

5.0 Request to Vary a Development Standard

Clause 4.6 of the Botany LEP 2013 allows Council to grant consent for development even though the development contravenes a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

This request under clause 4.6 relates to variations to the height of buildings (building height) development standard (clause 4.3) within the Botany LEP 2013.

As detailed in Section 1.1, this request relates to a revised design scheme for the site prepared following detailed analysis of the constraints and opportunities of the site, neighbouring development (existing and proposed), the objectives of the height of buildings standard and issues and matters of concern expressed in the public submissions and by Council and the JRPP to date.

A maximum height of buildings standard of 10m applies to land zoned B4 and 22m for that part of the site zoned R3.

The revised design distributes height around the site to achieve an improved planning outcome taking into account the matters raised by the various stakeholders. Accordingly some buildings are significantly lower in height than the LEP height standards while other buildings protrude above the height standards, in some cases due to the flood planning level above existing ground level. The proposed building heights do not seek to accommodate any additional gross floor area above the total FSR permitted for each zone with the revised scheme complying with the FSR development standards of the LEP.

This Clause 4.6 variation will demonstrate how a scheme that strictly complied across the site would result in a poorer design outcome having regard to the specific objectives of the B4 Mixed Uses zone and R3 Medium Density Residential zone, and the height of buildings standard.

This Clause 4.6 variation considers the site conditions as a whole but has been prepared specifically for the B4 Mixed Uses zone and R3 Medium Density Residential zone of the site which are the specific areas of non-compliance.

5.1.1 Request to Vary the Height of Buildings Development Standard

Clause 4.6 of the Botany LEP 2013 allows for the variation of certain development standards within the LEP, when granting consent to a development application, subject to a request for a variation from the applicant and provided certain tests are satisfied. This document constitutes such a request to vary the Height of Buildings standard in the Botany LEP 2013, as it applies to that portion of the site zoned B4 Mixed Uses and R3 Medium Density Residential, and sets out the justification for doing so.

Clause 4.6 is specifically designed to provide an appropriate degree of flexibility in applying those standards in order to achieve better development outcomes. The variations sought with respect to building height on those parts of the site zoned B4 Mixed Uses and R3 Medium Density Residential stem from shifting some of the allowable GFA and height around the site to achieve a better design outcome for redevelopment of the site as a whole and to address the concerns and issues raised by council and the JRPP, and in particular to deliver a new public park and

additional publicly accessible open space in the form of new landscaped through site pedestrian links.

The relevant provisions of Clause 4.6 state:

- (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 for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) *that **compliance with the development standard is unreasonable or unnecessary in the circumstances of the case,** and*
 - (b) *that there are **sufficient environmental planning grounds to justify contravening the development standard.***
- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is **consistent with the objectives of the particular standard and the objectives for development within the zone** in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Director-General has been obtained.*
- (5) *In deciding whether to grant concurrence, the Director-General must consider:*
 - (a) *whether contravention of the development standard raises any **matter of significance for State or regional environmental planning,** and*
 - (b) *the **public benefit of maintaining the development standard,** and*
 - (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

The principal tests are found in subclauses (3) and (4), namely:

- the '*unreasonable or unnecessary test*' which is similar to that found in State Environmental Planning Policy No.1 – Development Standards (SEPP 1);
- the '*sufficient environmental planning grounds*' test;
- consistency of the proposed development with the objectives of the standard; and
- consistency of the proposed development with the objectives of the zone.

It is understood that the Director- General's concurrence under Clause 4.6(5) has been delegated to Council. Nevertheless, this request to contravene the FSR standard also addresses those matters referred to in subclause (5).

5.1.2 Development Standard to be Varied

The development standard that is sought to be varied as part of this application is clause 4.3 of the Botany LEP 2013, relating to Building Height.

Clause 4.3 of the Botany LEP 2013 is reproduced below in its entirety, and an extract of the Height of Buildings Map to which that clause applies, is reproduced in **Figure 38**. It should be noted that **Figure 38** shows the extent of the entire site, including that portion of the site zoned R2 Low Density Residential, which is not subject to this clause 4.6 variation.

4.3 Height of buildings

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

- (a) *to ensure that the built form of Botany Bay develops in a coordinated and cohesive manner,*
- (b) *to ensure that taller buildings are appropriately located,*
- (c) *to ensure that building height is consistent with the desired future character of an area,*
- (d) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,*
- (e) *to ensure that buildings do not adversely affect the streetscape, skyline or landscape when viewed from adjoining roads and other public places such as parks, and community facilities.*

(2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

(2A) *Despite subclause (2), if an area of land in Zone R3 Medium Density Residential or Zone R4 High Density Residential exceeds 2,000 square metres, the height of a building on that land may exceed the maximum height shown for the land on the Height of Buildings Map but must not exceed 22 metres.*

(2B) *Subclause (2A) does not apply to land identified as "Area 1" on the Height of Buildings Map.*

(2C) *Despite subclause (2), if an area of land identified as "Area 2" on the Height of Buildings Map has a site area exceeding 1,900 square metres, the maximum height for a building on that land may exceed the maximum height shown for the land on the Height of Buildings Map by no more than 2 metres.*

