

EXCEPTIONS TO DEVELOPMENT STANDARDS REPORT

CLAUSE 4.6 EXCEPTION TO THE HEIGHT DEVELOPMENT STANDARD

42-44 Pemberton Street,
BOTANY

18 August 2014 (amended 26.8.14)

Prepared by:



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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 height development standard pursuant to Clause 4.3 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 4.3 of the LEP permits a maximum height of 10 metres on the B4 zoned land and 22 metres on the R3 zoned land.
- 1.4 The proposed development has a maximum height of 21.6 metres.
- 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. These buildings are currently under construction. 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 height 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 height control is assessed against 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 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 4.3 of the Botany Bay Local Environmental Plan 2013 contains a development standard that allows for a maximum height on the subject site. Clause 4.3 states:

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.

- 2.2 Clause 4.3 is a development standard.
- 2.3 A written justification for the proposed variation to the height development standard is required in accordance with Clause 4.6.

Variation to the Development Standard.

2.4 As amended, the development proposes the following building heights:

Building	Maximum Height	Non-Compliance
Building A	13.6 metres to 20 metres	3.6 metres to 10 metres
Building C	20.8 metres to 21.6metres	10.8 metres to 11.6 metres

2.5 The subject site is subject to flood related controls which are a result of flooding downstream and not a result of development of this site. As a consequence the floor levels of the building are required to be raised 1.6 metres above the existing ground level. This constraint impacts on the height of the building.

2.6 The variation to the height control is demonstrated in the following diagrams:



2.7 As demonstrated in the above diagram, the variation to the height standard is minor at the northern end, reducing to 4 storeys and increasing at the southern end where the site addresses the intersection of Pemberton Street and New Street 1.

What is the underlying object or purpose of the standard?

2.8 The objectives of Clause 4.3 Height under Botany Bay LEP 2013 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.*

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

- 2.9 The proposed variation to the height control is assessed with consideration to the principles established by the Land and Environment Court in *Whebe V Pittwater Council [2007] NSW LEC 82*. His Honour Preston CJ set out 5 ways of establishing that compliance with the standard is unreasonable or unnecessary. Each of the 5 ways will be addressed in detail below:

(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 4.3 of the LEP. A detailed assessment against each objective is provided below:

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,

- 2.11 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.
- 2.12 The development locates taller building forms than envisaged by the controls in this location as the proposed building sits between the B7 Business Park zoning and the R3 Medium Density Residential zoning. Due to this relationship, it is appropriate to position taller building forms to the western edge of the site providing a visual and acoustic buffer to the communal open space to the east;
- 2.13 The development of the Wilson and Pemberton Street precinct has evolved with lower scale building forms by the incorporation townhouses along the eastern edge of the precinct addressing the R2 Low Density Residential zone increasing in height heading west across the precinct. The incorporation of higher building forms enables the site to realise its full floor space and density potential. The development provides a cohesive approach to height distribution, locating the taller building forms at the opposite side of the precinct, well removed from the R2 Low Density zoning and the townhouse developments along Wilson Street. The overall height transition as dictated by the height controls is achieved across the precinct.
- 2.14 The location of taller buildings in this location has no adverse impact by way of overshadowing, loss of views and loss of privacy. This will be addressed in further detail below.

- 2.15 The majority of the building is well below the maximum height control permitted on the adjacent R3 zoned land. The building steps down in height to the north concentrating the taller components of the building at the southern end which provides a natural progression of height towards the Botany Road of the Precinct. The building form provides a strong corner element to Pemberton Street and New Street 1. The building height at the corner also steps down to the east along New Street 1 which emphasis the stepping in height down towards the R2 zone. Furthermore the planning controls do not take into account the constraints on this land in regards to flooding and the requirement to raise the lowest habitable floor level an additional 1.6 metres.
- 2.16 Furthermore, the increased building height on this section of the site enables the site to realise its development density as determined by the FSR control. The development of stage 1 of the site (Buildings D, E, F) was approved below the permitted density established by the controls. Stage 1 which falls within the R3 zone has a potential to achieve a FSR of 1.65:1. The approved GFA of Stage 1 was well below the maximum permitted FSR at 1.07:1. Increased building heights, appropriately located, enable the entire site to realise its maximum development density. (it is noted that a minor variation of less than 10% is sought to the FSR control).
- 2.17 Without a variation to the height control, the precinct could not be developed in a cohesive manner that achieves the density anticipated by the controls.

