

EXCEPTIONS TO DEVELOPMENT STANDARDS REPORT

CLAUSE 4.6 EXCEPTION TO THE FLOOR SPACE RATIO (FSR) DEVELOPMENT STANDARD

42-44 Pemberton Street,
BOTANY

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1.0 INTRODUCTION

- 1.1 This Clause 4.6 variation report accompanies amended DA drawings submitted to Council to support the proposed variation to the Floor Space Ratio (FSR) development standard pursuant to Clause 4.4 of Botany Bay LEP 2012.
- 1.2 The subject site is zoned part R3 Residential and Part B4 Mixed Use under the Botany Bay LEP 2013. The portion of the site applicable to the subject application is zoned B4.
- 1.3 Clause 4.4 of the LEP permits a maximum FSR of 1:1 on the B4 zone and 1.65:1 on the R3 zone.
- 1.4 The proposed development has a total FSR across the site of 1.54:1.
- 1.5 The subject site is located at 42-44 Pemberton Street, Botany and the site has a total area of 13,162m² but the portion of the site applicable to the development application is 4,228m².
- 1.6 This development application is for the erection of the final building on this site, which is split into two wings known as Blocks A & C.
- 1.7 Three apartment buildings known as Blocks D, E & F within the Pemberton Street site, were approved by the JRPP on 7 August 2013. The approved buildings contained a total of 164 apartments. The subject DA relates to the portion of the site adjacent to Pemberton Street.
- 1.8 As amended, the application proposes the erection of one building split into two wings, known as Blocks A & C. The building provides a total of 62 apartments plus 8 commercial units.
- 1.9 The unit mix of the apartments is as follows:
 - 8 x commercial units
 - 4 x studio
 - 17 x one bed
 - 41 x two bed
 - Total 70
- 1.10 The development will exceed the maximum floor space ratio limits under the Botany Bay LEP 2013.
- 1.11 The development will provide a significant public benefit by a letter of offer to enter into a VPA for the following:
 - The dedication of 474m² of land for the widening of Pemberton Street and the half road reconstruction of Pemberton Street along the 120 metre frontage of the site
 - The construction of a north south through site link including the dedication of 354m² of land to Council for approximately two thirds of the length of the link and a right of way for public access or dedication of lot in stratum subdivision for the 77m² remainder of the link.
- 1.12 The proposed works will be facilitated through a Voluntary Planning Agreement (VPA) and will provide a significant public benefit.

- 1.13 Clause 4.6 allows for the contravention of a development standard with approval of the consent authority.
- 1.14 A development standard is defined under the Environmental Planning and Assessment Act, 1979 as:
“Provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development”
- 1.15 The objectives of Clause 4.6 ‘Exceptions to Development Standards’ are as follows:
- (a) *To provide an appropriate degree of flexibility in applying certain development standards to particular development; and*
 - (b) *To achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- 1.16 Subclause (3) requires the consent authority to consider a written request from the applicant that demonstrates:
- 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.*
- 1.17 Subclause (4) requires the consent authority to be satisfied that:
- a) *The applicants written request has adequately addressed the matters required to be demonstrated by subclause (3); and*
 - b) *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.*
- 1.18 The proposed variation to the FSR control is assessed with consideration to the principles established by the Land and Environment Court in *Whebe V Pittwater Council [2007] NSW LEC 82* and the principles established in *Winten Developments Pty Ltd v North Sydney Council [2001] NSWLEC 46*.
- 1.19 It is noted that the abovementioned judgements related to the former process of varying a development standard under State Environmental Planning Policy No. 1. Notwithstanding this, the principles established are relevant and are considered in the assessment of the proposed variation to the standard.
- 1.20 This Clause 4.6 variation report has been prepared by LJB Urban Planning and accompanies the development application.

2.0 CLAUSE 4.6 VARIATION REPORT

Is the Requirement a Development Standard?

