

Clause 4.6 Variation Statement - FSR.

Residential Towers – Bella Vista TOD

40 Memorial Ave, Bella Vista

On behalf of:

Landen Dev No 8 Pty Ltd

Submitted to:

Department of Planning Housing and Infrastructure

26 August 2025

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This report is current at the date of the State Significant Development Application only.

This report is to be read in its entirety and in association with other documentation submitted as part of the State Significant Development Application.

Project Name		40 Memorial Avenue, Bella Vista - residential towers		
Project Number		24-077		
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1. Introduction

Knight Frank Town Planning has been engaged to prepare a written statement addressing the matters listed in Clause 4.6 (Exceptions to development standards) of *The Hills Local Environmental Plan 2019* (THLEP 2019). This statement relates to a requested exceedance of Clause 4.4 (Floor space ratio) and is being prepared in support of a State Significant Development Application (SSDA). The subject site is 40 Memorial Avenue and 1Z Free Settlers Drive, Bella Vista (the site), comprising land legally described as Lots 1 1237055 and Lot 1 DP 1298513 respectively.

The proposed development comprises the construction of a residential flat building development to be constructed in two (2) stages comprising four (4) residential towers connected by two (2) levels of basement which will deliver 444 units. The following is a more detailed description of the works for which consent is sought through this SSDA application:

Site Preparation and Infrastructure

- Demolition of all existing structures in the form of a house and shed;
- Vegetation clearance of 98 trees (0.32ha), dewatering and infill of an existing dam;
- Construction of local Road 02 and part construction of Road 01;
- Installation of essential site servicing and infrastructure, including Padmount electrical stations; and
- Consolidation and subdivision of Lot 1 DP 1237055 and part Lot 1 DP 1298513 to provide for the development site, local road and open space;

Residential Development

- Construction of four (4) residential buildings in two (2) stages;
- Delivery of 444 residential dwellings comprising 438 apartments and 6 townhouses;
- Provision of two (2) levels of basement comprising car parking (504 spaces) for residents and visitors;
- Provision of 201 bicycle spaces within the lower ground level;
- Affordable housing delivered through monetary contributions, equivalent to approximately 34 apartments;

Community Infrastructure and Public Benefits

- Creation of high-quality communal open space for residents;
- Creation of a publicly accessible through site link;
- Public domain improvements that will enhance the broader streetscape and community amenity;
- Dedication of open space land 1,464m² to The Hills Shire Council for public purposes;

The proposed development has been designed and positioned to optimise amenity, bulk, and scale for the site. The design has resulted in a minor exceedance of the maximum FSR of 1.9:1 with a proposed FSR of 1.954:1. Consequently, a total of 1,395.9m² GFA or 2.87% exceedance is created. Therefore, this submission seeks a Clause 4.6 variation to the maximum FSR development standard under Clause 4.4 of THLEP 2019.

Clause 4.6 requires a Consent Authority to be satisfied that the applicant has demonstrated compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with the relevant legislation, the Department of Planning and Environment's 'Guide to Varying Development Standards' (November 2023) and case law, this clause 4.6 variation request:

- identifies the development standard to be varied;
- identifies the extent of the variation sought;
- establishes the reasons by which compliance with the development standard is unreasonable or unnecessary in the circumstances; and
- demonstrates that there are sufficient environmental planning grounds to justify the variation.

2. Proposed Variation

2.1 Clause Being Varied

A variation to the maximum floor space ratio development standard is sought under cl 4.6 of the THLEP 2019.

Clause 4.4 Floor space ratio, is as follows:

4.4 Floor Space Ratio

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

- (a) *to ensure development is compatible with the bulk, scale and character of existing and future surrounding development*
- (b) *to provide for a built form that is compatible with the role of town and major centres.*

(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](#).*

2.2 Extent of Variation Sought

The proposed development does not achieve compliance with the maximum floor space ratio (FSR) of 1.9:1 in THLEP 2019 – refer to **Figure 1**. The proposed development will result in an FSR of 1.954:1 as detailed in the table below (refer to **Table 1**).

