

CLAUSE 4.6 REQUEST TO VARY DEVELOPMENT STANDARD

DEMOLITION OF ALL STRUCTURES
AND CONSTRUCTION OF A MIXED
USE DEVELOPMENT WITH
BASEMENT PARKING

342-350 HIGH STREET, PENRITH



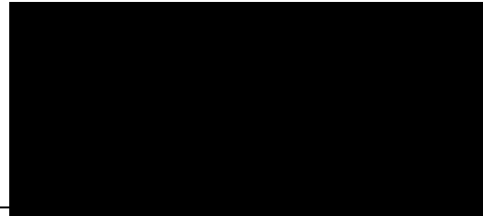
CLAUSE 4.6 REQUEST TO VARY DEVELOPMENT

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Client and Land Details

Client: Colin & Andrea Henry
Subject Site: SP65435, Lots 2 & 3 DP3180
342-350 High Street, Penrith.
Proposal: Demolition of all Structures and Construction of a Mixed Use
Development with Basement Parking.



Warwick Stimson RPIA
Director



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1 INTRODUCTION

The NSW planning system provides flexibility in planning controls by providing the ability for a consent authority to vary development standards in certain circumstances.

Clause 4.6 in Penrith Local Environmental Plan 2010, includes the following objectives:

- 1) The objectives of this clause are as follows—
 - (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.

Subclauses 3 and 4 detail the requirements for the consent authority when considering a variation, including:

- (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 Planning Secretary has been obtained.

Stimson Urban & Regional Planning has been engaged by Colin and Andrea Henry to prepare a request to vary two development standards in respect of its proposed development at 342-350 High Street, Penrith. The proposal is to be assessed by Penrith City Council and this request accompanies plans and other documentation, including a Statement of Environmental Effects, submitted to Council. This variation is to be read in conjunction with that material.

The submitted plans propose a breach in the *height of building* and *floor space ratio* development standard and this submission aims to address that aspect of the application. The request is considered to be reasonable in the circumstances and argues why compliance with the standard is unnecessary on the grounds that:

- a) there are sufficient environmental planning grounds to justify the contravention of the development standards;

- b) compliance with the development standards is unreasonable and unnecessary in the circumstances of this case;
- c) the proposed development is in the public interest because the proposed development achieves relevant objects of the *Environmental Planning & Assessment Act 1979* and is consistent with the relevant control objectives and development standards, despite the non-compliance;
- d) the proposed development standard breaches are reflective of a previously approved and activated consent in DA16/0254, with this application being largely consistent with that approval; and
- e) this variation request satisfies the tests established by the Land and Environment Court for the justification and assessment of variations to development standards.

It is considered there are sufficient environmental planning grounds to support the variations. These include the development demonstrating it has design excellence as per the Penrith LEP, the site needing to accommodate Council's on-site waste collection requirements as detailed in the DCP, satisfying the objectives of the zone and the relevant development standards, and the enormous public benefit arising out of this development through the provision of a pedestrian link through the site. The variations sought will not negatively impact nearby or adjoining sites, much like the existing approval on the site.

2 VARIATION CONSIDERATION

2.1 VARIATIONS SOUGHT AND THEIR OBJECTIVES

Variations are sought to the height of building and floor space ratio development standards.

The objectives of the height of building standard (Clause 4.3) include:

- (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 maximum height of building standard for this site is 12.0m.

The objectives of the Floor Space Ratio standard (Clause 4.4) include:

- (a) to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality,
 - (b) to minimise the adverse impact of development on heritage conservation areas and heritage items,
 - (c) to regulate density of development and generation of vehicular and pedestrian traffic,
 - (d) to provide sufficient floor space for high quality development.
- (2) The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.

The front portion of the site has a maximum floor space ratio control of 2:1, while the rear of the site is 3:1.

2.2 HISTORY OF SUPPORTING VARIATIONS ON THE SITE

Assisting in the consideration of this variation is the existing approval that the site currently enjoys. For DA16/0254, variations to development standards were considered in the report to the Panel in the following manner.

