

Appendix B

Clause 4.6 Justification – Clause 6.22(2) of the Parramatta Local Environmental Plan 2023

No 241-245 Pennant Hills Road Carlingford

1 Introduction - Content of the clause 4.6 request

This clause 4.6 report has been prepared by Nigel White – Town Planning consultant on behalf of *Triple Eight atf The Corporation Carlingford Unit* for the construction and operation of a mixed-use development including infill affordable housing (the proposal) on land at 241-245 Pennant Hills Road, Carlingford (the site).

This report has been prepared to review a proposed variation from the development standard under **Clause 6.22** of Parramatta Local Environmental Plan 2023 and provide a justification for the variation proposed.

This report accompanies a State Significant Development Application that seeks approval for the demolition and construction of a mixed-use residential and commercial development including infill affordable housing, which involves the following:

- Site preparation works, including demolition of existing structures, vegetation removal as necessary, and bulk excavation.
- Construction and operation of a mixed-use development comprising commercial premises, gymnasium, childcare centre and shop top housing as follows:
 - One 18-storey building (Building A) in the Northeast corner of the site; and two 4-5 storey buildings (Building B & C) along the western edge of the site.
 - A publicly accessible through site link between Pennant Hills Road and Felton Road.
 - 6 commercial tenancies at ground floor

- A three-storey gymnasium within the southern portion of Building C
- A 98 place childcare centre located on level 01 of Building A
- 2680m² of communal open space in the following locations:
 - the roof of Building A, B and C,
 - the two-storey podium of Building A
 - the publicly accessible through site link
- A total of 136 residential apartments across the three buildings, including 25 infill affordable apartments,
 - Provision of three levels of basement parking with a total of 263 car parking spaces comprising:
 - 151 residential car parking spaces (including 24 accessible spaces);
 - 30 commercial car parking spaces (including 4 accessible spaces);
 - 25 childcare parking spaces (including 4 accessible spaces);
 - 26 gymnasium parking spaces (including 2 accessible spaces);
 - 28 visitor car parking spaces (including 12 accessible spaces); and
 - 3 car share spaces.
 - Street tree planting and landscaping, extension and augmentation of services and infrastructure as required. For a detailed project description, refer to the Environmental Impact Statement prepared by Planning Direction.

2 Site Description and Location

The site is identified as 241-245 Pennant Hills Road, Carlingford within the City of Parramatta Local Government Area (LGA). It is situated in the western portion of the Carlingford Local Centre and is located approximately 18km northwest of the Sydney Central Business District (CBD).

The site is an irregular triangular shape and comprises approximate frontages of 140m to Pennant Hills Road to the southeast, 100m to Felton Road to the north and 135m to the adjoining properties to the west. The site comprises a total area of 6331m², with the entirety of the site under single ownership.

The site is described in Table 1 below and illustrated in the Site Aerial Map in Figure 1 following.

Reference	Street address	Legal description	Area
1	241-245 Pennant Hills Road	Lot 1 DP805059	-
2	241-245 Pennant Hills Road	Lot 2 DP805059	-
3	241-245 Pennant Hills Road	Lot 5 DP805059	-
4	241-245 Pennant Hills Road	Lot 6 DP805059	-

Reference	Street address	Legal description	Area
1	241-245 Pennant Hills Road	Lot 1 DP805059	-
2	241-245 Pennant Hills Road	Lot 2 DP805059	-
3	241-245 Pennant Hills Road	Lot 5 DP805059	-
4	241-245 Pennant Hills Road	Lot 6 DP805059	-
total			6331m ²



Figure 1 Site Aerial Map

Source: Nearmap, edits by Kennedy Associates Architects



Source: Nearmap, edits by Kennedy Associates Architects

SEARs Requirements Declaration: Project

Declaration		
Name	Nigel white	
Qualifications	Bachelor of Applied Science – (Environmental Planning)	
The undersigned declares that this clause 4.6 justification has been prepared in response to the following SEARs requirements issued for the Project on 23 May 2025 for SSD- SSD-84699461:		
SEARs item no.	SEARs Requirement	Relevant Section of this Report
1	1. Statutory Context • Address all relevant legislation, environmental planning instruments (EPIs) (including drafts), plans, policies, guidelines and planning circulars. • <u>Identify compliance with applicable development standards and provide a detailed justification for any non-compliances.</u> • Provide an explanation of how the development as described in the EIS is consistent with the development as was described in the request for SEARs (including any components that were not SSD) and provide a justification for any differences. • Address the requirements of any approvals applying to the site, including any concept approval, any endorsed or draft master plan, precinct plan or any recommendation from Gateway determination. • Provide an accurate summary of the detailed assessment of the impacts of the project and integrate the findings and recommendations of technical reports into the justification and evaluation of the project as a whole. • If affordable housing is being proposed, provide the name and ABN of the registered community housing provider that will be responsible for managing the affordable housing component, along with documentation confirming the provider's agreement to this responsibility.	3
Signed		
		