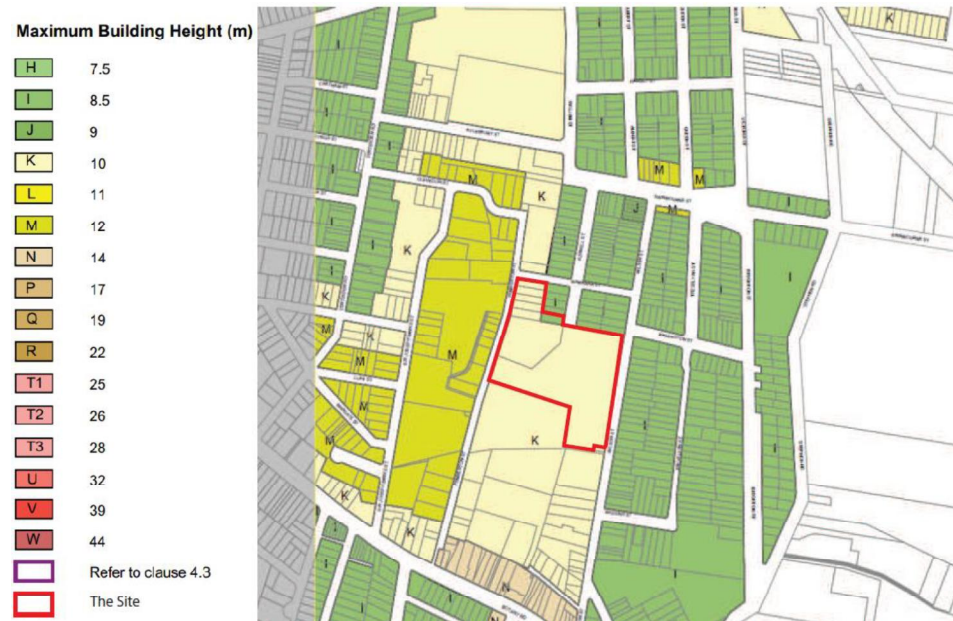


Figure 37 – Extract of Botany LEP 2013 Height of Buildings Map as it applies to 52-54 Pemberton Street, Botany

Source: Botany LEP 2013 Height of Buildings Map Sheet 005

An extract of the zoning map is provided at **Figure 38**.

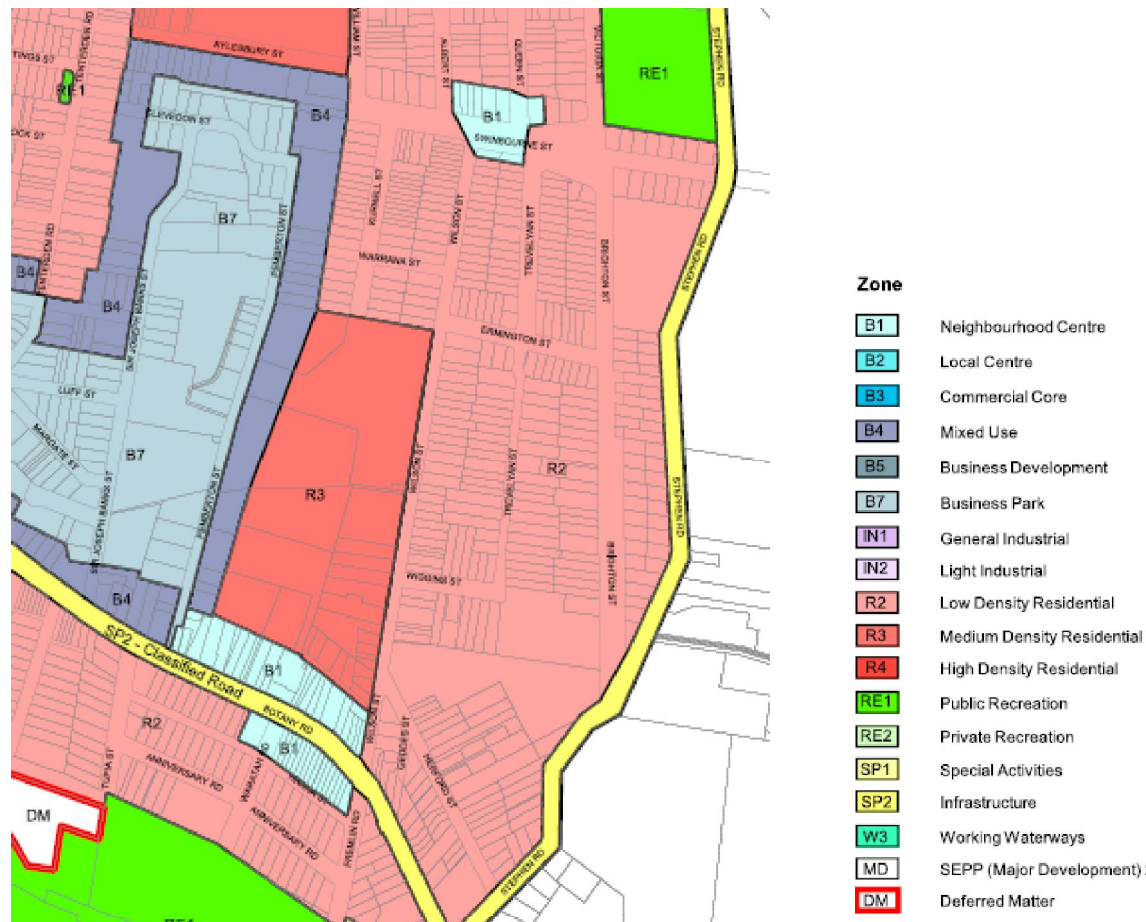


Figure 38 – Extract of Botany Bay Zoning Map

Source: Botany Bay LEP 2013 Zoning Map Sheet 005

Based on the above, the subject land is subject to three separate building height controls. No buildings are proposed on that part of the site zoned R2 and accordingly this clause 4.6 variation relates to proposed buildings on the B4 and R3 zoned parts of the site.