Floor Space Ratio

The subject site is identified on Council's Floor Space Ratio Map as being subject to two differing maximum floor space ratios. The 7 storey mixed use building fronting High Street is subject to a maximum floor space ratio of 2:1. The 7 storey residential flat building located to the rear is subject to a maximum floor space ratio of 3:1.

The development proposes a total of floor space ratio over the whole of the site of 2.982:1 and is therefore partially non-compliant with the development standard.

The total site area is documented as being 1,610.83 sqm (Site A = 765.41 sqm and Site B = 854.42 sqm). Submitted plans indicate Gross Floor Area as follows:

Proposed Gross Floor Area

Mixed Use Building (Building A) = 2338.43 sqm (3.055 : 1) - Does not comply.

Residential Flat Building (Building B) = 2464.43 sqm (2.884 : 1) - Complies.

Quantum Calculation (2338.43+2464.43) / 1610.83 = 2.982:1 FSR.

Height of Building

The maximum height permissible for the site under the Penrith LEP 2010 is 12 m. The development proposes a maximum height slightly greater than 24m and does not comply.

The report presented to the Panel included an extensive extract from the proponent's submission and, given the similarities between that proposal and that which is the subject of this application, it is worthwhile reproducing here as it was the main basis on which the variation was supported.

*"The proposed design provides a landmark architectural building for the Penrith Town Centre. As a backdrop to the vibrant High Street, adjacent to several significant heritage items, and located in Council's proposed new Legal precinct (as part of the Penrith New West initiative) the subject site is in a prominent location in the Penrith Town Centre and **ideal for a high standard architectural and urban design solution.***

Rather than repeating the residential grain of surrounding developments, this development embodies a sleek, elegant form to reflect the commercial and retail nature of a CBD location, whilst providing high-end apartments into the Town Centre, promoting pedestrian activity around a more retail and commercial streetscape.

The proposed development seeks to maintain the DCP envelopes in the existing streetscape in accordance with the DCP guidelines to provide a consistency in scale with the recent and proposed commercial developments at the eastern end of the High Street CBD. This provides a consistent streetscape with increased activity as you enter the traditional heart of the Penrith CBD.

Whilst the DCP and LEP allow a 0 m setback to the adjacent heritage items at 340 High Street, the development proposal actually increases the building setback in order to pull the new building away from the boundary to provide an appropriate curtilage around the heritage buildings at 340

High Street.

*This provides the old Bank Building at 340 High Street to have 'breathing space' with the opportunity to appreciate this building from the western and southern elevations, The proposal also reinstates the prominence of the Old Bank Building at 340 High Street in the streetscape through the use of symmetry. **Using the proportions of the Bank Building's large archways the proposal incorporates a new entry structure for 344 High Street at the ground level within the setback from the eastern boundary to provide relief for the bank building.***

This curtilage is reinforced by the extension of the vertical blades on the curved eastern facade which through the use of a bridging steel structure, provides an integrated facade between the front and rear buildings on the site which provide a consistent texture which acts as a backdrop to the heritage buildings. This backdrop not only addresses the Bank Building on the 340 High Street frontage, but also the old stables building at the rear of the site, providing a neatly landscaped courtyard at the end of John Cram Place.

The curved nature of the building also sets up the potential for a 'heritage precinct' where new developments in line with the LEP and DCP objectives can address the heritage buildings in this area, such as the items at 340 High Street and the Catholic Church adjacent. The proposal also provides a direct connection between High Street and the old 'Stables' building at the rear of 340 High Street. We note that the ground floor retail covers the entire frontage of High Street but is designed in such a way to provide pedestrian access through the retail space to the rear of the site.

We are looking to bring pedestrian activity into the site through a secure covered walkway, which can be used by commercial tenancies to promote pedestrian activity and passive surveillance at the end of John Cram Place.

The proposal also seeks to address John Cram Place through location of the residential lobbies for the development, which enter directly onto John Cram Place. This creates immediate pedestrian activity on the laneway, and changes it from a vehicle only service lane, to an active alive street.