- 2.1 Clause 4.4 of the Botany Bay Local Environmental Plan 2013 contains a development standard that allows for a maximum FSR on the subject site. Clause 4.4 states:

4.4 Floor space ratio

- (1) *The objectives of this clause are as follows:*
- (a) *to establish standards for the maximum development density and intensity of land use,*
 - (b) *to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality,*
 - (c) *to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing, and are not likely to undergo, a substantial transformation,*
 - (d) *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,*
 - (e) *to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,*
 - (f) *to provide an appropriate correlation between the size of a site and the extent of any development on that site,*
 - (g) *to facilitate development that contributes to the economic growth of Botany Bay.*
- (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.*
- (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 floor space ratio of a building on that land may exceed the maximum floor space ratio shown for the land on the Floor Space Ratio Map but must not exceed 1.5:1.*
- (2B) *Subclause (2A) does not apply to land identified as “Area 1” on the Floor Space Ratio Map.*
- (2C) *Despite subclause (2), if an area of land identified as “Area 2” on the Floor Space Ratio Map has a site area exceeding 1,900 square metres, the maximum floor space ratio for a building on that land may exceed the maximum floor space ratio shown for the land on the Floor Space Ratio Map by no more than 0.65:1.*

- 2.2 The accompanying map specifies a FSR of 1:1 on the subject site. Clause 4.4B of the LEP permits, subject to meeting certain criteria, the FSR of the R3 zone to increase to 1.65:1. The site meets the criteria under Clause 4.4B as follows:

- Part of the site is zoned R3 Medium Density Residential
- The total site area is 13,162m². (R3 zone – 8,934m², B4 zone – 4,228m²)

- The site is identified on the Acid Sulphate Soils Map
- The site is affected by contamination and has been remediated in accordance with a Phase 2 Environmental Assessment and Remediation Action Plan.
- The site is affected by Aircraft Noise.

2.3 These uplift provisions do not apply to the B4 zone.

2.4 Clause 4.4 is development standard.

2.5 A written justification for the proposed variation to the FSR development standard is required in accordance with Clause 4.6.

Variation to the Development Standard.

2.6 As amended, the development proposes a total GFA of 20,276m² which equates to a FSR across the site entire site of 1.54:1. The following table provides a summary of the approved and proposed FSR across the site:

	Stage 1 (Buildings D, E & F)	Stage 2 (Buildings A & C)
Zone	R3 zone	B4 zone
FSR permitted	1.65:1	1:1
Average FSR permitted	1.44:1	
FSR approved	1.07:1	-
GFA approved	14,179m ²	-
GFA proposed	-	6,097m ²
Total GFA proposed	20,276	
TOTAL FSR proposed	1.54:1	

2.7 As the site extends across two FSR zones, the average FSR permitted across the entire site is 1.44:1.

2.8 The variation to the FSR control is 0.1:1. A variation of 7%.

What is the underlying object or purpose of the standard?

2.9 The objectives of Clause 4.4 FSR under Botany Bay LEP 2013 are as follows:

- a) *to establish standards for the maximum development density and intensity of land use,*
- b) *to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality,*
- c) *to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing, and are not likely to undergo, a substantial transformation,*
- d) *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,*
- e) *to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,*
- f) *to provide an appropriate correlation between the size of a site and the extent of any development on that site,*
- g) *to facilitate development that contributes to the economic growth of Botany Bay.*