Relevant to the calculation of the FSR for the development is cl 8.3 - Site area of development includes dedicated land. This confirms that for the purpose of calculating FSR, the site area is taken to include land that is dedicated to the Council or a public authority for a public purpose, including roads, drainage or open space.

Table 1 – GFA & FSR Calculations

Metric	Comment
Site Area	25,569m ²
Permitted GFA	48,581.1m ²
Permitted FSR	1.9:1
Proposed GFA	49,977m ²
Proposed FSR	1.954:1
Numerical Exceedance	1,395.9m ² or 2.87%

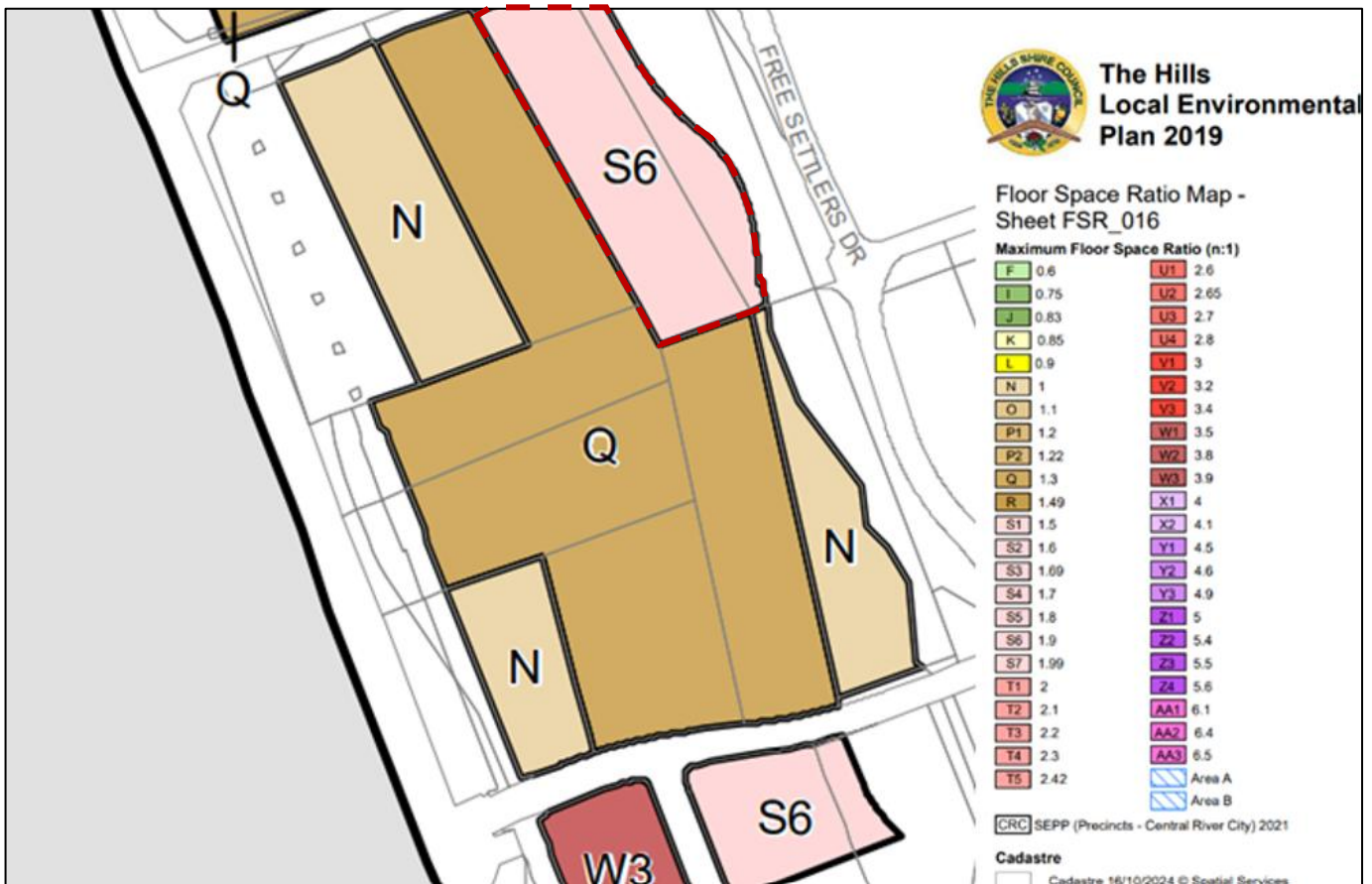


Figure 1 – FSR map extract from HLEP 2019

2.3 Planning basis for the variation sought

The optimal design and siting response for the proposed development in terms of amenity, bulk and scale has resulted in a minor exceedance of the maximum gross floor area and hence the floor space ratio for the site. The buildings footprint and distribution of height have been slightly modified from that within the *Bella Vista