c) to ensure that building height is consistent with the desired future character of an area,

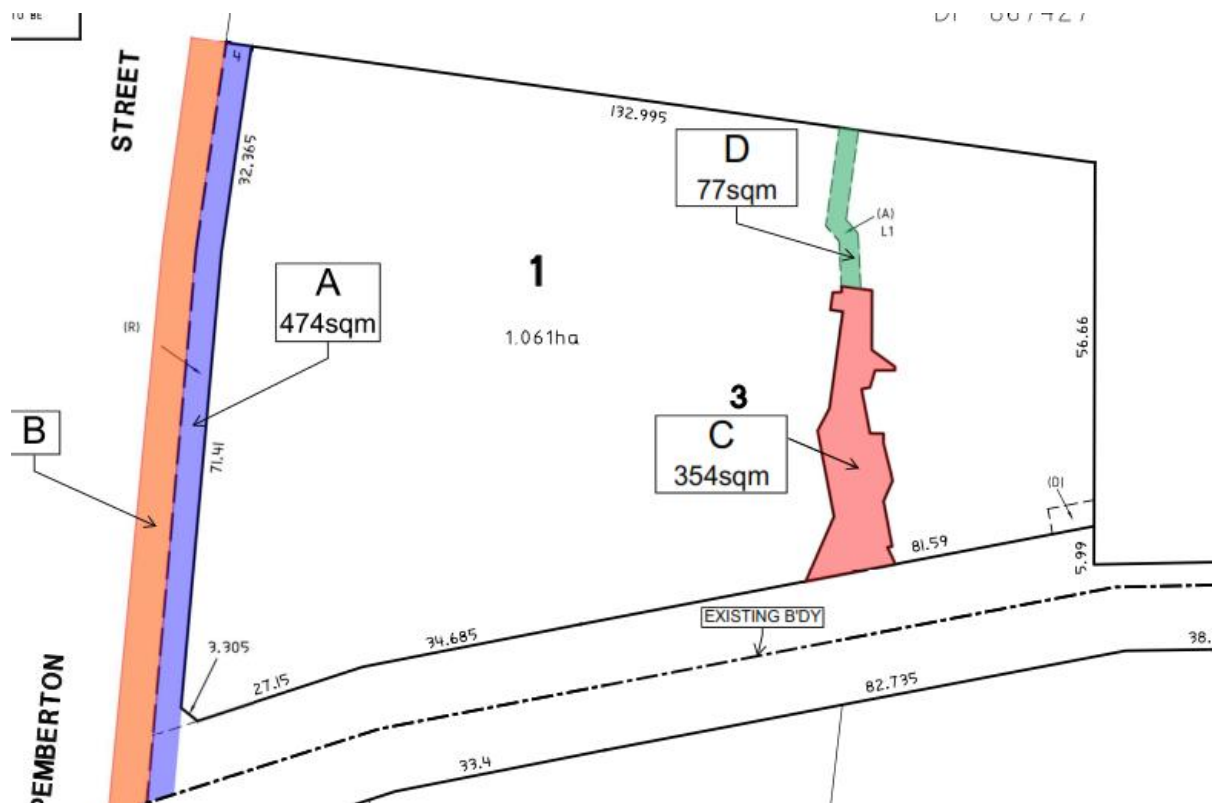
- 2.18 The height of the development is consistent with the desired future character of the Precinct. The DCP recognises the Desired Future Character of the Mixed Use zone along Pemberton St as achieving the stated objectives which are assessed below:

To encourage live/work opportunities;

- 2.19 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;

- 2.20 The development facilitates the construction of a north south through site link including the dedication 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 stratum lot to Council for the remainder. The development will significantly improve pedestrian linkages and access to quality open space provided in the Parkgrove development to the south.
- 2.21 The development will also facilitate the dedication 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 extent of works is shown in the following diagram:



2.22 As shown in the above diagram, the works involve:

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.

2.23 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;

2.24 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.

- 2.25 A higher 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.
- 2.26 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.
- 2.27 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;
- 2.28 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;

- 2.29 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;

- 2.30 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.