A maximum building height of 10m applies to the western proportion of the site (which is zoned B4 Mixed Uses). A maximum 22m height control applies to the remainder of the subject site (excluding R2 zoned land), pursuant to clause 4.3(2A) of the Botany LEP 2013, which applies to land zoned R3 Medium Density Residential and has a site area greater than 2,000m² in area.

Figure 39 illustrates the extents of the site subject to the 10m height control and the 22m height control. An 8.5m height control applies to the R2 Low Density Residential zoned portion of the site¹.



Figure 39 – Summary of building height controls on 52-54 Pemberton Street, Botany
Source: Botany LEP 2013 Height of Buildings Map Sheet 005 and Australand

5.1.3 Extent of Variation

An overlay of the B4 Mixed Uses and R3 Medium Density Residential zones and the applicable 10m and 22m maximum building heights for these zones, with the proposed scheme is outlined in **Figure 40** below. A copy of the Building Envelope Control Plan is included at **Appendix Q**.

¹ As with Figure 1, Figure 2 shows the extent of the entire site, including that portion of the site zoned R2 Low Density Residential, which is not subject to this clause 4.6 variation

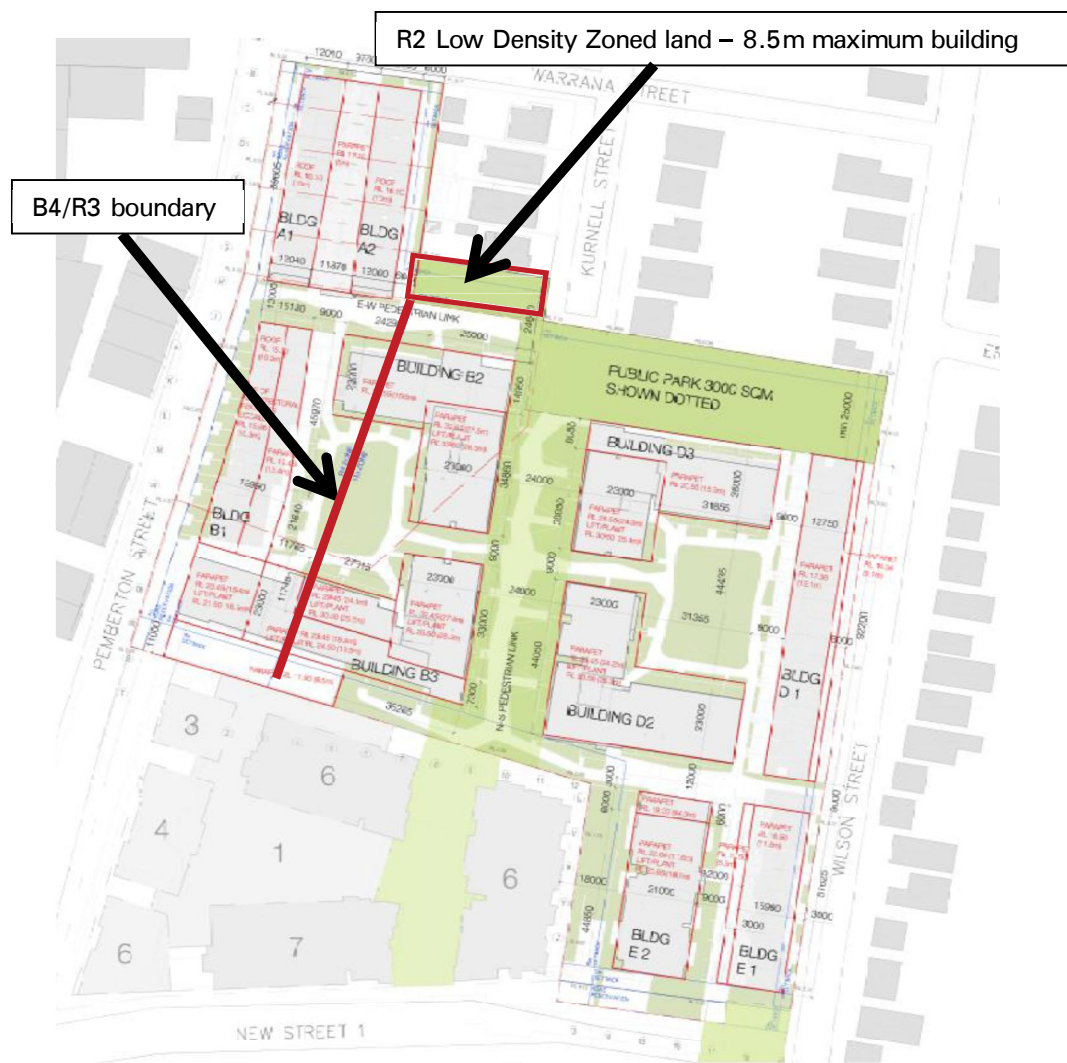


Figure 40 – Summary of proposed heights within the B4 Mixed Uses and R3 Medium Density Residential zones on 52-54 Pemberton Street, Botany

Source: Group GSA

The maximum building height expressed in metres to top of lift/plant for each individual building within the B4 Mixed Use and R3 Medium Density Residential zones as shown on **Figure 4** is summarised in **Table 10** below. The specific buildings subject to this clause 4.6 variation are highlighted in red below.

