

Attachment D

Clause 4.6 variation – Floor space ratio

19 March 2026

City of Sydney Local Planning Panel (**Panel**)

By email & planning portal

Dear Assessing Officer & Panel,

Re: Clause 4.6 Exception to Clause 4.4 of Sydney Local Environmental Plan 2012 (LEP)

The Site: 107-109 Darlinghurst Road, Potts Point (site)

I have been instructed by the Applicant to provide written justification for an exception to clause 4.4 of the LEP pursuant to clause 4.6(3) of the LEP taking a precautionary approach.

I rely upon:

1. The architectural plans and other supporting documents for the proposal have been relied upon.
2. PS 18-003 – Department of Planning and Environment (Revokes PS17-006 (December 2017))
3. Varying Development Standards: A Guide August 2011 - NSW Department of Planning & Infrastructure.
4. Guidance provided by judgments of the Land & Environment Court (the Court) detailed by the methodology (**Annexure 1**).
5. The Development Application (DA) Plans, Statement of Environmental Effects (SoEE), Design Verification Statement (DVS), Design Quality Statement (DQS) and other expert reports annexed to the DA.
6. GFA and FSR Plans (**Figure 1**) in summary:
 - a. Permissible GFA 599.3m² (FSR 2.32:1)
 - b. Proposed GFA 935.8m² (FSR 3.60:1)
 - c. Exceedance is 336.5m², That is a 56.15% exception..



Figure 1 – GFA & FSR Plans (Drawing 24A Rev E)

The Site

This clause 4.6 adopts the site as detailed by the Statement of Environmental Effects.

The site has been excavated, is highly modified and GL(E) is lower than pre-existing ground levels. The occupation and habitable use of basements means that substantial GFA is contained within the basement levels and does not contribute to the bulk and scale observable above ground.

Overall approach

This clause 4.6 request seeks to demonstrate that:

1. compliance with the development standard is unreasonable or unnecessary¹ in the circumstances of the case (cl 4.6(3)(a)), and
2. there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)).

¹ Wehbe [42-51] – 5 Tests but not exclusive tests

Methodology

Guidance as to the proper clause 4.6 methodology is provided by judgments of the Land & Environment Court (LEC) and Court of Appeal (NSWCA) detailed by **Annexure 1** of this clause 4.6.

The Objectives of Clause 4.6

The objective of Clause 4.6(1) of the LEP 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.

The Facts

1. What is the name of the environmental planning instrument that applies to the land?

Sydney Local Environmental Plan 2012 (LEP)

2. What is the zoning of the land?

E1

3. What are the objectives of the zone?

- *To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area.*
- *To encourage investment in local commercial development that generates employment opportunities and economic growth.*
- *To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.*
- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
- *To maximise public transport patronage and encourage walking and cycling.*

4. What is the development standard being varied?

Floor Space Ratio (FSR)

5. Under what clause is the development standard listed in the environmental planning instrument?

Clause 4.4 - Floor Space Ratio

6. What are the objectives of the development standard? (Relevant to the site)

- To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area.
- To encourage investment in local commercial development that generates employment opportunities and economic growth.
- To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.
- To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.
- To maximise public transport patronage and encourage walking and cycling.

7. What is the numeric value of the development standard for **FSR** in the environmental planning instrument?

2.32:1 (GFA 599.3m²) derived by apportionment for difference 2:1 and 3:1 FSRs by site area as detailed by Drawing 23 A)

8. What is proposed numeric value of the development standard in your *development application*?

Proposed **GFA 935.8m²** (FSR 3.60:1)

9. What is the percentage variation (between the proposal and the environmental planning instrument)?

The exceedance is **336.5m²**, That is a 56.15% exception..

Clause 4.6 Submission

1. Compliance with the development standard is unreasonable or unnecessary ² in the circumstances of the case (clause 4.6(3)(a)) on the following basis:

- a. The objectives of the zone are achieved notwithstanding non-compliance with the standard.
- b. the objectives of the development standard are achieved notwithstanding non-compliance with the standard: **1st Wehbe** test at [42] and [43].

Submission:

² Ibid [5].

- (a) The proposal makes a modest contribution providing sufficient floor space to meet anticipated development needs for the foreseeable future,
 - (b) The development successfully regulates the density of development, built form, land use intensity, and controls the generation of vehicle and pedestrian traffic.
 - (c) There is no significant intensity of development, and the modest increase capacity is commensurate with the capacity of existing and planned infrastructure,
 - (d) The modest additions reflect the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.
- c. the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: **2nd Wehbe** test at [45].