and Kellyville Transport Oriented Development Precincts Design Guide* whilst still achieving the principles of the Design Guide. This is demonstrated in Figures 2 and 3.

The response that has been adopted is considered to achieve an optimal outcome as follows:

- Enhances the interface with Elizabeth MacArthur Creek;
- Allows for greater connectivity with a publicly accessible through site link;
- Provides an appropriate height transition to Memorial Ave;
- Enhances the residential amenity for future residents of the development;
- The resulting built form and its ability to achieve design excellence pursuant to cl8.6 of THLEP 2019 has been the subject of review on two occasions by the State Design Review Panel; and
- Maximises the amount of affordable housing.



Figure 2 – General building heights strategy Precinct Design Guide (Source: DPHI)

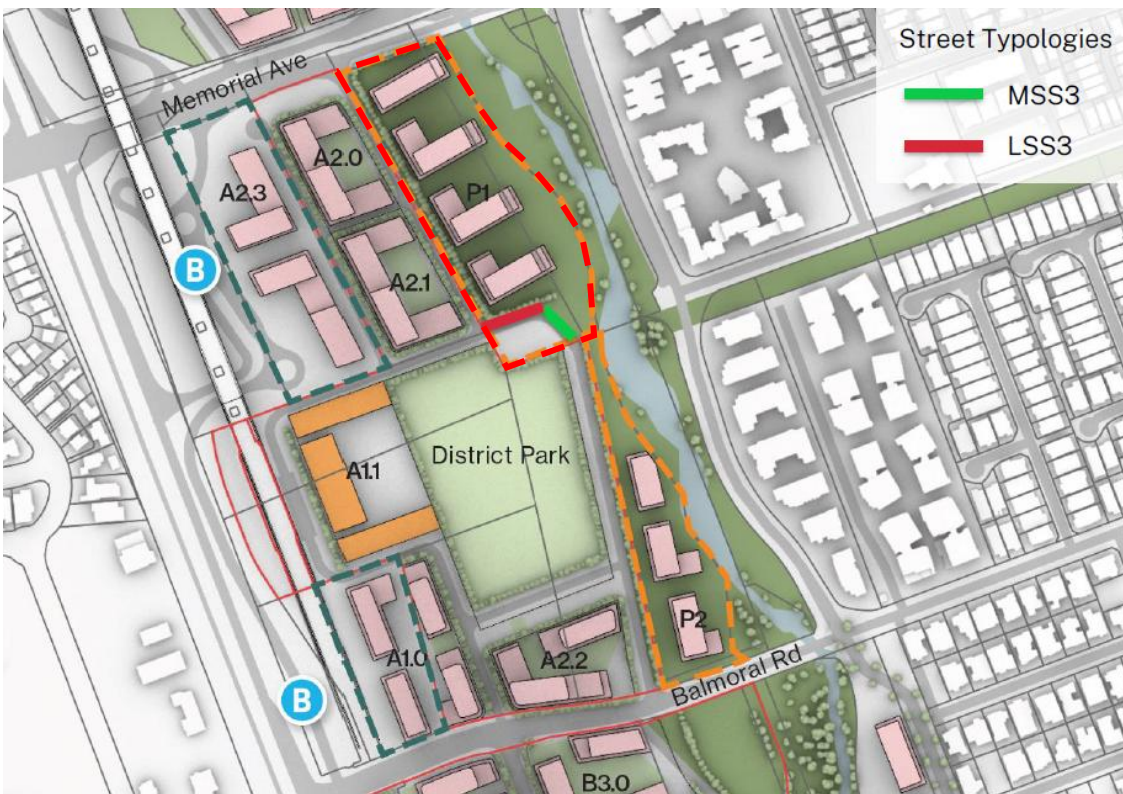


Figure 3 – Layout Plan for part Metro Fringe Sub-Precinct, Precinct Design Guide (Source: DPHI)