Dated 26 th September 2025		

3 Clause 4.6 Justification

Clause 6.22 of Parramatta Local Environmental Plan 2023 relates to **Development at 241–245 Pennant Hills Road, Carlingford** and states that:

(1) This clause applies to Lots 1, 2, 5 and 6, DP 805059, 241–245 Pennant Hills Road, Carlingford.

(2) Development consent must not be granted to the erection of a building on the land unless the consent authority is satisfied the building will include at least 1,970m² of floor area used for commercial premises.

(3) In calculating a floor space ratio under clause 4.5, a maximum of 465m² of the floor area of enclosed private balconies may be excluded from the gross floor area of a building on the land.

The proposed development provides for a development which includes commercial floor space on the ground floor of the development, recreational facility (indoor) and the inclusion of a childcare centre on the first level of the tower building. A total non-residential floor space of 2,060sqm is provided on-site.

Of note from subclause (2) is the reference to ‘commercial premises’. The total floor space allocated to the provision of commercial premises is 857sqm in strict application of the definition. A shortfall of 1,113sqm eventuates being a departure of 56% from the strict application of the requirement of subclause (2).

As the centre-based childcare facilities and the gym (recreational facilities – indoor) is separately defined to commercial premises, a technical non-compliance arises.

Given the above non-compliance with Clause 6.22 of the LEP, consideration of the matter is given pursuant to the provisions of clause 4.6 of the LEP for completeness. The proposed development has been designed to comply with the overall FSR and building height controls applying to the subject site pursuant to the provisions of *State Environmental Planning Policy (Housing) 2021, Chapter 2, Part 2, Division 1*.

The objectives of clause 4.6 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.*

Clause 4.6 of the LEP notably is designed to provide **flexibility when applying development standards particularly when the variation of the standard enables a better development outcome.**

The variation from the numerical control of clause 6.22(2) arises because of the reference to ‘commercial premises’ in the clause.

It should be noted that the planning proposal for the upzoning of the subject site always included a gym in the western row building and a childcare centre on level 1 of the tower building from the inception of the application. The Department of Planning, housing And Infrastructure and Parramatta Council were aware of the collective of uses for the site, inclusive of a childcare centre in the development when assessing the merits of the planning proposal.

A childcare centre is an appropriate use on the first level of the building as it provides a valuable service to the community given the site’s nexus to James Ruse Agricultural High School and Carlingford West Public and Cumberland high School. The proposed childcare centre provides a suitable transition in the tower building separating the ground floor commercial tenancies from the residential apartments above.

A childcare centre on the subject site will be in high demand by parents with siblings already attending the schools nearby and the centre will only operate till 6.00PM of a weekday. The non-occupation of level 1 after business hours enhances the level of amenity afforded apartment dwellers above.

The building allocated to a gym over 3 floors provide the appropriate floor to ceiling heights and open floor plan suitable for commercial occupation. Both the childcare centre space and the gym can be readily adaptable for use as a commercial premises should the demand arise.

Effectively the intent of the clause is met with a provision of commercial related uses with a floor space of more than 1,970sqm on-site.

A degree of flexibility to the application of the of the development standard in clause 6.22(2) is therefore warranted in this instance.

No adverse planning consequences (excess overshadowing, privacy, visual impact, urban design/streetscape, heritage, neighbourhood character) arise because of the variation. Compliance is achieved with the floor space ratio and building height controls pursuant to the *provisions of State Environmental Planning Policy (Housing) 2021, Chapter 2, Part 2, Division 1*. Rather, in this case the variation facilitates the provision of quality internal spaces and the optimal use of level 1 in the tower building.

The proposed mix of uses is appropriate and affiliated. Parents using the childcare centre can also use the gymnasium and or café/restaurant uses on-site.

The provision of commercial premises on level 1 of the tower building may not be as attractive or usable from a viability sense. Typically, commercial uses function best at ground level where interaction with pedestrians can contribute to the success of the business. As the site is also located on the fringe of the Carlingford commercial precinct, the likely occupation of the first floor by a tenant conducting a commercial premises use is likely to be reduced.