Submission: This test is not pressed as relevant to this proposal.

- d. the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: **3rd Wehbe** test at [46].

Submission: The development standard objectives are clearly stated, and one must not try to discern any objective different from the stated objectives. This test is not pressed as relevant to this proposal.

- e. the development standard has been virtually abandoned or destroyed: **4th Wehbe** test at [46].

Submission: 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 s 39(4) of the *Land and Environment Court Act 1979*.

Robson J 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*'.

It is my submission that contemporary consents and built form outcomes **inform the desired character or future streetscape of a locality**'.

Whilst it is plain that the proposal is different from neighbours it is subservient to the immediate neighbours and representative of the desired future character.

Consents and buildings around the site are more representative of the **desired character and the future streetscape of this locality**.

This character includes Omnia and other larger buildings.

A finding that a development standard has been abandoned requires evidence of a '**pattern of abandonment**' such that the development standard can no longer be said to represent the existing and/or desired character of the locality would mean that the development standard had been "virtually abandoned or destroyed....It will be a matter of fact and degree in the circumstances of each case.'

I do not submit that the exceptions already granted within the vicinity of this site can amount to abandonment, nevertheless, the FSR proposed **results in a bulk and scale that is subservient to larger buildings in the immediate vicinity (visual catchment)** and that is wholly consistent in its street wall heights of its northern neighbours.

Nevertheless, importantly, prior consents in the locality inform the desired character and future streetscape and the proposal is **consistent** with these contemporary outcomes and **consistent** the desired future character.

- f. the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: **5th Wehbe** at [48].

Submission: I do not press this as relevant to this proposal.

- g. In circumstances where there are no significant adverse impacts resulting from the variation, it is unreasonable and unnecessary to require strict compliance (given that strict compliance will come with greater and more negative impacts in redistribution of complying GFA, i.e. infilling the voids created to allow better internal amenity would be antipathetic to improving public and private access to natural light and ventilation). The design benefits are set out in more detail by the Design Excellence Report upon which this exception relies covering:
 - i. Improved building forms and materiality to Darlinghurst Road
 - ii. Improve amenity (including natural light penetration) to the railway concourse

- iii. Improved urban design and activation of Earl Street frontage,
 - iv. mitigation of shadow impacts, and
 - v. improved internal amenity.
- h. The burden placed on the future occupants of the development (by requiring strict compliance with the development standard) would be disproportionate to the (non-existent or inconsequential) adverse consequences attributable to the proposed non-compliant development (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).
- i. If strict compliance was required, it would undermine important statutory objectives that are relevant to the consideration of this matter, namely:

The Act

- i. Section 1.3(a) of the Act: to promote the social and economic welfare of the community ...'.
- ii. Section 1.3(b) of the Act: '[T]o facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment (bold added)'.
- iii. Section 1.3(c) of the Act: 'to promote the orderly and economic use and development of land,'
- iv. Section 1.3(g) of the Act: 'to promote the proper construction and maintenance of buildings'.

The LEP

- v. Clause 1.2(b) of the LEP:
 - (b) to support the City of Sydney as an important location for business, educational and cultural activities and tourism,
 - (f) to enable a range of services and infrastructure that meets the needs of residents, workers and visitors,
 - (h) to enhance the amenity and quality of life of local communities,
 - (i) to provide for a range of existing and future mixed-use centres and to promote the economic strength of those centres,
 - (j) to achieve a high quality urban form by ensuring that new development exhibits design excellence and reflects the existing or desired future character of particular localities,

The DCP

- vi. The proposal achieves all relevant DCP objectives.

The proposal demonstrates why compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

- 2. Sufficient “*environmental planning grounds*”³ to justify contravening the development standard (clause 4.6(3)(b)) are found on the following basis.

- a. The primary justification is that a significant amount of the GFA is buried and does not contribute to the bulk and scale of the building. This is wholly consistent with the observations within Council's **PDA 2024/72**, where the advice of Council was:

“The proposal presents a significant departure from the floor space ratio (FSR) control. It is understood and acknowledged that the FSR departure is largely because of existing gross floor area (GFA) that is located within basement levels of the building. This GFA is to be largely retained as part of the proposal, in addition to extra GFA proposed within the additional storeys. The departure from the FSR development standard can be supported in principle by Council officers. Any future DA must be accompanied by a clause 4.6 variation request justifying the departure by clearly demonstrating that compliance with the development standard is unreasonable or unnecessary in the circumstances, and there are sufficient environmental planning grounds to justify the contravention of the development standard.”