The installation of a new stormwater drainage line, a new footpath and external lighting for pedestrian safety enhance this treatment. *Through careful attention to form, massing and architectural detail the proposal has a distinct character. Located in the new legal precinct identified in the Penrith New West initiative the use of high quality materials, bold architectural features, and an expansive building form which curves and wraps around existing heritage items, result in a building which is not a regular residential apartment block.*

The role of this building in the public domain is to promote pedestrian activity in the precinct, set a high standard for architectural detailing and finishing, to celebrate and acknowledge the heritage buildings that are adjacent to this site, and importantly with regard to the public domain set a precedent for future developments in the area.

The proposal maintains the streetscape envelope required by the DCP. The street frontage is an appropriate scale for pedestrian interaction, allows for the streetscape to retain good access to natural light and ventilation. Whilst it maintains the desired street wall along High Street the ground floor design allows for high pedestrian activity and easy access through the site to buildings at the rear of the site on John Cram Place on adjacent properties.

The public domain is also improved at the southern side of the building. New pedestrian footpath, external lighting and guttering mean that the development provides a pedestrian friendly environment along John Cram Place without compromising the service function the laneway performs for the existing commercial premises. With increased pedestrian activity there is regular surveillance of this laneway, which makes this a safe place.

Council's intention to maintain a 12 m height limit along High Street to provide a natural light to public spaces and to take into account a number of heritage buildings is understood. This proposal maintains the DCP setbacks and heights for the streetscape. We also provide a more significant presence of the heritage building adjacent to our site but using the same proportions of that for our walkway entry."

The assessment report presented to the Panel succinctly concluded as follows.

In conclusion the proposed variations are supported on the basis of their consistency with the matters for consideration outlined in Clause 4.6.

For this application, whilst the site area is marginally bigger with the acquisition of an adjoining site, the principles applied through the design process, from establishing design excellence, through to consideration of the adjoining heritage item, have all been consistent with those that were applied in the original application. In simple, practical terms, it follows that the same response to the variations sought should also be similar with support being given to the development.

2.3 THE VARIATIONS CURRENTLY PROPOSED

Building Height				
Building	Building Element	LEP Standard (m)	Approved (m) ¹	Proposed (m)
A	Main Building	12	24m+	24.28
	Lift Overrun/Plant		24m+	25.38
B	Main Building	12	24m+	23.47
	Lift Overrun/Plant		24m+	25.07

Floor Space Ratio					
Building	LEP Standard	Approved	Approved (Total)	Proposed	Proposed (Total) ²
A	2:1	3.055:1	2.982:1	3.17:1	2.99:1
B	3:1	2.884:1		2.72:1	

¹ The Council assessment report presented to the Panel explains the proposed height of the building as *"The development proposes a maximum height slightly greater than 24m and does not comply"*. No detailed measurements or building references are included. It is not clear whether there is any difference, or extent thereof, between the height of the main building and that of the lift overrun/plant.

² Assuming the same calculation methodology in Council's Assessment Report presented to the Panel

2.4 COMPLIANCE IS UNREASONABLE OR UNNECESSARY – (CL4.6(3)(A))

Of relevance to this part of the consideration, the Land and Environment Court has considered a series of questions, as outlined in *Wehbe v Pittwater [2007] NSW LEC 827*. This case expanded on the previous findings in *Winten v North Sydney Council* and established a five (5) part test to determine whether compliance with a development standard is unreasonable or unnecessary considering the following questions (with those most applicable to this matter underlined):

- Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives;
- Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;
- Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;
- Has Council by its own actions, abandoned or destroyed the development standard, by granting consents that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or
- Is the “zoning of particular land” unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently, compliance with that development standard is unnecessary and unreasonable.

Consistency with the objectives

We submit it would be unreasonable to enforce strict compliance given that the proposal satisfies the height of building and floor space ratio standards as follows...

- The proposal is compatible with the height, bulk and scale of the emerging and desired future character of the locality and with the surrounding development, as indicated in Council’s Penrith City Centre section of DCP 2014.
- The proposal demonstrates design excellence as required under clause 8.4 of the LEP, and as endorsed by Council’s Urban Design Review Panel and the NSW Government Architect’s Office convened Design Integrity Panel.
- The proposal does not impact on the visual amenity or minimise loss of privacy or solar access.
- There is no heritage item on the site. The adjoining heritage item has been considered extensively in the design submitted for consideration.
- The proposal provides a high-quality urban form and results in a building that will contribute to a varying skyline given the height limit in this locality.

