 FTE jobs.
 - Ongoing total direct output of \$124.5 million, with a total ongoing estimated output of \$221.0 million
 - Other benefits are likely to include significant improvements to land utilisation, progressive value uplift to the site and the wider area, increased local employment opportunities and economic activity, a reduction in anti-social behaviour and increased sense of community, improved training and education outcomes, knowledge acquisition and skill development, a more visually appealing streetscape and synergy with the surrounding industrial precinct.

The proposed development will result in benefits to the local community through employment generation. Jobs supported by the development will accrue through direct and indirect employment generated during both the construction phase, and ongoing employment as part of the operational phase as noted by Macroplan.

The proposed retail 'shop' floorspace will have an overall positive impact with respect to employment generation.

It is therefore considered that the proposal meets the objective of providing for a wide range of employment generating uses.

To maintain the economic strength of centres by limiting the retailing of food, clothing and convenience shopping.

Clause 4.1E(1) of the *SEPP* seeks to ensure that retail 'shop' floorspace within the Lasso Road precinct would not impact upon the envisaged hierarchy of centres and intended function of Central Hills Business Park.

The proposed retail 'shop' tenancies would not impact on the ongoing operating or viability of any existing retail centre in the local area, or impact negatively on the existing hierarchy of centres. This is because the retail offering is 177.6m² and aligns with Cl 4.1E(2) being the 500m² cap. It is further noted that the retail shop floor space is 2.2% of the overall floor space and clearly an ancillary element to the broader scheme- and the proposal limits food, clothing retailing that will be left to other Centres (i.e. Narellan).

To provide for a range of uses, including recreational uses and function centres, that complement other permissible employment generating land uses within the zone.

The proposal adopts a range of uses as follows:

AREA BREAKDOWN PER LEVEL			AREA BREAKDOWN TOTALS		
LEVEL	GFA	SPACE TYPE	LEVEL	GFA	SPACE TYPE
GROUND FLOOR			BUSINESS NON-RETAIL		
GROUND FLOOR	675.8 m ²	BUSINESS NON-RETAIL	GROUND FLOOR	675.8 m ²	BUSINESS NON-RETAIL
GROUND FLOOR	177.6 m ²	RETAIL			
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			3rd FLOOR	434.8 m ²	BUSINESS PREMISES
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4th FLOOR				5904.3 m ²	
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4th FLOOR	423.4 m ²	BUSINESS PREMISES	GROUND FLOOR	269.0 m ²	HOSPITALITY
5th FLOOR			6th FLOOR	660.0 m ²	HOSPITALITY
5th FLOOR	705.2 m ²	BUSINESS PREMISES	6th FLOOR	150.5 m ²	HOSPITALITY
5th FLOOR	424.1 m ²	BUSINESS PREMISES	GROUND FLOOR	204.5 m ²	HOSPITALITY
6th FLOOR				1284.1 m ²	
6th FLOOR	660.0 m ²	HOSPITALITY	RETAIL		
6th FLOOR	150.5 m ²	HOSPITALITY	GROUND FLOOR	177.6 m ²	RETAIL
Grand total	8041.7 m ²			177.6 m ²	
			Grand total	8041.7 m ²	

The proposed retail 'shop' tenancies represent a reasonable ancillary use that will support and complement the operation of the other floorspace at the site.

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.

ENVIRONMENTAL PLANNING GROUNDS

The following factors demonstrate that sufficient environmental planning grounds exist to justify contravening the development standard.

For that purpose, the critical matter that is required to be addressed is the departure from the development standard itself, not the whole development.

As demonstrated throughout this report and the accompanying economic impact assessment by Macroplan there are sufficient environmental planning grounds to justify contravention of the retail floorspace cap in Clause 4.1E(1):

- The proposed retail 'shop' tenancies will not detract from the economic strength or function of centres and the shop tenancies are compliant with the 500sqm control applying to the development and only presents 2.2% of the proposed GFA of the development.
- The proposed retail 'shop' tenancies will have an overall positive impact in respect of employment generation as noted in the report by Macroplan.
- The proposed development includes an appropriate mix of ground level ancillary retail uses that seek to activate the street frontage and support the operation of business premises, which represent the primary land use activity proposed across the site.
- The departure to the height standard furthers the objects of the Environmental Planning and Assessment Act 1979 as set out below:
 - o To promote the orderly and economic use and development of land- noting strict compliance would lead to a perverse planning outcome whereby the development standard is abandoned and yet the development could not proceed.
 - o To promote good design and amenity of the built environment through the provision of the activated ground floor uses.

The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

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

The objection is well founded and considering the absence of adverse environmental, social or economic impacts, it is requested that the Panel support the development including the departure to the 'cap' associated with the Turner Road Precinct- noting that this departure is only a temporal one- in the sensed that the control is sought to be removed by the Council owing to the fact it is inconsistent with the DCP and largely redundant.