- b. The bulk and scale of the building is further attributable to:
 - i. Voids that provide for better internal amenity for the public users of the Railway Station concourse, in particular natural light that will enter the Railway Station concourse from the Earl Street elevation as shown in Drawing DA 07.
 - ii. Voids will allow natural light into the Railway Station concourse and provide views of Earl Street, significantly improving Crime Prevention Through Environmental Design (CPTED) for the area. Kings Cross station recorded about 684,000 entries and exits in March 2025, averaging around 22,065 daily passengers. At least 11,000 passengers will observe Earl Street from the new building, offering a notable public benefit in terms of CPTED.

³ *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26] and “that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act”.

- iii. Voids that provide a significant improvement to the internal amenity of the building for occupants as detailed by the Design Excellence Report.
- iv. Voids that contribute to the activation and natural surveillance of the Earl Street elevation and access to the building from Earl Street and from the Railway Station concourse.
- v. The lightwell and the articulation in the southern façade adjoining Omnia mitigate solar access impacts and provide natural light and ventilation to the building.

In summary, as to the design benefits, the better CPTED, amenity and design outcomes mitigate and offset the impacts of the additional GFA(FSR) and HOB.

- c. The proposal is consistent with the following objects of the Act:
 - i. The proposal promotes the social and economic welfare of the community and a better environment by the proper management, development, and conservation of the State's natural and other resources, in particular the proposal retains most of the building fabric and a use that is directly compatible with the building's location relative to Kings Cross Railway Station.
 - ii. It promotes the orderly and economic use and development of land, reusing the building and significantly improving the CPTED outcomes.
 - iii. It supports the delivery and maintenance of affordable housing, not in the strict sense of permanent housing but in the provisions of affordable tourist accommodation for backpackers. Backpackers support businesses more generally under the Working Holiday Visa (subclass 417) and the Work and Holiday Visa (subclass 462). These visas allow young people from eligible countries to holiday and work in Australia for up to one year (with extensions possible under certain conditions).
 - iv. The proposal has no environment or conservation impacts.
 - v. The proposal has no adverse impacts upon the built or cultural heritage, including Aboriginal cultural heritage.
 - vi. The proposal ensures good design (design excellence) and amenity of the built environment. The building's façades as well as the building functionality and level of safety will be significantly improved.

- vii. It promotes the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants by implementing a full NCC-BCA upgrade as part of the alterations and additions. The building works will improve the health and safety for occupants of the building and over 11,000 users of the Railway Station Concourse every day.
- d. The proposal is consistent with the aims of the LEP addressed in detail above.
- e. The proposal is consistent with the Zone and Development Standard as set out above.
- f. The proposal is contextually consistent with the contemporary buildings to the north approved under this LEP and DCP, forming the desired future character within the *immediate vicinity* and this is shown in the following figures 3, 4 & 5 by reference to the Design Excellence Report.
- g. The proposal is consistent with existing and desired future character noting that the LEP provides no direct reference to the relevance of the desired future character under the DCP therefore, one must have regard to the desired future character informed by prior consents on the same site that in inform the desired character or future streetscape of the locality as found by Robson J, in *Abrams v The Council of the City of Sydney (No 2)* [2018] NSWLEC 85 at [39], *"Existing development consents either on the subject land or in the locality may be instructive for the purpose of an "abandonment" argument in Class 1 appeals in this Court, or in informing the desired character or future streetscape of a locality."*
- h. The works will also provide a National Construction Code (NCC) – Building Code of Australia (BCA) upgrade, albeit due to many constraints' performance solutions must be employed at the Construction Certificate stage and that detail will be provide at that stage.
- i. There are a lack of any unacceptable amenity impacts and the key impacts that relate to HOB being; *loss of views, loss of privacy, overshadowing or visual intrusion*, have been **minimised**⁴ by the design changes including increasing the eastern front setback and reducing the bulk and scale at the upper western elements of the building.