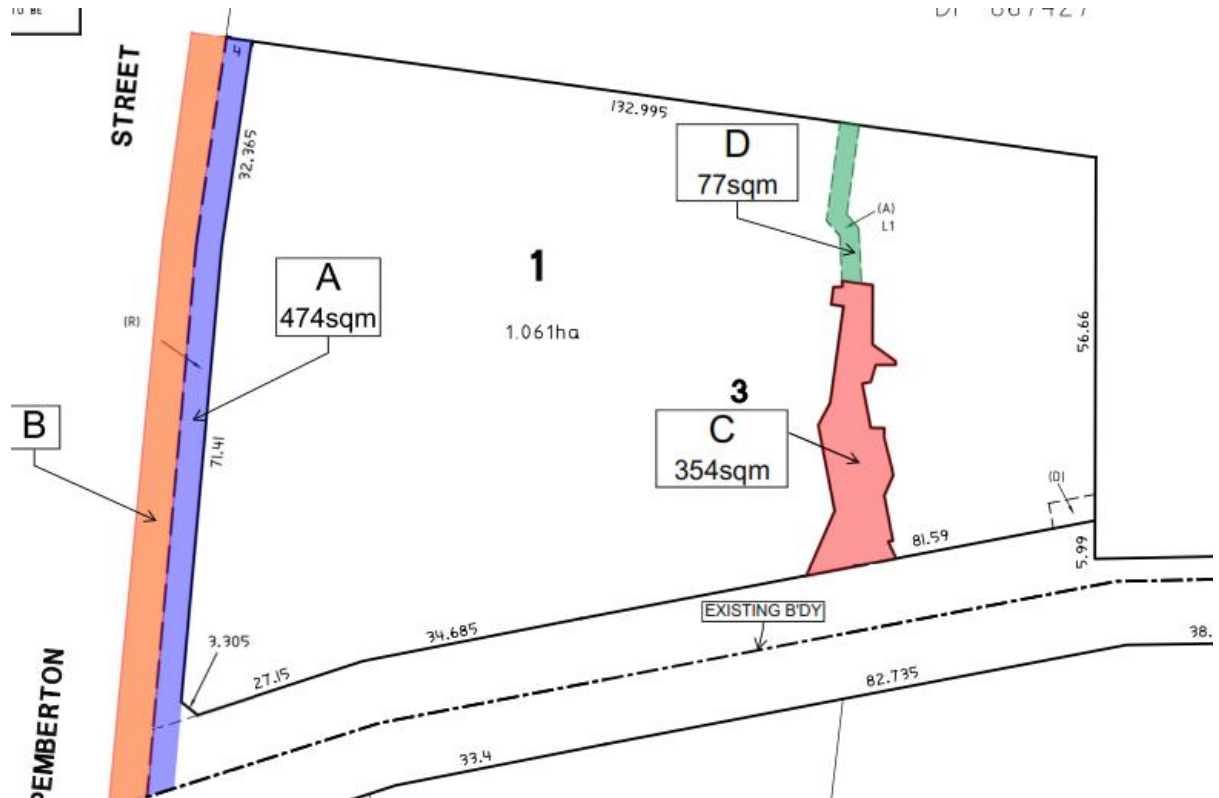
Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

(a) The proposal meets the objectives of the development standard notwithstanding its non-compliance with the standard. In this instance one must determine the objectives of the standard and if not expressly stated in the LEP what are the inferred objectives?

- 2.10 The proposed development will achieve compliance with the objectives of the development standard under Clause 4.4 of the LEP. A detailed assessment against each objective is provided below:

a) to establish standards for the maximum development density and intensity of land use,

- 2.11 The proposed variation to the control represents a minor increase in density, variation of 7% of the density envisaged by the planning controls. As demonstrated in the table above, Stage 1 of the development site did not utilise its FSR potential (permitted 1.65:1, approved 1.07:1). The subject application seeks to utilise the remaining FSR to enable the site to achieve its development density envisaged by the controls.
- 2.12 The minor variation is offset by the substantial public benefits identified in the following diagram and listed below:



A. Dedication of 474m² of land to Council for the purposes of widening of Pemberton Street.

A+B. Half road reconstruction of Pemberton Street including construction of new footpath, landscaped verge, kerb, gutter. Relocation of existing in-ground services and construction of new stormwater drainage system including inlet pits. The design is to be approved by City of Botany Bay.

C. Dedication of 354m² of land in fee simple to Council for through site link. Construction of through site link including paving, landscaping, drainage and lighting. The design is to be approved by City of Botany Bay.

D. Dedication of 77m² right of way or lot in stratum to Council for through site link. Construction of through site link including paving, drainage and lighting. The design is to be approved by City of Botany Bay.

- 2.13 The development will result in significant improvements to the public domain at no cost to the community. The above works are not offset against Section 94 contributions and will significantly improve the permeability and access around and through the precinct which warrant a variation to the FSR standard.

b) to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality,

- 2.14 The bulk and scale of the development is consistent with the desired future character of the Precinct. The DCP recognises the Desired Future Character of the Mixed Use zone along Pemberton St as achieving the stated objectives which are assessed below:

To encourage live/work opportunities;

- 2.15 The development provides the opportunity for employment opportunities in close proximity to residential housing by the inclusion of 8 commercial units on the Pemberton Street frontage. This will facilitate employment opportunity for residents within the precinct. In addition, a large portion of the units are provided with a separate study or nook which will encourage 'home office' type activities.

To encourage improvements to the Public Domain;

- 2.16 As noted above, the development facilitates the construction of a north south through site link including the dedication of 354m² of land to Council for approximately two thirds of the length of the link and 77m² of land as a right of way for public access or dedication of stratum lot to Council. The development will significantly improve pedestrian linkages and access to quality open space provided in the Parkgrove development to the south.
- 2.17 The development will also facilitate the dedication of 474m² of land for the widening of Pemberton Street and the half road reconstruction of Pemberton Street along the 120 metre frontage of the site.
- 2.18 The development will result in significant improvements to the public domain at no cost to the community. The above works are not offset against Section 94 contributions and will significantly improve the permeability and access around and through the precinct.