Table 10 – Summary of proposed building heights by building within the B4 Mixed Uses and R3 Medium Density Residential zones on 52-54 Pemberton Street, Botany

	Botany LEP 2013 Maximum Height Control	Proposed Maximum Height (m)	Variation
B4 Mixed Uses Zone			
Building A	10m	10m	Complies
Building B (terrace style apartments)	10m	Ranging from 10m at street frontage to 12.4m behind	2.4m
Building B (south wing apartment building fronting Pemberton Street)	10m	16.2m	6.2m

	Botany LEP 2013 Maximum Height Control	Proposed Maximum Height (m)	Variation
Building B (south wing apartment building centre where it straddles zone boundary)	10m	19.5m	9.5m
R3 Medium Density Zone			
Building B (south wing apartment building)	22m	Ranging from 19.5m on south elevation to 25.5m behind	2.5m to 3.5m
Building B (east wing apartment building)	22m	28.6m	6.6m
Building B (north wing apartments)	22m	15.5m	Complies
Building D (north wing apartments)	22m	15.3m	Complies
Building D (west wing apartments)	22m	25.4m	3.4m
Building D (terraces)	22m	12.1m	Complies
Building E (terraces)	22m	11.5m	Complies
Building E (residential apartments)	22m	18.7m	Complies

Table 11 above clearly identifies the flexible approach to building heights which has been adopted across the site to respond to site context and achieve a better planning outcome which is in the public interest and delivers public benefits.

As indicated in the table above, a significant portion of the site zoned R3 is proposed to accommodate development well below the permissible height limits which while not subject to a clause 4.6 variation underlies one of the key reasons for the extent of variations outlined above in relation to other parts of the site. It is also noted that no buildings are proposed on that part of the site zoned R2 and further a 3,200m² public park plus additional publically accessible landscaped spaces are proposed.

5.2 Justification for Deviation from the Height of Buildings Standard

5.2.1 The Standard is Unnecessary and Unreasonable

In the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827, which relevantly provides case law relating to SEPP 1 objections, Chief Justice Preston outlined the rationale for development standards, and the ways by which a standard might be considered unnecessary and/or unreasonable. At paragraph 43 of his decision in that case Preston CJ noted:

"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 *Wehbe v Pittwater Council* Preston CJ noted that this approach of satisfying the objectives of the development standard is one of five possible ways of establishing that compliance with a development standard is “unreasonable or unnecessary”. Other ways cited are to establish that:

- the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
- the underlying objective or purpose would be defeated or thwarted if compliance is required with the consequence that compliance is unreasonable;
- 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; or
- the zoning of particular land was unreasonable or inappropriate so that “a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land” and that compliance with the standard in that case would also be unreasonable or unnecessary.

5.2.2 Satisfying the Objectives of the Development Standard

The objectives of the building height development standard (under clause 4.3 of the Botany LEP 2013) are:

- (a) to ensure that the built form of Botany Bay develops in a coordinated and cohesive manner,*
- (b) to ensure that taller buildings are appropriately located,*
- (c) to ensure that building height is consistent with the desired future character of an area,*
- (d) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,*
- (e) to ensure that buildings do not adversely affect the streetscape, skyline or landscape when viewed from adjoining roads and other public places such as parks, and community facilities.*

The proposed development satisfies the objectives of the height of buildings development standard, as set out below.

Objective (a) – Coordinated and cohesive built form

The distribution of height across the site is the outcome of a detailed site analysis which recognises the existing attributes of the site and its surrounds, but importantly recognises the site is located in a precinct undergoing significant transition. Accordingly some parts of the site are proposed to accommodate building heights that exceed the LEP controls whereas other parts of the site will accommodate building heights significantly lower than what the LEP allows. The transfer of floor space to some taller buildings within the site also allows for the provision of a deep soil park to be dedicated to Council in addition to publicly accessible through site links connecting Pemberton Street with Wilson Street and Kurnell Street with the public domain works on the neighbouring development to the south. It also allows for the inclusion of 3 storey terraces than 6 storey apartment buildings fronting Wilson Street which are permissible under the LEP provisions applicable to this part of the site.

The proposed development satisfies objective (a) and demonstrates that it is a coordinated and cohesive built form as the compatibility of the proposed development with the character of the surrounding development has been duly considered, as has the potential impact of the built form on the existing and future character of the area.

This is demonstrated in the B4 Mixed Uses Zone by:

- Revising the design to incorporate terrace style apartments in Building A adjoining land zoned R2 with a maximum height which complies with the 10m LEP control in this position.
- Revising the design to incorporate terrace style apartments in Building B fronting Pemberton Street with a street frontage height of 10.3m stepping up to 12.4m at the rear of this building as a consequence of the need for freeboard to satisfy the required flood design level.
- Revising the design to retain a 4 to 5 storey form at the southern end of Building B (south wing residential apartment building) as this building forms part of the proposed residential apartment building which runs east west across the southern end of the site. Building B south wing steps down to 4 storeys at its frontage with Pemberton Street from 8 storeys where it fronts the N-S pedestrian link. Building B's frontage with Pemberton Street comprises a ground floor commercial tenancy with loading dock behind and 3 levels of residential apartments above. While the proposed 4 storey apartment building at the frontage with Pemberton Street is a storey higher than the approved adjoining building at the northern end of 42 to 44 Pemberton Street (but 2 storeys lower than the maximum approved height of the adjoining development at its frontage with Pemberton Street), the additional storey presents a coordinated and cohesive built form given it forms part of a larger residential flat building which will not detract from the adjoining development. The proposed 11m side setback between the 3 levels of residential apartments and the shared boundary with 42 to 44 Pemberton Street will mitigate any impacts associated with the additional storey.