⁴ See: [Pallas Development Management Pty Limited trading as Fortis Development Group v Woollahra Municipal Council \[2022\] NSWLEC 1048](#) – at [99]: "I do not accept Mr Perdiggao's evidence that for the impact to be **minimised** it would have to be reduced the smallest possible amount or degree. To do so would mean that there would be no impact at all. **The objective of the control contemplates some impact**, it just requires the impact to be minimised. I accept the submission of Mr To, for the Applicant, that to adopt this logic, there would always be a further reduction possible to the point of there being no breach and therefore no impact. **This is not what is contemplated by cl 4.6 of the WLEP. It contemplates that the development standard will be breached. What has to be determined is if that breach is appropriate in the circumstances of the case.** I consider that it is."

- j. The elements comply with the development standard and any reasonable development complying with the HOB will have similar, inevitable, and unavoidable impacts upon the southern neighbours that cannot be avoided without a loss of reasonable development potential for the site.
- k. The proposal is consistent with all other objectives of LEP, the Coastal SEPP, SEPP 65 and the ADG.
- l. These departures can be supported as the bulk of the GFA is located within basement levels that does not add to the external height, shape, bulk or scale of the building. Further to this, the building also accommodates the Kings Cross Station entry, (in part a double height space) and so has a large volume of area that would normally be developable but in these exceptional circumstances are given over for the public good.
- m. Lastly, the proposal provides excellent amenity outcomes for future occupants and proper maintenance consistent with section 1.3(g), (h) of the Act, consistent with SEPP 65 and the ADG as disclosed by reference to the Design Verification Statement by Vic Lake Architects.

The proposal provides “sufficient environmental planning grounds” to justify contravening the development standard.



Figure 2 –Streetscape

3. The concurrence of the Secretary of the Department can be assumed⁵ under clause 4.6(4)(b). This is because:
 - a. Concurrence may be assumed by written notice given to the consent authority (as per clause 64(1) of the *Environmental Planning and Assessment Regulation 2000*).
 - b. Such written notice was given by means of planning circular PS 18-003 'Variations to development standards' dated 21 February 2018.

⁵ PS 18-003 – Department of Planning and Environment (Revokes PS17-006 (December 2017)).

4. In any event (when considering the factors set out in clause 4.6(5):
- a. the contravention of the development standard does not raise any matter of significance for State or regional environmental planning;
 - b. there is public benefit in ensuring the upgrading the building's amenity, its NCC-BCA compliance and its appearance and the range of improvements best summarised by the Design Excellence Report demonstrate that the benefits outweigh any contention that maintaining the development standard is more beneficial in the circumstances of this case.

Conclusion

The proposal demonstrates and this written (clause 4.6(3)) request for an exception to the development standard justifies:

1. that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)).
2. sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)).
3. that the exception is in the public interest because it is consistent⁶ with the objectives of the development standard and the objectives of the zone (clause 4.6(4)(a)(ii)), as detailed above.
4. We have assumed the Council continue to have assumed concurrence. The Court on appeal have assumed concurrence. (clause 4.6(4)(b)).

The proposal is consistent with the existing and desired future character providing sufficient environmental planning grounds to justify contravening the development standard. The proposed development is compatible with the bulk, scale, streetscape, and existing character of the locality.

The extent of the exceedance is acceptable in both a quantitative and qualitative sense.

The exception is in the public interest because it is consistent⁷ with the objectives of the development standard and the objectives of the zone (clause 4.6(4)(a)(ii)), as detailed above.

Clause 4.6 of the LEP contemplates that the development standard will be exceeded. What must be determined is if that exceedance is appropriate in the circumstances of the case. I consider that it is.

I believe that the breach of cl 4.4 of the LEP is appropriate given the circumstances of the case.

⁶ Ibid [1].

⁷ Ibid [1].

This clause 4.6 exception should be considered favourably as it allows a merit assessment to proceed, ensuring that there are proper planning grounds to warrant the grant of consent, and that the contravention is justified.

I submit that this clause 4.6 exception should prevail to the extent that it allows a merit assessment to proceed as this clause 4.6 the consent authority can be satisfied that there are proper planning grounds to warrant the grant of consent, and that the contravention is justified.