3. Assessment of Proposed Variation

3.1 Clause 4.6 Exceptions to Development Standards

Clause 4.6 Exceptions to development standards of the THLEP 2019 permits the consent authority the flexibility to grant consent where a development exceeds a development standard. Cl 4.6 states:

- (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.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant 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 a development application for development that proposes to contravene a development standard 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 subclause (3).*
- (5) *(Repealed)*
- (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 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)*
- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following—*
 - (a) *a development standard for complying development,*
 - (b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
 - (c) *clause 5.4,*
 - (caa) *clause 5.5,*
 - (cab) *(Repealed)*
 - (ca) *clause 6.3,*
 - (cb) *clause 7.11,*
 - (cc) *clause 7.15.*

3.2 Objectives

The object of cl4.6 is to provide a degree of flexibility when considering a development against the development standards to achieve better outcomes for and from development in particular circumstances.

This submission demonstrates that despite not achieving compliance with the maximum FSR development standard, a better outcome is achieved in this instance and that it is appropriate to apply flexibility in this circumstance.

3.3 Exclusions

The consent authority may grant development consent even though the development would contravene a development standard imposed by the THLEP 2019. Clause 4.4 is not a development standard expressly excluded from the operation of this clause as noted in Clause 4.6(8).

3.4 Compliance with the development standard is unreasonable or unnecessary

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the development being considered as justified using the *Wehbe v Pittwater Council [2007] NSWLEC827* (Wehbe) Court case, where Preston CJ identified five ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. The five ways outlined in Wehbe are:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (Fourth Way).
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable and unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Way).

This submission relies on the First Way to support our submission that compliance with the development standard is unreasonable or unnecessary.

We note that in *Initial Action Pty Ltd v Woollahra Municipal Council [2018 NSWLEC 118]*, Chief Justice Preston considered the proper interpretation of clause 4.6 and found that:

- Clause 4.6 does not require a proponent to show that the non-compliant development would have a neutral or beneficial test relative to a compliant development (at [87]);
- There is no requirement for a clause 4.6 request to show that the proposed development would have a 'better environmental planning outcome for the site' relative to a development that complies with the standard (at [88]); and
- One way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts (at [94(c)]). That is, the absence of environmental harm is sufficient to show that compliance with the development standard is unreasonable or unnecessary.

These comments of the Chief Judge are particularly pertinent in this case as this clause 4.6 request shows that there are no adverse amenity or design impacts due to non-compliance with the maximum permitted FSR.

Objectives of the Development Standard (First Way)

The following are the objectives of the floor space ratio development standard being varied:

- (a) *to ensure development is compatible with the bulk, scale and character of existing and future surrounding development*
- (b) *to provide for a built form that is compatible with the role of town and major centres.*

It is our view that the objectives of the development standard being varied are achieved despite the non-compliance. The following is our consideration of the development against the objectives of the development standard.

- (a) *to ensure development is compatible with the bulk, scale and character of existing and future surrounding development.*

The desired future character for the locality as a high density mixed use area has been confirmed by the Kellyville and Bella Vista and Kellyville Transport Oriented Development (TOD) Precinct (the TOD Precinct) of which the site forms part. The planning framework for the TOD Precinct came into effect on 27 November 2024.

Clause 7.27 of the THLEP 2019 states that development consent must not be granted for development unless the consent authority has considered the *Bella Vista and Kellyville Transport Oriented Development Precincts Design Guide* (Precinct Design Guide). This Precinct Design Guide provides "a hierarchy of objectives and provisions to guide future development in the Precincts. The Design Guide sets clear provisions for how the objectives can be

practically achieved. If it is not possible to satisfy the provisions, applications must demonstrate what other responses are used to achieve the objectives”.