To ameliorate conflicts on the interface between the non-residential and residential uses;

- 2.19 The subject site provides an appropriate interface between the B7 zone and the R3 zone. The new B7 zoning of the western side of Pemberton Street recognises the shift away from heavier industrial uses and a shift towards light industrial/business park uses. A mixed use building, which is permitted in the B4 zone will enable non-residential uses at ground level that are not sensitive to be at the interface and closer to traffic movements along Pemberton Street and the more sensitive residential uses above.
- 2.20 A larger building in this location enables a physical barrier along Pemberton Street that improves the amenity of the communal space to the east in terms of acoustic and visual privacy.
- 2.21 The building has been designed to comply with the high acoustic requirements for residential developments and the change in focus towards a 'business park' in the B7 zone will further reduce the ongoing potential impact at the interface.
- 2.22 The incorporation of commercial units which are directly accessible from Pemberton Street is an appropriate use in this location. Commercial uses in a mixed use building are highly compatible with residential uses above and these uses will function and integrate well to provide day time and night time activation of the street;
- 2.23 The nature of the proposed development is appropriate adjacent to the Business Park zoning which has a focus on commercial and light industrial uses;

To encourage low scale mixed use development with residential at 2nd floor and a range of compatible vibrant uses such as shops, professional offices, and studio/workshops at ground floor and first floors, which are not impacted by adjoining industrial and commercial uses and

that do not impact on adjoining and adjacent residential amenity;

- 2.24 As noted above, commercial uses are proposed along the Pemberton Street frontage which will address and activate Pemberton Street without adverse impact on the residential above.

To ensure that proposed development is designed to minimise the impact of noise and vibration from uses with the B7 zone;

- 2.25 The submitted acoustic report confirms that the future acoustic amenity of the proposed residential development can achieve the required internal noise levels of the relevant standards and is therefore acoustically acceptable. The scale and form of the development achieves high levels of residential amenity.

- 2.26 Due to the permissibility of residential use in the B4 zone and the acoustic amenity of the development, a lower scale non-residential development is not needed to provide a buffer to the residential uses to the east. Residential uses of this scale are highly appropriate in this location and the design will minimise the impact from the B7 zone on the remainder of the precinct.

To create a focus for a wide variety of businesses that offer employees and visitors a lively and attractive environment, becoming more than just a 'place of work' but one that compliments and connects business activities with each other;

- 2.27 As noted above, the development provides well designed commercial space along the entire Pemberton Street frontage. The incorporation of commercial space will provide for an extension of the B2 zone along Botany Road and enable an increased variety of employment opportunities in the area. The development achieves the intent of the B4 zone which is to encourage mixed use developments notwithstanding the permissibility of residential apartment buildings.

To promote and encourage a high design quality of buildings;

- 2.28 The building presents a quality architectural outcome that will complement the approved buildings in Stage 1 of the site. The building forms are highly articulated with design features that break down the massing of the building and provide visual interest. The buildings are of high design quality. This is further addressed in the architects design statement.

To provide a high level of pedestrian amenity and create a vibrant and safe precinct;

- 2.29 The development maintains the provision a legible vehicular and pedestrian access. Access to the site is off New Street 1 from the Pemberton Street end only, therefore minimising any potential adverse impacts on the residents in Wilson Street. The widening of Pemberton Street will improve vehicle movements around the precinct and increase the separation between the Business Park and commercial / residential uses.

- 2.30 The provision of the through site link will enable the residents in the precinct to traverse north and south through the precinct and take advantage of the public open space and increased permeability. These works are being undertaken at no cost to Council or the community.

To encourage the provision of parking, vehicular access and servicing areas that provide a buffer between residential and non-residential uses and pleasant, safe and provide shared working environment;

- 2.31 The development facilitates the widening of Pemberton Street along the full frontage of the site which will facilitate and improved streetscape and vehicular movement within the precinct.
- 2.32 All parking associated with the commercial uses is contained within the basement carpark accessed off New Street 1 which enables the commercial space to be highly visible and accessible to Pemberton Street.

To ensure the protection and viability of the Botany Local Centre and Banksmeadow Neighbourhood Centre;

- 2.33 The development provides a small proportion (8 commercial tenancies) along the Pemberton Street frontage. It enables the extension of the commercial and retail uses dominant along Botany Road into the precinct. The small scale nature of the non-residential uses is unlikely to impact on the viability of the local centres, but rather will support and increase the variety of employment opportunities in the precinct.