The proposed variation to the floor space development standard for the provision of commercial premises will not be discernible to the casual observer from a streetscape perspective. The buildings retain a commercial appearance and can be used potentially for alternate commercial uses in the future.

For reasons expressed in this submission the ‘flexibility’ provided by clause 4.6 of the PLEP facilitates a design and use outcome for the subject site that does not adversely impact on any adjoining property despite the proposed variation to clause 6.22(2).

Application of Clause 4.6

(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.

Clause 4.6(2) of the PLEP provides that development consent may be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this does not apply to a development standard that is expressly excluded from the operation of this clause.

Clauses 6.22 of the PLEP is not expressly excluded from the operation of clause 4.6 and thus the consent authority would have the power to grant consent to a breach of the specified development standard under clause 6.22 subject to being satisfied of other matters under clause 4.6.

Contravention of a Development Standard

Clause 4.6(3) of the LEP provides that the consent authority, must not grant development consent for a development that contravenes a development standard unless it is satisfied that the applicant adequately addressed the matters required to be demonstrated by clause 4.6(3).

The matters required to be demonstrated by clause 4.6(3) are considered below.

(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.*

Clause 4.6(3)(a) - Unreasonable and Unnecessary

Clause 4.6(3)(a) requires the applicant to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

The term “unreasonable or unnecessary” is not defined in the relevant environmental planning instruments or in the Act. Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827 at [42] – [49] identifies 5 ways by which strict compliance with a development standard may be unreasonable or unnecessary. This written request adopts the first way identified by Preston CJ.

42..... *The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.*

The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)."

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, the Chief Judge of the Land and Environment Court stated that the commonly cited tests he set out in *Wehbe* remain relevant to a consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances under clause 4.6.

Justice Preston's analysis requires the following questions to be answered.

1. What are the objectives of the development standard?
2. Does the development proffer an alternative means of achieving the objectives of the development? (unnecessary)
3. Would no purpose be served if strict compliance was required? (unreasonable)

Provided below is a commentary in relation to the above three considerations.

1 Objectives of development standard

There are no objectives specifically supporting the development standard.

Of relevance however are the objectives of the E1 Local Centre zones, which are as follows:

- *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 ensure the scale and type of development does not adversely affect the amenity of the surrounding neighbourhood.*

The proposed development is consistent with the objectives of the zone as detailed below:

The proposed development includes a range of compatible uses on-site – business, retail and community use.

The proposed childcare centre is appropriate for encouraging investment and generating employment on-site. The childcare centre will indirectly assist other businesses on-site through patronage. The childcare centre will generate employment for up to 24 people and will assist parents of the precinct through reduced vehicle trips ferrying children between school and childcare.

There will be no disruption of views, loss of privacy or loss of solar access from the proposed use of level 1.

There will be no erosion of bushland or scenic quality because of the delivery non-residential floor space on level 1 of the site.

The provision of additional ‘non-residential’ floor space above the requirement is a positive aspect of the application and for this reason, strict compliance with clause 6.22(2) of the PLEP is unnecessary and unreasonable.

The development proffers alternative means of achieving the objective of the zone and the requirements of clause 6.22(2) of the PLEP.

The proposed development does not impact on the existing levels of open space on-site. The design of level 1 of the tower building will establish an openness in built form created by the outdoor playgrounds and an enhanced appearance of the building relative to walled commercial space.

There would be no purpose served if strict compliance was required by the consent authority given that the proposed development provides compatible uses on-site as encouraged by the zone objectives.

As will be detailed in subsequent parts of this request the variation does not manifest in any adverse planning consequences in terms of streetscape, neighbourhood character or amenity (additional overshadowing and loss of privacy). There are no adverse ‘flow on’ adverse environmental impacts arising from the variation in this instance.

A compliant development in relation to the provision of a ‘commercial premises’ on level 1 of the tower building may have an adverse impact on the function and viability of the development. This is clearly not the intent of clause 6.22 of the PLEP.

The proposed development and use provision on-site represent a cost effective, orderly and economic outcome for the site.

Clause 4.6(3)(b) - Sufficient Environmental planning grounds

Clause 4.6(3)(b) requires the applicant to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard.

The term “environmental planning grounds” is broad and encompasses wide environmental planning grounds beyond the mere absence of environmental harm or impacts : Tuor C in *Glenayr Avenue Pty Ltd v Waverley Council* [2013] NSWLEC 125 at [50].

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1008, Pearson C held at [60] that environmental planning grounds as identified in cl 4.6 must be particular to the circumstances of the proposed development on a site. This finding was not disturbed on appeal (Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 & Meaher JA; Leeming JA in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248.