- It is unreasonable to apply the height limit across the site in this case as the proposal does not impact on the visual amenity nor does it significantly reduce views, privacy or solar access.
- The proposed development meets the objectives of the zone and the height of building clause, in that it contributes to the provision of necessary land uses within the Penrith LGA in locations that are in close proximity to services and facilities.

On this test the requirements of clause 4.6(3)(a) have been met.

Abandonment of the Development Standard

The Urban Design Analysis accompanying the application describes the character of the area as follows:

The site is located on the periphery of the Civic and Justice Precinct which brings a formality to the eastern boundary of the City Centre. The precinct will house a range of government services, including Courts and Police. The area will largely be active during the day. The Justice Precinct provides a feeling of safety, with strong way finding elements on the ground to assist people as they participate in the activities of justice, appearing or defending, paying fines or consulting legal opinion. For many people it is a place of work, with small cafés and office accommodation.

The proposed development is consistent with the built form anticipated in the locality, guided by the street wall and setback controls within Council's DCP, and is similar to other commercial and mixed-use development being considered in the locality. This development is representative of the built form envisaged in the location and the accepted interpretation of the applicable controls, which is itself a reflection of the development approved under DA16/0254. Whilst the subject site is now slightly larger, the two developments scale similarly and the inclusion of the additional site has created an improved presentation of urban form to High Street and a better result overall. It is reasonable to use DA16/0254 as a basis for considering this development and the variations proposed.

In *Abrams v The Council of the City of Sydney (No 2)* [2018] NSWLEC 85, Robson J, on appeal, concluded that the previous development consents were relevant instruments to be considered for the purpose of s39(4) of the *Land and Environment Court Act 1979* (NSW) because they were relevant to whether the FSR development standard had been abandoned.

Abrams requested a variation of the FSR development standard pursuant to CI 4.6 of the Sydney LEP, relying on two prior consents given by Council on the site. The Council refused the development application and Abrams appealed the refusal to the LEC. Commissioner Brown heard and dismissed the appeal. Abrams appealed against this decision.

Abrams relied upon *Wehbe v Pittwater Council* [2007] NSWLEC 827; (2007) 156 LGERA 44, as the basis for arguing that compliance with the development standard was unnecessary or unreasonable in the circumstances. In particular, it was argued that the fourth test as set out in that case applied. Namely, the development standard had been abandoned or destroyed by the Council's own actions of granting development consents departing from the standard.

The Court held that prior consents on the same site or in the locality ‘may be instructive for the purpose of an ‘abandonment’ argument or in informing the desired character or future streetscape of a locality’.

This, however, was not sufficient to demonstrate abandonment of the development standard. In 2020, the Court determined *SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112* in which further direction was provided when it comes to dealing with the test of establishing whether a development standard has been abandoned as justification for a clause 4.6 variation request. This decision also considered the impacts of existing nearby developments in determining the ‘desired future character’ of a neighbourhood.

SJD DB2 Pty Ltd (the Applicant) sought consent for the demolition of existing buildings and the construction of a six-storey shop top housing development, with retail on the ground floor, twenty-one residential apartments above, and two levels of basement parking for thirty-six cars and four motorbikes.

The proposed development had a height of 21.21m and a floor space ratio (FSR) of 3.54:1. Pursuant to the height and FSR controls under the applicable Woollahra Local Environmental Plan 2014 (WLEP), this is an exceedance of approximately 44% in relation to height and 41% in FSR.

Importantly, adjacent to the subject site to the east are two approved developments under construction, each to become six storey buildings of a very similar height and floor space to the proposed development. The proposed development was designed with the intention of continuing the line of development from adjoining sites to the east, adopting the same height and general form.

As established by Preston CJ in *Wehbe v Pittwater Council [2007] 156 LGERA446*, one of the five most common ways to demonstrate that the application of standards is unreasonable or unnecessary in a particular scenario is to show that the standard has been abandoned.