Yours faithfully,



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Annexure 1 – Clause 4.6 Methodology

Guidance as to the proper clause 4.6 methodology is provided by judgments of the Land & Environment Court (LEC) and Court of Appeal (NSWCA) detailed by the methodology below. including:

- a. *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115, (**SJD**) an appeal under s 56A of the Land and Environment Court Act 1979 ("the Court Act") with respect to *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 (**SJD**)
- b. *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, (**RebelMH**)
- c. *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 (**Baron**)
- d. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (**Al Maha**)
- e. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (**Initial Action**) an appeal under s 56A of the Land and Environment Court Act 1979 ("the Court Act") with respect to *Initial Action Pty Ltd v Woollahra Council* [2017] NSWLEC 1734
- f. *Gejo Pty Ltd v Canterbury-Bankstown Council* [2017] NSWLEC 1712 (**Gejo**)
- g. *Randwick City Council v Micaul Holdings Pty Ltd* 225 LGERA 94; [2016] NSWLEC 7 (**Micaul**)
- h. *Moskovich v Waverley Council* [2016] NSWLEC 1015 (**Moskovich**)
- i. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 (**Four2Five**)
- j. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 (**Four2Five**)
- k. *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (**Webhe**)
- l. *Clearcut Homes Pty Ltd v City of Ryde Council* [2020] NSWLEC 1249 at [24-25] (**Clearcut**)
- m. *Ricola Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1047 (**Ricola**)
- n. *Big Property Pty Ltd v Randwick City Council* [2021] (**Big Property**)
- o. *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021] (**HPG**)
- p. *Abrams v The Council of the City of Sydney (No 2)* [2018] NSWLEC 85, Robson J, (**Abrams**)

- q. *Pallas Development Management Pty Limited trading as Fortis Development Group v Woollahra Municipal Council* [2022] NSWLEC 1048 (**Pallas**) – at [99]

With respect to the guidance provided by the Courts above, there was apparent tension between the approach adopted by **Al Maha** and *Initial Action*. **RebelMH** and Baron further clarified the requirements for clause 4.6 requests and sought to unify the approaches in *Initial Action* and **Al Maha**.

It now appears settled, at [51] in **RebelMH** that:

“... in order for a consent authority to be satisfied that an applicant's written request has “adequately addressed” the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3) (which is the process required by cl 4.6(3)), the request must in fact demonstrate the matters in subcl (3) (which is the outcome required by cl 4.6(3) and (4)(a)(i)).”

Arising from **Initial Action**, In the second class 1 appeal in *Initial Action Pty Ltd v Woollahra Municipal Council* [2019] NSWLEC 1097 decided 12 March 2019.

A very concise summary of what is required is stated at [24-25] in **Clearcut**:

- “24. Consistent with the decision of Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 (“*Initial Action*”), for there to be power to grant development consent for a development that contravenes a development standard, cl 4.6(4)(a) requires that the Court, in exercising the functions of the consent authority, be satisfied that the written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)) and adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)). The Court must also be satisfied that the proposed development will be consistent with the objectives of the zone and with the objectives of the standard in question, which is the measure by which the development is said to be in the public interest (cl 4.6(4)(a)(ii)).
25. In accordance with the decision of the Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, the Court, in exercising the functions of the consent authority, must “in fact” be satisfied of the above matters. The state of satisfaction that compliance is “unreasonable or unnecessary” and that there are “sufficient environmental planning grounds” to justify the contravention must be reached only by reference to the cl 4.6 request. The evidence in the proceedings cannot supplement what is in the request, although the evidence may assist in understanding the request and in considering its adequacy. On the other hand, the state

of satisfaction that the proposed development is consistent with the relevant objectives, and therefore in the public interest, can be reached by considering the evidence before the Court and is not limited to what is contained in the cl 4.6 request."

Further the recent judgement in *Big Property Pty Ltd v Randwick City Council* [2021] (**Big Property**), and *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021] (**HPG**), both provide guidance and flexibility in terms of how to properly assess the '**desired future character**' of an area.

This clause 4.6 submission specifically responds to the above guidance of the LEC and demonstrates it is also the public interest to support the exception.

The Objectives of Clause 4.6

The objective of Clause 4.6(1) of the LEP 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.