The building heights proposed in the B4 portion of the site therefore respect lower density accommodation adjoining parts of the site while being largely comparable with the scale of existing and proposed industrial development to the west opposite the site. The stepping up in height from 3 storey terraces to a 4 storey mixed use building with ground floor commercial and 3 levels of apartments above at the southern end of the B4 zone, setback 11m from the boundary with the neighbouring 3 to 6 storey mixed use development, will provide visual interest through the change in dwelling form and building height.

Development in the R3 Residential Zone demonstrates compliance with objective (a) by:

- Proposing terrace houses along the entire eastern portion of the site fronting Wilson Street, which are significantly lower than the 22m height control permitted on that part of the site.
- Providing a deep soil public park between the proposed development and the boundary with adjoining residential development to the north fronting Kurnell Street and Wilson Street, with a minimum setback of 24m and 25m between the northern site boundary and Building B (north wing) and Building D (north wing), respectively, which significantly exceeds the building separation distances of the Residential Flat Design Code.
- Revising the design to reduce the height of Building B (north wing) and Building D (north wing) to 4 storeys or maximum heights of 15.5m and 15.3m, respectively which sit 2 storeys below the applicable 22m height control for this part of the site.
- Reallocating some of the allowable gross floor space that would otherwise be provided within the terraces and other residential flat buildings that sit under the LEP height limits to an additional 1 to 2 storeys located in the centre of the

site fronting the central N-S landscaped open space. The taller towers are positioned in the centre of the site where they best relate to neighbouring high rise development on the site to the south and have less impact on neighbouring dwellings in the R2 zone than would otherwise be the case if buildings to the permitted 22m height were developed around the edges of the R3 land.

- Despite the additional height within the central part of the site the proposed FSR for the R3 land is 1.5549:1 which sits well below the maximum allowable 1.65:1. The proposal also complies with the FSR applicable to the B4 zone, resulting in a proposed development with a total FSR below the LEP controls.

The location of the building bulk in the R3 zone removed from more sensitive lower density residential areas to the north and east ensures that there is a co-ordinated and cohesive approach to the distribution of building height across the subject site taking into account the context of building height within the locality. Accordingly, it is considered that the distribution of height across the site has been planned to achieve a coordinated and cohesive built form.

Objective (b) – Appropriate location of taller buildings

This objective links the location of height across a site to its context.

The proposed development places the tallest buildings (7 and 8 storeys of a maximum 25.4m and 28.6m, respectively) in the central area of the site, where they will be less visible from adjoining properties or the perimeter of the site. The location of the tallest buildings has also been sited having regard to the adjoining medium density project to the south. The proposed distribution of building height in this manner does not result in any adverse impacts regarding the intensity of development with respect to the proposed streetscape or visual impact and allows the more sensitive parts of the site to accommodate lower heights, representing an appropriate and thoughtful response to the site's context.

From the central portions of the site, building heights step down to the west towards Pemberton Street (where proposed building heights are a maximum 4 storeys or 16.5m) and the east towards Wilson Street (where the proposed building heights are a maximum 3 storeys or 12.1m which is materially lower than the maximum allowed by the LEP. The building heights also step down towards the north, transitioning from 7 and 8 storeys to a maximum 4 storeys (15.3m which complies with the 22m height limit applicable to this part of the site as shown in figure 4) and no height is proposed on the R2 Low Density Residential land.

The proposed distribution of building heights results in a height cone to provide a good transition between the different development types. Importantly, the built form immediately fronting Wilson Street is proposed to be limited to 3 storeys – recognising the lower height dwellings located across the street. In addition, the new public park replaces the formerly proposed Building C which provides a building separation greater than 25m and accordingly good transition between the proposed taller elements on Building B and Building D and dwellings along Kurnell Streets. The opportunity for significant landscaping between the buildings is also a meritorious component of the proposed development.

Furthermore, land immediately west of the site across Pemberton Street is also subject to a FSR of 1:1, and benefits from height controls (12m) that are more generous than those that apply to the B4 Mixed Uses portion of the subject site (10m). The proposed development arguably provides a better transition between taller buildings proposed in the middle of the site, and the maximum permissible building height control on adjoining properties, and therefore complements the adjoining lands.

On the basis of the above, it is considered that the stepping of the built form has appropriately located the taller building elements across the site and balanced the development with appropriately located smaller buildings, therefore satisfying Objective (b).

Objective (c) – Ensuring building height is consistent with desired future character

The desired future character of the area is detailed within Part 9C of the BBDCP2013 and provides:

The Precinct will be a predominately residential neighbourhood that integrates with the suburb of Botany and Banksmeadow. It will be a place where people can live, work and play in a safe and comfortable environment. To achieve this vision the area will offer a diversity of housing types of a high design standard, and good quality communal open spaces and local public open spaces to meet the needs of the Botany Bay local community.

It is understood that the intent of the 10m building height control in the B4 Mixed Use zone was to provide an appropriate transition to adjoining development and preserve the character along Pemberton Street. The proposed design achieves this by providing a development with a height and built form generally consistent with other new residential development in the surrounding area which is compatible with the scale of industrial development along Pemberton Street.