In this case, the Court concluded that the development meets the objectives of the development standards notwithstanding the breaches. That said, the Acting Commissioner still stated that when considering whether the relevant development standards had been abandoned, the Court had to again consider whether to look at the recent approvals to the east of the subject site in their immediate context or in the broader context of the Double Bay Centre.

The Council argued that the controls had not been abandoned, as it was only two non-compliant developments that had been approved, and as such the controls that apply to the Double Bay Centre had not been abandoned and should apply to the subject site.

However, the Applicant again argued that the planning controls had clearly been abandoned in this specific area of the Centre, as shown by the approval of the two developments adjacent to the east.

The Acting Commissioner agreed with the Applicant, stating “The Council deliberately and knowingly decided that larger buildings were appropriate in the block of which the site form’s part. That, in my view, amounts to an abandonment of the controls for this part of Double Bay.”

So the Court, if asked to determine the matter on this issue, **adopted the position that the concept of abandoning a control can apply to a part of an area that is the subject of that control, albeit subject to the circumstances of the case.**

The cases are relevant to this scenario for the following reasons:

- The controls that are seeking to be varied, apply to a very small area of the Penrith CBD. Their genesis was likely a rudimentary approach to preserving the heritage values of the adjoining heritage item, the efforts of which translated into a clumsy set of planning controls applying to this site. This development proposal incorporates a sophisticated consideration of the adjoining heritage item and its relationship with the proposed development, including consideration by Council’s own Urban Design Review Panel and the NSW Government Architects convened Design Integrity Panel.
- The controls themselves do not relate to each other, given there are differing FSR controls over an area that has a constant building height limit.
- DA16/0254 represents the built form that Council, and the Panel, believes is appropriate for this part of the Penrith CBD as depicted in the Penrith Development Control Plan. Apart from a differing architectural detail on this proposal, the main contrast between the approved DA and this proposal is that the site extends further to the west – the resultant building form, we submit, is a broader benefit to this particular Penrith streetscape.
- The objectives of the standards have been met, notwithstanding the non-compliances.

Even if one concludes the development standards have not been abandoned through the approval of DA16/0254, one will have to accept that its approval was a recognition that built form generally of the scale which was approved then, and is proposed now, can sit comfortably within the context of the planning controls that apply to the Penrith CBD beyond the site and the relevant zoning boundaries.

On this basis the requirements of clause 4.6(3)(a) have also been met.

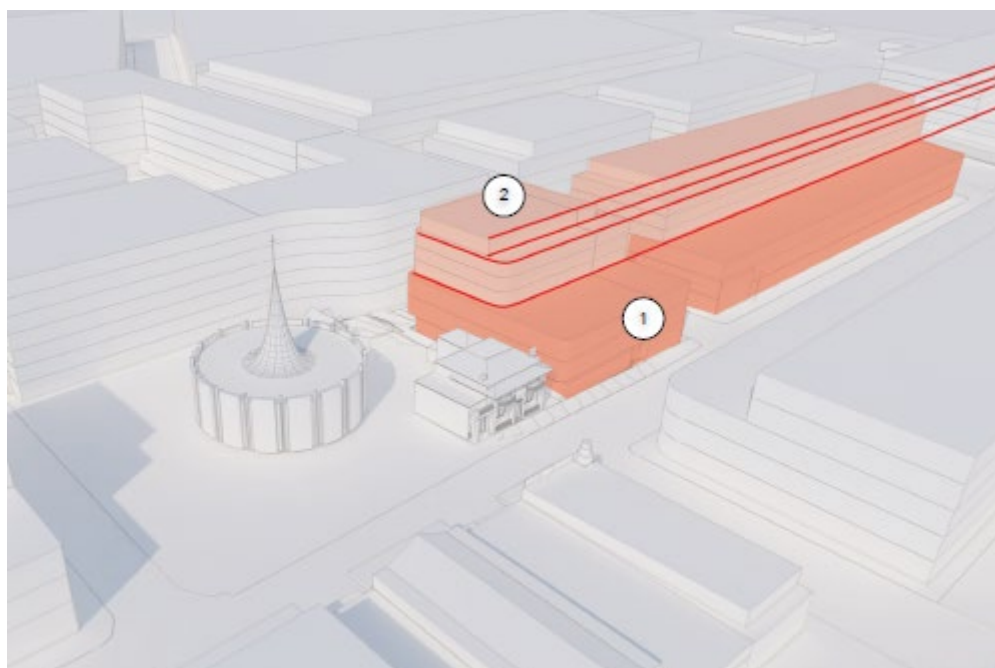
Inappropriate Development Standards

As an extension to the points made above in relation to the potential discarding of the relevant standards, it follows that there would therefore be an acceptance that those controls were not appropriate.