Preston CJ clarified the correct approach to the consideration of clause 4.6 requests including that clause 4.6 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. (**Initial Action**)

In **Al Maha**:

21. "A consideration of legal error should start by identifying the criterion as to which the Commissioner was to be satisfied. On a literal reading, subcl (4)(a)(i) merely required that she be satisfied that the applicant had taken two steps, namely, that it had, first, made a written request to be excused compliance with the development standard and, secondly, "adequately addressed" the matters set out in subcl (3). On that (narrow) reading, the Commissioner did not need to form any view herself about the justification for failing to comply with the development standard.
22. The alternative reading is that the matters would not be "adequately" addressed unless they in fact justified the non-conformity. In other words, the Commissioner had to be satisfied that there were proper planning grounds to warrant the grant of consent, and that the contravention was justified.
23. The second reading is attractive for three reasons. First, in its terms, it gives work to the evaluative requirement implicit in the need to be satisfied that certain matters have been "adequately" addressed. Secondly, this is not a gateway provision prior to public consultation or

further assessment; it is a criterion for the ultimate grant of consent⁸. Thirdly, the narrow approach fails to give separate work to subcl (3) and (4). Thus, subcl (3) requires the consent authority to have “considered” the written request and identifies the necessary evaluative elements to be satisfied. That is, to comply with subcl (3), the request must demonstrate that compliance with the development standard is “unreasonable or unnecessary” and that “there are sufficient environmental planning grounds to justify” the contravention. It would give no work to subcl (4) to simply require the Commissioner to be satisfied that the demonstration required under subcl (3) had occurred. The additional step is that the request satisfied the Commissioner that it should be granted.

24. However, it is not necessary to resolve this issue in this case, because it should be accepted that the Commissioner did not form either state of satisfaction. Further, it is not appropriate to determine the issue in the absence of submissions as to the purpose and extent of the departures of the language of cl 4.6 from its predecessor, State Environmental Planning Policy No 1—Development Standards, cl 7 and 8.”

The Court of Appeal decision in **RebelMH** and Preston CJ’s decision in *Baron* support **Al Maha** and **Initial Action**. *Gejo Pty Ltd v Canterbury-Bankstown Council* [2017] NSWLEC 1712 (at [27-29]), suggested the following approach:

27. Clause 4.6 of the CLEP 2012 [a standard instrument LEP] allows development standards to be applied flexibly in certain circumstances. In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, Preston CJ found that in applying the provisions of cl 4.6, the power to allow an exception to a development standard can be exercised where the Commissioner is satisfied that:

3. the proposed development will be **consistent**⁹ with the objectives of the zone (cl 4.6(4)(a)(ii)) (at [7]),
4. the proposed development will be **consistent**¹⁰ with the objectives of the standard in question (cl 4.6(4)(a)(ii)) (at [7]),
5. the written request adequately demonstrates that compliance with the development standard is **unreasonable or unnecessary**¹¹ in the

⁸ Compare s.75H(2) (repealed in 2011) using a similar criterion with respect to an environmental assessment prior to public release.

⁹ *Moskovich v Waverley Council* [2016] NSWLEC 1015 at 53:

53. The threshold of “**consistency**” is different to that of “**achievement**”. The term “consistent” has been considered in judgements of the Court in relation to zone objectives and has been interpreted to mean “**compatible**” or “**capable of existing together in harmony**” (*Dem Gillespies v Warringah Council* (2002) 124 LGRA 147; *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190) or “**not being antipathetic**” (*Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21). Whichever interpretation is adopted the test of “**consistency**” is less onerous than that of “**achievement**”.

¹⁰ *Ibid* [3].

¹¹ *Ibid* Wehbe [42-51] and noting that in *Initial Action* [22] “These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may

circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)) (at [38]), and

6. the written request adequately demonstrates that there are **sufficient environmental planning grounds** to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)) (at [38]).

[bold and underlining added]

28. Clause 4.6(4)(a)(ii) presumes that if the proposed development is consistent [emphasis added] with the objectives of the zone and of the standard (i.e. meets (1) and (2) above), then it is in the public interest. I also note that nothing in cl 4.6 requires the consistency with the objectives to be established in or by the written request.
29. Further, in outlining (3) and (4) above, regarding the requirements for the written request, Preston CJ stated that the Court need not be directly satisfied that compliance is unreasonable or unnecessary and sufficient environmental planning grounds exist, but rather "only indirectly by being satisfied that the applicant's written request has adequately addressed" those matters.

We note that the above observation at [29] has been further clarified by **RebelMH** and **Baron**.

The most recent guidance of the LEC arises from **SJD** where Preston CJ held:

46. "... the provisions of a development control plan cannot be used to interpret the provisions of a local environmental plan unless the provisions of the local environmental plan expressly refer to the provisions of the development control plan for that purpose. ..."

47. "The fact that the principal purpose of a development control plan is to provide guidance on certain matters referred to in s 3.42(1) of the EPA Act does not make it permissible to construe the provisions of a local environmental plan by reference to a development control plan.