Importantly the revised design includes terrace style apartment buildings adjoining exiting residential dwellings in Kurnell Street which comply with the building height control and integrate well with the social fabric of these dwelling types.

The proposed development includes significant landscaping, public domain and other design innovations to provide an improved visual relationship between the new development and the existing, arguably undesirable, character which dominates the Pemberton Street interface.

Further, the application of the 22m height limit on that part of the site zoned R3 Medium Density Residential reflects a desired future character for the site which is distinctively different from existing single dwellings along Wilson and Kurnell streets in the vicinity of the site. Notwithstanding this, the proposed development includes numerous buildings significantly under this allowable height limit and arguably at a lower height and scale than anticipated by the LEP controls.

Objective (d) – Minimise visual impact, disruption of views, loss of privacy and loss of solar access

Redevelopment of the site will no doubt change the visual appearance of the site when viewed from surrounding development. However, it is considered that the change is not a view loss or negative visual impact, as the proposed development will replace the arguably unsightly views of redundant and outdated industrial buildings which do not, in our opinion, currently provide high levels of visual amenity.

There are no established sightlines across or into the site that will be compromised or removed with the proposed development. Rather, the proposed development provides the opportunity to provide visual breaks and establish new view corridors between Buildings A and B, as well as Building D and existing residential development north of the site fronting Wilson Street.

Despite the proposed development exceeding the maximum building height controls applicable to parts of the B4 Mixed Uses and R3 Medium Density Residential zones, the proposed development is appropriately setback from its

boundaries and adjoining development to ensure satisfactory levels of privacy and solar access will be maintained.

The proposed heights of the development will cause no significant overshadowing onto properties to the west, north or south of the development, and no impact in terms of view impact or amenity impact on the enjoyment and use of the rest of the buildings within the subject site. Building separations comply with the recommended distances identified within SEPP 65.

In fact, putting lower buildings in sensitive locations means less impact than the controls anticipate. The visual presentation of townhouse forms along both the Pemberton Street and Wilson Street frontages provide an appropriate bulk and scale compatible with neighbouring development.

The proposed building heights have been tested to ensure that good solar access is achieved to these areas during mid-winter. The shadowing plans appended to the Statement of Environment Effects demonstrate that the open space areas will benefit from good amenity. Views of the proposed development from public places, including the surrounding street network, the green corridor on the adjoining property to the south, and from within the internal publicly open space will be framed by the buildings, and provide good surveillance and activation irrespective of the numerical non compliances with the building height controls.

Objective (e) – No adverse impacts to streetscape, skyline or landscape when viewed from road and public places

The proposed building envelopes across the site represent an appropriate and sensitive distribution of height which has sound urban design and external amenity outcomes. It therefore clearly results in a satisfactory streetscape outcome along both Pemberton Street and Wilson Street and a better outcome than would be achieved if strict compliance was adhered to.

The buildings within both the B4 Mixed Uses zone and the R3 Medium Residential Development zone are in context with the scale of existing and proposed buildings as outlined above. The stepping of building heights, and the siting of taller elements within the central portions of the site and smaller buildings in sensitive locations such as adjoining residential dwellings in Kurnell Street will result in improved visual impacts to the streetscape than could otherwise be achieved through a strictly complying scheme.

5.2.3 Satisfying the Objectives of the Zone

The proposed development exceeds the height controls in both the B4 Mixed Uses zone and the R3 Medium Density Residential zone. As such, the objectives of both zones are required to be considered in determining whether the variation to exceed the applicable height controls is supportable.

The objectives of the B4 Mixed Uses Zone are as follows:

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*

The proposal in its entirety satisfies the B4 Mixed Uses Zone objectives as it:

- proposes a mix of 2 to 3 storey terrace style apartment buildings and a 4 to partial 5 storey mixed use building including ground floor commercial with 3 to partial 4 levels of residential apartments above in the centre of the site, which will be compatible with other land uses located within this and adjoining zones;

- proposes to provide one 333m² commercial tenancy on the ground floor of Building B with frontage to Pemberton Street;
- the proposed development represents an appropriate design response to the opportunities and constraints inherent in the site and its setting and is consistent with the design quality principles outlined in SEPP 65;
- the proposed development locates significant publicly accessible open space on site, thereby providing a localised recreation opportunity within walking and cycling distance, which reduces the need for offsite travel by private vehicles; and
- does not compromise the ability of adjoining properties in the B4 Mixed Uses zone to provide other uses typically found in the zone to provide a precinct wide integrated land use framework that is economically, environmentally and socially sustainable.

The objectives of the R3 Medium Density Residential zone are as follows:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of the residents.*

The proposal in its entirety satisfies the R3 Medium Density Residential Zone objectives as it:

- provides for the housing needs of the community by being designed in such a manner that the social and affordable housing objectives of the Botany LEP 2013 and Botany DCP 2013;
- contributes to housing diversity and will increase the housing choice within the Botany Bay LGA by providing additional housing in an established urban area with good access to major employment centres;
- provides a range of landscaped open spaces areas that are appropriately designed to ensure compatibility within the site, the desired future character of the area, and the broader Botany locality; and
- provides residential development and through-site links in close proximity to existing employment lands thereby encouraging walking and cycling through the local precinct between proposed residential and existing non-residential land uses.

5.3 Sufficient Environmental Planning Grounds

There are sufficient environmental planning grounds to justify flexible application of the building height control as it applies to both the B4 Mixed Uses and R3 Medium Density Residential Zone to allow for some buildings to exceed the maximum height controls and others being significantly below the maximum control.