Additionally, in *Initial Action* the courts considered that 'environmental planning grounds' could also relate to the scope and purpose of the Act, including the Objects. A commentary in relation to the objects is provided below:

Object	Comment
<i>(a) to promote 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</i>	The proposed development includes an appropriate and compatible mix of uses and optimises site and zone opportunities. The proposed development will remove a redundant building from a large and well-located site. A quality development is proposed which includes affordable rental housing commitments, a new gym, a childcare centre to complement the existing nearby schools and potential food outlets. There are no ecological or natural impediments.
<i>(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment</i>	The proposed building has been developed with due consideration given to ESD principles. An attractive development has been generated with high amenity apartment living opportunities. The design has been prepared in balanced consideration of adjoining property amenity and introduces a landscape scheme which will be a feature of the site.
<i>(c) to promote the orderly and economic use and development of land</i>	The proposed design maximises site opportunities in terms of floor space and building height. The provision of three basement car parking levels also reflects the optimum capacity of the site. The transition in the built form represents an appropriate response to the surrounding built form and change in zoning. The proposed development is constructable and economically feasible.
<i>(d) to promote the delivery and maintenance of affordable housing</i>	The proposal includes 25 affordable rental apartments in the development set aside for 15 years.
<i>(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats</i>	The site has no ecology or threatened species. The site is suitable for development in its urban environment.
<i>(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)</i>	Aboriginal and European heritage considerations have been made in the assessment. No impediments to the orderly development of the site arises.
<i>(g) to promote good design and amenity of the built environment</i>	An exceptional well co-ordinated design has been prepared for the site.
<i>(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants</i>	The proposed building will be constructed to Australian Standards and reflect compliance with Building Code of Australia.
<i>(i) to promote the sharing of the responsibility for environmental planning and assessment between</i>	Noted and consistent.

Community engagement has been initiated by the applicant and a formal notification of the application will be undertaken by the consent authority once the SSDA is submitted. Further community engagement can eventuate should the need arise.

Strict compliance with clause 6.22 of the PLEP in this instance would not achieve any additional architectural integrity or urban design merit of the development.

The proposed built form will not be intrusive and will sit well within its site boundaries and context.

In addition, there are no adverse amenity impacts arising, which affect existing residential properties or affect the environment. There are no sensitive land uses adjoining the site which will be adversely impacted by the distribution of floor space as proposed.

In this case the variation to the floor space control does not impact on the ability to accord reasonably with all other performance standards and numerical controls.

Having regard to the above there are well founded environmental planning grounds to vary the development standard in this instance.

The proposed development provides an appropriate infill development and contemporary construction.

The proposed development provides for the housing needs of the community by permitting a range of compatible uses on-site.

The proposal is not inconsistent with, or incapable of, existing in harmony with other developments in the immediate locality.

Approval of the development as proposed will have no impact on any other nearby development opportunities. Approval of the development will also not reduce the provision of commercial uses. It is likely that a higher generation of employment is derived with the childcare centre use as opposed to a typical commercial premises use.

The variation to the commercial floor space standard does not raise any matters of significance for State or regional environmental planning.

There is no public benefit that would be achieved by maintaining strict adherence with the development standard or compromised by approving the development as proposed.

It is contextually appropriate not to strictly apply the floor space development standard in this instance, and it is not an abandonment of the standard.

Conclusion

The proposed provision of 2,060sqm of non-residential floor space exceeds the minimum numerical requirement of clause 6.22(2) of the PLEP. The proposed inclusion of a childcare centre on-site is practical, desirable and an efficient use of level 1 of the tower building. The three floors allocated for use by the gym responds to interest expressed by the current tenant on-site.

Strict compliance with the floor space provision for commercial premises uses is unnecessary and unreasonable given the circumstances of the site and design initiatives. There are sufficient environmental grounds to justify the breach in this instance. It is recommended that the consent authority invoke its powers pursuant to clause 4.6 and approve the application.

It is noted that Acting Commissioner P Clay (SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112) in a recent consideration in relation to the consideration of clause 4.6, deemed that there is no numerical limitation to the extent of the variation sought. Such will be determined on merit.

In consideration of the merits of the application, the proposal is reasonable. Should you require any further information please contact the undersigned.

Yours Faithfully

A handwritten signature in dark ink, appearing to read 'Nigel White', with a stylized flourish at the end.

Nigel White

Bachelor of Applied Science (Environmental Planning)

1st May 2025 - Amended 5th November 2025