49. " So understood, the Commissioner did not err on a question of law by not construing the "desired future character" in the objectives of the height and development standards in cl 4.3 and cl 4.4 and the objective of the B2 zone of WLEP by reference to the desired future character provisions of WDCP."

Therefore, this clause 4.6 will limit itself to the express objectives of the zone and development standard.

I note that Clay AC, in **SJD DB2 Pty Ltd v Woollahra Municipal Council** [2020] NSWLEC 1112, accepted the Applicant's position and found that the adjacent buildings which also exceeded the height controls should be

be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way."

considered when determining desired future character. Importantly, the Commissioner found that it is possible to meet the objectives of the height and FSR controls even if there is a breach of those controls. Commissioner Clay also clearly supported the use of clause 4.6 requests and said as follows:

"It should be noted cl4.6 of WLEP is as much a part of WLEP as the clauses with development standards. Planning is not, other than orderly, simply because there is reliance on cl 4.6 for an appropriate planning outcome."

In *Abrams v The Council of the City of Sydney (No 2)* [2018] NSWLEC 85, Robson J, (**Abrams**) on appeal, concluded that the previous development consents were relevant instruments to be considered for the purpose of s 39(4) of the *Land and Environment Court Act 1979*.

Robson J 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'. In this case the latter applies.

In the **Big Property** case Commissioner O'Neil **held that the desired future character of an area is not determined solely by the development standards that control building envelopes for the area**. Commissioner O'Neil specifically referenced **SJD** and further held:

"The presumption that the development standards that control building envelopes determine the desired future character of an area is based upon a false notion that those building envelopes represent, or are derived from, a fixed three-dimensional masterplan of building envelopes for the area and the realisation of that masterplan will achieve the desired urban character. Although development standards for building envelopes are mostly based on comprehensive studies and strategic plans, they are frequently generic, as demonstrated by the large areas of a single colour representing a single standard on Local Environmental Plan maps, and they reflect the zoning map. As generic standards, they do not necessarily account for existing and approved development, site amalgamations, the location of heritage items or the nuances of an individual site. Nor can they account for provisions under other EPLs that incentivise particular development with GFA bonuses or other mechanisms that intensify development. All these factors push the ultimate contest for evaluating and determining a building envelope for a specific use on a site to the development application stage. The application of the compulsory provisions of cl 4.6 further erodes the relationship between numeric standards for building envelopes and the realised built character of a locality" [at44]"

In the more recent **HPG** case Commissioner O'Neil held

"The desired future character of the locality can be evaluated by reference to matters other than the development standards that

determine the building envelope for the site, including the existing development that forms the built context of the site (Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115 (SJD DB2) at [54]). The desired future character of an area is not determined and fixed by the applicable development standards for height and FSR, because they do not, alone, fix the realised building envelope for a site. The application of the compulsory provisions of cl 4.6 further erodes the relationship between numeric standards for building envelopes and the realised built character of a locality (SJD DB2 at [62]-[63]). Development standards that determine building envelopes can only contribute to shaping the character of the locality (SJD DB2 at [53]-[54] and [59]-[60])."

It was again also important that 'desired future character' was not defined in the LEP itself. Indeed, the Council sought to define the 'desired future character' by reference not even to a DCP, but to the 'Mosman Local Housing Strategy', a document which the Court noted 'postdates' the LEP, and could not therefore be relied upon to define terms used in the LEP.

In **Pallas** Development Management Pty Limited trading as Fortis Development Group v Woollahra Municipal Council [2022] NSWLEC 1048 – at [99] Morris AC held:

"I do not accept ... evidence that for the impact to be **minimised** it would have to be reduced the smallest possible amount or degree. To do so would mean that there would be no impact at all. The objective of the control contemplates some impact, it just requires the impact to be minimised. I accept the submission of ..., for the Applicant, that to adopt this logic, there would always be a further reduction possible to the point of there being no breach and therefore no impact. This is not what is contemplated by cl 4.6 of the WLEP. It contemplates that the development standard will be breached. What has to be determined is if that breach is appropriate in the circumstances of the case. ..."
[abridged]

The *Pallas* approach should be applied when considering objectives of standards that seek to *minimise* impacts.

Finally, the consent authority retains a very broad discretion under clause 4.6 and there are no numerical limits placed upon the dispensing power, either by clause 4.6 or by the interpretation of clause 4.6 by the Courts.