The non-compliance with the building height control across both the B4 Mixed Uses zone and R3 Medium Density Residential zone is predominantly caused by the technical requirement to raise ground level to address the flood planning level and in relation to the taller buildings in the centre of the site by the proponent's intention to distribute built form across the site in a manner that recognises the site's contextual relationship, future desired character and the opportunity to provide significant publicly accessible open space that significantly exceeds

Council's minimum open space requirements. The case is an appropriate one for the flexible application of the height control in order to facilitate an overall improvement in environmental outcome on this large site.

In addition:

- the height, form and density of the proposed development is considered to be more appropriate in this context than would a strictly complying scheme;
- the proposal satisfies the objectives of the height development standard as it will not adversely affect views, solar access or privacy and is compatible with the bulk, scale and character of the area;
- the proposal satisfies the objectives of the B4 Mixed Uses and R3 Medium Density Residential Zones on the basis that it provides for the housing needs of the community and provides a suitable apartment mix;
- the proposed development does not raise any matters of significance for State or regional environmental planning significance set at Section 2.3 below and summarised as follows:
 - the proposed development is suitable for the site and exhibits demonstrable public interest despite the numerical non-compliances with the applicable height controls; and
 - the proposal is not inconsistent with the objectives of the Botany LEP 2013, Botany DCP 2013, Draft Metropolitan Strategy and the Draft South Subregional Strategy;
- there is no tangible public benefit in maintaining numerical compliance with the applicable height controls as demonstrated throughout this report and the Statement of Environmental Effects.

In light of the above it is considered that there are no environmental planning grounds that warrant maintaining and/or enforcing the numerical building height standard in this instance. Rather, there are clear and justifiable environmental planning merits which justify the application of flexibility allowed for in Clause 4.6.

5.4 Director General's Concurrence

It is understood that the Director-General's concurrence under clause 4.6(5) has been delegated to Council. The following section provides a response to those matters sets out in clause 4.6(5) which must be considered by Council under its delegated authority.

Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The proposed contravention to the building height development standard is well balanced by areas significantly below the standard and does not raise any matter of significance for the state or regional environmental planning. The additional height proposed within Building B on land zoned B4 Mixed Uses and the additional height proposed in Building B and D on land zoned R3 Medium Density Residential does not result in any adverse impact on the surrounding area, and enables a more appropriate distribution of height across the entire site, including the specific location of taller buildings in the centre of the site and adjoining other taller buildings on the adjoining site to the south and smaller buildings along the site's Wilson Street frontage.

The proposal is consistent with the most recent Draft Metropolitan Strategy for Sydney to 2031 (dated March 2013) (the draft Metro Strategy) and the preceding

Metropolitan Plan for Sydney 2036 (dated December 2010), as demonstrated by the Statement of Environment Effects submitted with the DA. In summary:

- The proposed development satisfies the “Balanced Growth” objectives of the draft Metro Strategy in that:
 - The site is effectively part of an urban renewal area.
 - The proposed development is within the Metropolitan Urban Area in a location experiencing strong market demand.
 - The proposed development reduces pressure on greenfield land which may contain agriculture and resource lands.
 - The proposed development reduces pressure on greenfield land which may contain high value environmental land.
 - The proposed development provides growth in an inner ring suburb of Sydney.
 - The proposed development encourages the growth of employment in those areas by co-locating housing and employment and encouraging small businesses servicing the resident population.
- The proposed development satisfies the “Liveable City” objectives of the draft Metro Strategy in that:
 - The proposed development provides much needed additional homes in the subregion.
 - The proposed development provides new housing close to existing infrastructure.
 - The proposed development provides a range of housing types (courtyard units and apartments) and sizes that are in demand in this location.
 - Whilst the proposed development will not provide housing for very low or low income earners it will provide “opportunities to invest in mid- and moderately-priced housing in accessible places to boost supply and improve overall housing affordability.” It also satisfies BASIX requirements and enables savings to household bills.
 - The proposed development provides for the growth and change in the Pemberton – Wilson Precinct as anticipated by the current local plans (including the relevant character statement).
 - The proposed development does not affect any heritage assets.
 - The proposed development follows good principles of urban design, including those in SEPP 65.

The public benefit of maintaining the development standard

There is no public benefit in maintaining the numerical building height development standard in this instance. Specifically, as demonstrated above, there will be no adverse impacts as a result of the variation to the development standard. Maintaining and enforcing the development standard in this case would unreasonably prevent the orderly and economic development of this underutilised site, would result in a less desirable relationship in terms of character with neighbouring development, and would unnecessarily preclude the various community benefits this development brings, including:

- revitalisation of an underutilised and derelict site;
- a new development that is compatible with the desired future character of the locality and recognises that Botany is an area undergoing significant and dynamic transformation;
- a new development offering high quality design and improvements to the streetscape;

- a new development including a public deep soil 3,200m² park in addition to publicly accessible landscaped site through pedestrian linkages;
- provision of construction jobs; and
- a capacity to achieve a better outcome by materially reducing heights in more sensitive locations on the site.

It is therefore considered to be in the public interest that the variation to the development standard be supported in this case.

Any other matters required to be taken into consideration by the Director-General before granting concurrence

In addition to the matters already mentioned, it is worth pointing out that the non-compliance will not set an undesirable precedent in the area. The applicant is not seeking an unreasonable amount of additional height; merely a variation from the height development standard to permit some parts of some buildings to be erected above the height control to allow for lower heights to be achieved on more sensitive parts of this large site in order to achieve a better overall environmental outcome.