The design and siting of the proposed residential flat building development ensures that the FSR exceedance remains consistent with the relevant objectives of the Precinct Design Guide, being;

- a. *To ensure that development occurs in a coordinated manner and integrates with the layout, structure, and development on the adjacent sites in the Town Centres Sub-Precinct.*
- b. *To ensure development sites are of sufficient size and configuration to support high quality residential development and landscaped setbacks to Elizabeth Macarthur Creek.*
- c. *To ensure the layout and orientation of development sites provides for a variety of building types and diversity in height across the sub-precinct.*
- d. *To ensure the layout and structure of the sub-precinct provides an appropriate interface and edge condition to Elizabeth Macarthur Creek and integrates with the adjacent open space areas and riparian areas in the Town Centres Sub-Precinct.*
- e. *To ensure development within the Metro Fringe sub-precinct provides a transition to the Town Centres Sub-Precinct and delivers development and public domain outcomes that contribute to the outcomes for the adjoining Town Centres Sub-Precinct.*
- f. *To ensure the layout of development sites considers the relationship to the Elizabeth Macarthur Creek corridor, adjoining development sites, and the public domain.*

The resulting bulk, scale and character of the proposed development has been the subject of two independent reviews by the State Design Review Panel (SDRP) - refer to Minutes of 18 June 2025 – Attachment 1. The design has since been modified to incorporate the comments of the SDRP.

A high degree of amenity is achieved within the development with respect to its communal open space (COS) areas at both the ground floor plane and roof top level. The distribution of COS within the development ensures there is equal access for its residents and provides spaces for all weather conditions. A range of amenities are provided, including a swimming pool, landscaped areas, grassed areas, formal seating, indoor and outdoor gym, function room with cooking facilities, BBQ area, library / work from home hub, entertainment and cinema area, and further dining room / gathering space.

The design and siting of the proposed development delivers the highest standard of architectural, urban and landscape design as required when satisfying cl 8.6 - *Design excellence in Bella Vista and Kellyville Station Precincts* of the THLEP 2019. In this case, considering the planning context and interface to Elizabeth Macarthur Creek, most relevantly, the following aspects of the clause:

- *bulk, massing and modulation of buildings,*
- *street frontage heights*
- *environmental impacts such as sustainable design, overshadowing, wind and reflectivity,*
- *the achievement of the principles of ecologically sustainable development,*
- *achieving appropriate interfaces at ground level between the building and the public domain,*

A review of the proposal has been undertaken by Turner Architects (August 2025) addressing the *Design Principles for Residential Development* in Schedule 9 of *State Environmental Planning Policy (Housing)* – refer to *Design Report (Appendix B* of EIS) in the Environmental Impact Statement (EIS). The Design Report notes the *“built form is carefully scaled to increase housing supply while maintaining appropriate relationships with surrounding residential areas, natural assets, and open space corridors. Proximity to Elizabeth Macarthur Creek is respected through appropriate setbacks that protect ecological and visual values while enhancing site permeability and amenity”.*

Objective (b) of the development standard to be varied is as follows:

- (b) *to provide for a built form that is compatible with the role of town and major centres.*

Critically, the proposed FSR exceedance is consistent with and supports the Precinct Design Guide principle of *“leveraging the strategic location of the Precincts to optimise the number of new homes and deliver diverse housing supply, including affordable housing, within walking distance to public transport, open space, and services”.*

For the above stated reasons, it is considered that compliance with the development standard is unreasonable or unnecessary as required under Clause 4.6(3)(a). The variation sought to the maximum permitted FSR meets the objectives of the development standard as it supports the role of Bella Vista as a TOD precinct, in a manner which is compatible with the bulk, scale and character of the future surrounding development as contemplated by the *Bella Vista and Kellyville Transport Oriented Development Precincts Design Guide*.

3.5 Environmental Planning Grounds

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009, it was determined that it is necessary for applicants to demonstrate there exist sufficient grounds particular to the development in the Clause 4.6 objection.