To ensure non-residential development is sympathetic with the streetscape character and maintains the amenity of surrounding residential development;

- 2.34 The commercial space has been designed to provide an attractive interface with the public domain. Disabled access has been consolidated into two points providing access to a large paved terrace that provides individual entry to each of the commercial spaces. The space enables the incorporation of planter boxes with low level planting that will soften the interface and enhance the visual amenity of the spaces.
- 2.35 The residential balconies cantilever to provide weather protection to the commercial terrace and add further interest and demarcate the commercial uses.

To protect existing public stormwater drainage assets;

- 2.36 Works within the precinct will improve the existing stormwater drainage and reduce flooding impacts.

To minimise impact of flooding to the developments, nature environment and built up areas.

- 2.37 The buildings have been raised 1.6 metres above existing ground level to minimise the potential impacts of heavy flooding to the habitable floors which impacts on the overall height and scale of the buildings. Works within the precinct will address the current flooding issues to minimise the impact on existing and proposed developments.

- 2.38 On the basis of the above assessment, the proposed development meets the desired future character of the B4 zone.

c) to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing, and are not likely to undergo, a substantial transformation,

- 2.39 Given the transitional nature of the area from industrial to residential/mixed use, the design proposes an appropriate building form that provides a strong edge to Pemberton Street marking the western residential edge of the precinct. The building will achieve an appropriate visual relationship with existing and future development in the precinct.

- 2.40 Visually the building will complement the existing and future streetscape. The scale of the development results in a quality urban design outcome that presents as an appropriate and well-designed building form to frame Pemberton Street and the western end of New Street 1.

d) 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,

- 2.41 The proposed building will be visible from the surrounding public roads and are unlikely to be visible from public parks or community facilities.

- 2.42 The minor variation (7%) to the FSR control will not be visible in the bulk and scale of the building. The minor increase in floor space sits appropriately in the scale and form of the building as viewed from the surrounding public streets.

- 2.43 As clearly outlined above, the development achieves the objectives of the FSR development standard.

e) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,

- 2.44 The proposed development and variation to the FSR control will not adversely impact on the surrounding properties or the public domain. The minor increase in floor space of 7% will have no increased impact on privacy, solar access or views.

f) to provide an appropriate correlation between the size of a site and the extent of any development on that site,

- 2.45 The proposed development is proportionately appropriate on this site and results in a variation to the permitted FSR of 7%. The site can accordingly accommodate a development of this scale.

- 2.46 In addition, the overall site provides the opportunity for generous landscaped space, communal open space and a north south through site link that will improve the permeability in the precinct. The application provides sufficient parking to accommodate the needs of the future residents and achieves high residential amenity including compliant solar access and cross flow ventilation. As part of the proposed variation to the FSR control, substantial public benefits are being achieved as addressed in detail earlier in this report.

- 2.47 The size of the site is capable of accommodating a development of this scale and density.

g) to facilitate development that contributes to the economic growth of Botany Bay.

- 2.48 The redevelopment of the site will contribute positively to the economic growth of Botany Bay LGA by providing residential accommodation and commercial floor space that will support the surrounding industry and services within the immediate locality.

(b) The underlying objective or purpose is not relevant to the development;

- 2.49 The underlying objectives and purposes remain relevant to the proposed development. The proposed development is consistent with the objectives of the FSR controls as contained in Botany Bay LEP 2013.

(c) The underlying objective or purpose would be defeated or thwarted if compliance was required with the standard;

- 2.50 The underlying objective or purpose of the FSR control remains relevant to the proposed development. The development is consistent with the objectives of the height control.

(d) The development standard has been virtually abandoned or destroyed by Council's own actions.

- 2.51 The Council has not abandoned or destroyed its controls. Notwithstanding this, it has been demonstrated that a variation to the control is appropriate in this instance.

(e) The zoning of the 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.

- 2.52 The zoning of the land is appropriate as it provides an interface between the R3 and B7 zones and encourages a mix of uses to support the surrounding zones. However given the location of this site and its relationship with the R3 zone, the development standards warrant variation.

- 2.53 The proposed development maintains compliance with the objectives of the B4 Mixed Use zone.

- 2.54 The objectives of the B4 Mixed Use Zone under the Botany Bay LEP 2013 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.