As we have submitted above, not only do the two standards (height and FSR) not ‘talk to each other’, their genesis was likely based on a rudimentary approach to preserving the heritage values of the adjoining heritage item. This proposal has taken a far more sophisticated approach to the design submitted and this is detailed in the accompanying Urban Design Analysis, which states:

The proposal seeks to provide consistency in the streetscape of the Penrith City Centre by using the current Town Centre DCP controls for street heights and setbacks along High Street and Castlereagh Street. With increased separation from the shared boundary with the adjacent heritage building the proposal seeks to extend this retail street character down a new laneway connecting to the new residential development at the rear of the site providing further activation in the site and connecting to the rear land of John Cram Place.

1. Maintain a 12m street wall along High Street with retail at ground level and commercial tenancies at level 1 and 2.
2. Setback upper levels of commercial and residential in line with allowable DCP controls to minimise impact on streetscape, but increase density to provide pedestrian activation, passive surveillance, and accommodation and employment opportunities.



In this case, the DCP controls could be considered in conflict with the LEP standards. Notwithstanding, the assessment of DA16/0254 considered this conflict and concluded that the above representation presented the preferred principles on which development of the site should be based.

It could be argued that on this basis, the requirements of clause 4.6(3)(a) have been met.

2.5 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS – (CL4.6(3)(B))

In the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, it was found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

- Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP.
- Whether there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning

grounds that may apply to any similar development occurring on the site or within its vicinity).

- That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs; and
- All three elements of clause 4.6 have to be met and it is best to have different reasons for each, but it is not essential.

In the context of the current proposal, an in light of Council's consideration of development on the site over the past several years, the following is submitted for consideration.

- One could argue that due to the small footprint of where the planning controls apply (particularly the FSR control – centred around the heritage item), the approval of DA16/0254 has effectively abandoned their application. At the very least, the approval of DA16/0254, including all of the arguments and principles supported through the design, was recognition that there was a better method in planning development on this site and in proximity of the heritage item.
- The approval of DA16/0254 also acknowledged the conflict between the controls within the LEP, and those within the DCP. The decision indicates a preference for the built character and outcomes sought by the DCP, and this proposal reflects that position and decision making.
- The resultant building bulk, is positioned away from the edge of High Street, meaning that the built form will not result in an unacceptable and overbearing visual element on the streetscape.
- As a result, the objectives of the DCP, particularly the controls relating to street wall height and surrounding overall building height, are met.
- Further benefits have arisen through the design process with the creation of a pedestrian link to John Cram Place. This has not only created pedestrian permeability in a part of the Penrith CBD that is lacking in that respect, but that link has created the opportunity for an appropriate setback to the heritage item, in turn creating an activated laneway space.
- The proposal pioneers an interesting mix of commercial and residential uses that will guide such developments in the CBD in the future.
- The creation of unique and intimate public open spaces in the laneway should be supported in contributing to the broader activity within the Penrith CBD. Tenancies fronting such spaces may result in social and economic benefits that would otherwise not be created were a strictly compliant development be proposed.
- The variation proposed as part of this application, would not result in any material impacts beyond what has been approved under DA16/0254.
- Design excellence has been demonstrated through the general satisfaction of the ADG controls and SEPP 65 design principles, as well as endorsement of the proposed

development by the NSW Government Architects Office convened Design Integrity Panel.

Given the unique situation on this site with the previous approval of DA16/0254, the above grounds are not considered generic, and are closely linked to the differences between the two development proposals and the applicable controls. These are sufficient environmental planning grounds on which the proposal can be justified.