Furthermore, the variation provides for the provision of a new public park in addition to publicly accessible site through link and for town/row home built form along the Wilson Street and Pemberton Street frontages with a height and FSR considerably less than what is allowed for this portion of the site. The variation to the height development standard as it applies to the site would facilitate a development scale more closely comparable to the scale of each of the various building components surrounding the site and achieving an overall improvement in the outcome both on and off the site.

5.5 Summary

In putting together or assessing the complex variables of any given development it is important to consider the inter-relationship of the many and often competing planning controls and objectives. Ultimately the development needs to achieve a balanced and efficient response that 'best fits' the site in its physical and statutory context. Clause 4.6 of the Botany LEP 2013 recognises this by permitting flexibility in the application of development standards and has an important objective of achieving better outcomes from development by allowing flexibility in appropriate circumstances. The proposal applies clause 4.6 in order to achieve that objective by proposing a development that has better outcomes both for the development itself and future occupants, and from the development in terms of its external environmental impacts and relationships with the public domain and neighbouring sites.

The development application is accompanied by an offer to enter into a Voluntary Planning Agreement with Botany Council relating to the proposed dedication of land for the new public park and road widening in addition to the embellishment works for these spaces and for works and the creation of an easement over the landscaped pedestrian links.

The proposed development is entirely consistent with the objectives of the Botany LEP 2013 Height of Buildings control, the zone objectives for the B4 Mixed Uses and R3 Medium Density Residential zones, and is in the public interest.

Due to the application of building height bands based on the zoning of the site which appears to follow the underlying subdivision pattern, strict compliance with the 10m height control to Building B in the B4 Mixed Use zone does not lead to the best outcome in addressing contextual issues associated with existing and

desired future character or opportunities to provide appropriately located open space areas which will have a broader community benefit. Furthermore, the 10m height limit for Building B within the B4 zone does not take into account the constraints caused by flooding which require a freeboard which raises the ground floor of the development above the existing ground level. It is necessary to vary the building height control in the B4 Mixed Use zone in order to facilitate a 3 to 4 and part 5 storey development that accommodates the flood level and provides regularised and SEPP 65 compliant building envelopes, of comparable scale to surrounding buildings and which achieves a better overall outcome across the development site by implementing the flexibility in clause 4.6 of the LEP.

The proponent's commitment to construct an appropriately scaled built form fronting Wilson Street and the opportunity to provide extensive open space, which is significantly more than required by Council's local controls, supports the proposed development's variation to the building height control within the R3 Medium Density Residential zone and the B4 Mixed Uses Zone.

On balance, the proposed variation is justified for the following reasons:

- The proposed non-compliance provides the opportunity to appropriately locate building heights across the site which best respond to their immediate context including existing, proposed and future development potential of neighbouring sites in accordance with planning controls, and allow for gross floor area to be concentrated in four (4) buildings in order to provide for a new deep soil park on the site in addition to publically accessible open space, noting that the development complies with the FSR controls for all parts of the site.
- The proposal is compatible with surrounding development, recognising that the site is located in a precinct undergoing transition with heights and built form that will differ in scale between single dwellings, residential apartment buildings and industrial development.
- The additional building height within certain portions of the site zoned B4 Mixed Uses and R3 Medium Density Residential is offset by the proposal proposing less than the maximum permitted height on the other parts of the site, including along the Wilson Street frontage, and on land immediately south of adjoining residential development on Kurnell and Wilson Streets where no buildings are proposed to be located to allow for development of a new public park and a landscaped area on land zoned R2 Low Density Residential.
- The proposed development seeks to redevelop an existing under-utilised site to provide for the housing needs of the community.

Taking this into consideration this statement demonstrates that the consent authority can be satisfied that:

- compliance with the development standard is both unreasonable and unnecessary in the circumstances of the case, because the objectives of the standard and the B4 Mixed Uses Zone and the R3 Medium Density Residential zones are satisfied notwithstanding non-compliance with the standard; and
- there are sufficient environmental planning grounds to justify the contravention, and the variation does not result in any adverse environmental impacts.

The proposal also results in the opportunity to establish a high quality development that positively contributes to the precinct and provides public benefits. For the reasons set out throughout this report, an analysis of the development has demonstrated that on balance compliance with the objectives of the standard is achieved notwithstanding non-compliance with the standard itself. Accordingly, the Clause 4.6 Variation has demonstrated that one of the ways in

which an objection to a development standard might be shown to be unreasonable or unnecessary has been met, and therefore the Objection is well founded.

This Clause 4.6 submission demonstrates the consent authority can be satisfied that the proposed variation to the building height development standard that applies to land zoned B4 Mixed Uses and land zoned R3 Medium Density Residential is justified and satisfies the tests established by the Land and Environment Court for SEPP 1/Clause 4.6 Objections, in that:

- The clause 4.6 variation is 'well founded' because the proposal is compatible with the scale and character of the area and will not have adverse amenity impacts on surrounding land;
- The strict application of the standard would be both unreasonable and unnecessary in the circumstances of the case;
- The strict application of the standard would hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the EP&A Act;
- The non-compliance with the development standard does not raise any matters of State and regional planning significance and will assist with the attainment of policies;
- There is no public benefit in maintaining the building height development standard adopted by the environmental planning instrument for this site; and
- The proposed flexible application of controls achieves better planning outcomes than would be achievable by strict adherence to the controls across the development site.