In *WZSydney Pty Ltd v Ku-ring-gai Municipal Council* [2023] NSWLEC 1065, it was considered by Commissioner Dickson that avoiding adverse impacts may constitute sufficient environmental planning grounds as it promotes 'good design and amenity of the built environment' being one of the objects of the EP&A Act 1979. However, that the lack of impact must be specific to the non-compliance to justify the breach.

With respect to the relevant case law mentioned above, there are sufficient environmental planning grounds specific to the development and subject site that warrant support as detailed below:

- Provides a high-quality architectural design consistent with the desired future character of the Precinct;
- Enhances the Elizabeth MacArthur Creek corridor with a human scale building form, integrated landscape strategy, and high quality communal open space areas for use by residents and the public;
- Provides for a range of COS areas that are of a high amenity in that they have been designed for a range of weather conditions, provide for a range of amenities, and is equitable with respect to its distribution;
- Provides for extensive deep soil areas and tree canopy within the development site that well exceed statutory requirements;
- Avoids and minimises impacts on the biodiversity values of the site, with 0.25 ha of the Threatened Ecological Community 'Cumberland shale plains woodland' to be retained within the development site;
- Provides for an additional 97.7sqm of GFA towards affordable housing units within The Hills Shire LGA;
- Shadow diagrams submitted in support of the application confirms that solar access is maintained to adjoining properties with respect to existing and future residential development;
- Shadow diagrams submitted in support of the application confirm that solar access is maintained to adjoining open space areas comprising the Elizabeth Macarthur Creek corridor and future District Park;
- A Traffic and Parking Assessment report has been prepared in support of the SSDA. There are no impacts identified from the development on the local or state road network as it relates to the number of vehicular movements generated; and
- There is no significant or unreasonable environmental or amenity impacts that arise from the exceedance of the permitted FSR.

For the above reasons, it is considered there are sufficient environmental planning grounds consistent with clause 4.6(3)(b) to warrant support from the Department of Planning, Housing and Infrastructure.

3.6 State or regional environmental planning significance

Contravention of the development standard does not raise any matter of significance for State or regional environmental planning.

3.7 Public Interest

The development is considered to be in the public interest as it will achieve a high standard of urban design and supports high density housing in a TOD Precinct.

While it is no longer a statutory requirement to satisfy the matter of 'public benefit', which has since been repealed, for the purpose of considering the development particularly against the zone objectives that it is still prudent to do so.

The subject site is zoned R1 General Residential under the THLEP 2019, and the proposed development is permissible with development consent. The relevant objectives of the R1 zone are as follows:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To enable other land uses that support the adjoining or nearby commercial centres and protect the amenity of the adjoining or nearby residential areas.*

The proposed development is considered to consistent with the objectives of the zone as follows:

- It will contribute towards the housing needs of the community by providing 444 dwellings in a location that is close to population and public transport routes;
- Provides a variety of housing types including adaptable, livable and affordable housing; and
- Contributes towards the housing needs of the community by providing a range of apartment sizes and layouts, including a substantial number with 3 + bedrooms that can accommodate families.

The proposed development achieves the objectives of the development standard being varied and the objectives of the zone in which it is proposed, despite the non-compliance with cl 4.4. Therefore, the proposal remains in the public interest despite the variation being sought.

4. Conclusion

This cl 4.6 variation request demonstrates that compliance with cl 4.4 of the THLEP 2019 is unreasonable and unnecessary in the circumstances of the proposal and that the proposed variation to the standard is an acceptable outcome.

This variation statement details the unique circumstances of the proposed development, which will provide a better planning outcome in the context of the site for the following reasons:

- The proposed FSR is consistent with the desired future character of the locality;
- That the proposed development continues to satisfy the objective of cl 4.4 despite the variation sought;
- There are sufficient environmental planning grounds to justify the contravention in the circumstances of this particular case;
- The proposed development is consistent with the objectives of the R1 General Residential zone;
- The proposed non-compliance with the FSR requirements will not result in any matter of significance for State or regional environmental planning; and
- The proposed development is in the public interest.