2.6 ADEQUATELY ADDRESSED THE MATTERS REQUIRED TO BE DEMONSTRATED BY SUBCLAUSE (3) – (CL4.6(4)(A))?

The Court, in *Initial Action Pty Ltd v Woollahra Municipal Council*, further clarified the correct approach to the consideration of Clause 4.6 requests. This included clarifying that the Clause does not require that a development that contravening a development standard must have a neutral or better environmental planning outcome than one that does not.

Clause 4.6 of a standard instrument LEP permits a consent authority to grant development consent for development that would contravene a development standard where the consent authority is satisfied that:

- cl4.6(4)(a)(i): a written request from the applicant adequately demonstrates that compliance with the development standard is unreasonable or unnecessary (cl4.6(3)(a)), and that there are sufficient environmental planning grounds to justify the contravention (cl4.6(3)(b)), and
- cl4.6(4)(a)(ii): the proposed development will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development within the relevant zone.

To clearly consider this case and its applicability to the proposed development, the clauses have been tabulated below, and considered against the above Court case, the proposal, and this very submission.

<i>Penrith LEP 2010</i>	<i>Consideration</i>
<p><i>4.6(4) Development consent must not be granted for development that contravenes a development standard unless:</i></p> <p><i>(a) the consent authority is satisfied that:</i></p>	
<p><i>(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and</i></p>	<p>Subclause (3) requires the following to be demonstrated for the purposes of this consideration:</p> <p><i>(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and</i></p> <p><i>(b) that there are sufficient environmental planning grounds to justify contravening the development standard.</i></p> <p>These matters have been responded to earlier in this report in tat:</p> <ul style="list-style-type: none"> • There are sufficient environmental planning grounds to justify the proposal. • Application of the standards is unreasonable and unnecessary on the basis that the controls have effectively been abandoned. If not abandoned, the

previous approval on the site has effectively established an appropriate scale and bulk of development in the context of the locality and the adjoining heritage item.

Other matters to note, although less direct in the specifics of this proposal, include:

- The height, bulk and scale of the proposal is consistent with that of the desired future character of the locality, as indicated in Council's DCP.
- There will be no loss of views to or from public areas, nor any loss of solar access.
- The height proposed is considered to result in a building that will present as a high-quality architectural element in this locality and represents a scale and bulk generally consistent with the desired future character.

The objective of each of the development standards can be satisfied through this development as proposed.

It follows that this aspect of Clause 4.6 has been satisfied.

(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

The proposed development is consistent with both the development standards that are proposed to be varied, as well as the objectives of development in the zone. The development is therefore in the public interest (see para 27 of the judgement).

2.7 CONCURRENCE OF THE PLANNING SECRETARY – (CL4.6(4)(B))

Concurrence may be assumed by the consent authority as per Planning Circular PS20-002, issued on 5 May 2020.

3 CONCLUSION

Compliance with the building height and floor space ratio development standard is considered to be unreasonable and unnecessary in the circumstances of the case, and it is considered that there are sufficient environmental planning grounds to vary the standards in this case.

The request to vary the development standards is considered to be well-founded on the grounds that the non-compliance with the building height development standard, *inter alia*:

- Enables compliance with Council's DCP in respect of built form and design outcomes along High Street.
- Enables provision for additional housing stock in a transport-accessible location.
- Will result in a building that demonstrates design excellence, as endorsed by Council's Urban Design Review Panel and the NSW Government Architects Office Design Integrity Panel.
- Allows for the efficient and economic development of a site that is capable of accommodating, and suitable for, the additional height proposed.
- Enables a development that reflects the changing character of the locality without significant impact on the use and enjoyment of adjoining land.
- Does not fetter consistency of the development with the objectives of the building height development standard, or the objectives of the zone.
- Achieves relevant objects of the *Environmental Planning & Assessment Act 1979*, in particular, the provision of housing, in the public interest; and
- Does not raise any issues of State or regional planning significance.

This variation request addresses the matters required to be considered in Clause 4.6 of Penrith LEP 2010. Council is requested to exercise its discretion to vary the development standards by granting consent to the proposed development despite its non-compliance with the building height standard.