- 2.55 The proposed development satisfies the objectives of the B4 Mixed Use zone, as outlined below:

- The development provides for residential uses in a highly accessible location consistent with the objectives of the zone. This site is considered to be a 'suitable' location for residential uses due to its connection with the remainder of the site which is located in the R3 zone;
- The incorporation of commercial units which are directly accessible from Pemberton Street is an appropriate use in this location. Commercial uses in a mixed use building are highly compatible with residential uses above and these uses will function and integrate well to provide day time and night time activation of the street;
- A residential use in this location is considered appropriate due to the low scale building heights on the adjacent B7 and in general on industrial land. The low scale heights enable expansive views across the industrial land. The outlook for the apartments in the upper levels of Block A & C is therefore ideal and will improve the internal amenity of the units;
- The commercial units at ground level will maintain appropriate non-residential uses ensuring that a mix of compatible uses is provided within the locality;
- The B4 portion of the site is opposite B7 zoned land and adjoins the R3 Medium Density Residential zone on the remainder of the site. A residential flat building containing commercial units can contextually exist next to these zones with minimal impact by providing adequate separation.

The nature of the proposed development is appropriate adjacent to the Business Park zoning which has a focus on commercial and light industrial uses; and

- The development will be consistent with the redevelopment of the eastern part of the site which contains residential flat buildings and is located within the R3 zone.
- 2.56 The site is located within an area that has and is currently transitioning to provide a mixture of uses including greater residential development. The proposed development is consistent with the desired future character of the area and the zoning under Botany Bay LEP 2013 as outlined above.
- 2.57 It is therefore considered that the development notwithstanding the variation to the development standard, achieves the objectives of the B4 Mixed Use Zone.

Is the variation in the public interest?

- 2.58 As previously addressed in this report, the development will provide a significant public benefit by a letter of offer to enter into a VPA for the following works:
- *Dedication of 474m² of land to Council for the purposes of widening of Pemberton Street.*
 - *Half road reconstruction of Pemberton Street including construction of new footpath, landscaped verge, kerb, gutter. Relocation of existing in-ground services and construction of new stormwater drainage system including inlet pits. The design is to be approved by City of Botany Bay.*
 - *Dedication of 354m² of land in fee simple to Council for through site link. Construction of through site link including paving, landscaping, drainage and lighting. The design is to be approved by City of Botany Bay.*
 - *Dedication of 77m² right of way or lot in stratum to Council for through site link. Construction of through site link including paving, drainage and lighting. The design is to be approved by City of Botany Bay.*
- 2.59 The proposed works will be facilitated through a Voluntary Planning Agreement (VPA) and will provide a significant public benefit. These works will not be offset against Section 94 contributions and would not occur if the development did not proceed.
- 2.60 The density of development sought is a minor variation (7%) of the FSR control and the minor increase in density is offset by the substantial public benefit. The development will satisfy the demand for additional housing in the area.
- 2.61 As demonstrated in this report, the proposed variation still achieves the objectives of the control and has no additional adverse impact. Clause 4.6 allows for the contravention of a development standard with approval of the consent authority and it is appropriate and in the public interest to exercise this ability in this instance.
- 2.62 A variation to the FSR control is in the public interest.

Is the variation well founded?

2.63 The Clause 4.6 variation report is well founded as it demonstrates as required by Clause 4.6 of the LEP that:

- Compliance with development standard would be unreasonable and unnecessary in the circumstances of this development
- There are sufficient environmental planning grounds to justify the contravention;
- The development meets the objectives of the development standard and the B4 Mixed Use zone, notwithstanding the proposed variation;
- The proposed development is in the public interest and there is no public benefit in maintaining the standard; and
- The contravention does not raise any matter of state or regional significance.

2.64 The variation is considered well founded.

3.0 CONCLUSION

- 3.1 The variation to the development standards relating to Clause 4.4 of the Botany Bay LEP 2013, in respect of FSR is considered appropriate in the circumstances of this development application.
- 3.2 It has been demonstrated that the development is capable of satisfying the objectives of the zone and the development standards.
- 3.3 The development will exceed the maximum FSR but will provide a quality urban design outcome and provide a significant public benefit.
- 3.4 The development will be highly compatible with the transitioning nature and desired future character of the Mascot Station Precinct and the wider Botany Bay LGA.
- 3.5 The proposed variation to the development standards is considered reasonable and necessary.