- 2.31 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;

- 2.32 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;

- 2.33 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;

- 2.34 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.
- 2.35 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;

- 2.36 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.
- 2.37 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;

- 2.38 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;

- 2.39 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.
- 2.40 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;

- 2.41 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.

- 2.42 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 of the buildings. Works within the precinct will address the current flooding issues to minimise the impact on existing and proposed developments.

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

d) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,

- 2.44 Notwithstanding the variation to the height standard, the proposed development will not have an additional adverse impact on existing or future development in the precinct as discussed below:

Visual Impact

- 2.45 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.
- 2.46 The building forms and elements are enhanced by the use of a restrained materials pallet which reinforces the building modelling.
- 2.47 The facade materials are a combination of face brick of various earth colours and smooth rendered/ painted finishes. Aluminium pergolas are utilised on the upper level and aluminium glass balustrades, windows and doors. The building form and scale with increased verticality than envisaged by the controls provides a strong and visually interesting western edge to the precinct.

Disruption of views

- 2.48 There are no identified views that would be disrupted by the proposed building heights. The building heights are consistent with what is permitted in the adjacent R3 zone and therefore are unlikely to have an additional impact. The additional building height is at the furthest point in the precinct from the low density dwellings in the R2 Low density zone and accordingly, they will not be impacted by the height of the building.
- 2.49 Buildings D & E within Stage 1 are oriented with a view north and south and will not be impacted by the additional height proposed.

Loss of privacy

- 2.50 The buildings will maintain appropriate levels of visual privacy to future development through the careful design of the apartment layouts and use of privacy screens, louvres, highlight windows and deep soil landscaping.

2.51 High levels of privacy will be maintained between buildings within the development with the positioning of the buildings exceeding the recommended separation distances of the RFDC between openings and balconies as follows:

- Part Building A to D – min 13.5 metres
- Part Building C to E – min 13.2 metres

Loss of Solar access

2.52 Shadow diagrams have been prepared and accompany the DA. Due to the location and orientation of the site, the building forms have the potential to impact on the B7 zone, Parkgrove development to the south and the approved Buildings within Stage 1 of the subject site. However, it is noted that residential uses are not permitted on the B7 zone.

2.53 The shadow diagrams prepared by Krikis Tayler Architects as measured in mid winter (21 June) demonstrate the following:

- The proposed buildings will have no impact on the B7 zone.
- The shadow to the south falls within the road reserve and has no impact on the future residential apartments or public open space within the Parkgrove development.
- The building has no impact on the communal open space or units within Stage 1 between 9am and 12 noon. 71% of units within the total development achieve a minimum of 2 hours solar access between 9am to 3pm in mid winter.

2.54 As demonstrated above, notwithstanding the variation to the height control, compliance levels of solar access are achieved.

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.

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

2.56 As discussed above, the taller building forms will sit appropriately in the context of this site, being between the B7 and R3 zones. The streetscape will be significantly improved through the strong edge to the precinct that will be created by the buildings. The buildings will form the western edge and will clearly demarcate the transition from the B7 to R3 zones. This is achieved through a transition from Industrial uses in the Business Park zone, a mix of commercial and residential uses on the subject site and residential uses to the east.

2.57 As viewed from the surrounding public streets this transition of uses will be evident and result in a positive urban design outcome.

2.58 The stepping of the building from 6 storeys at the southern end to 4 storeys at the northern end will provide further relief and visual interest in the skyline. In addition, the setback of the upper levels further enhance the stepping of the building as shown in the following extract from the 3D model:



- 2.59 As clearly outlined above, the development achieves the objectives of the height development standard.

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

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

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

- 2.61 The underlying objective or purpose of the height control remains relevant to the proposed development. The development is consistent with the objectives of the height control as demonstrated above.

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

- 2.62 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.

- 2.63 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.

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

2.65 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.

2.66 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.

2.67 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 outlines above.

2.68 It is therefore considered that the development notwithstanding the variation to the development standard, achieves the objectives of the B4 Mixed Use Zone.

2.69 The variation to the standard is also considered in relation to the criteria established in *Winten Developments Pty Ltd v North Sydney Council [2001] NSWLEC 46*. The Commissioner identified a series of questions relevant to the consideration of a SEPP 1 Objection. The same questions are relevant to a Clause 4.6 variation and are addressed below:

1. Is the planning control in question a development standard?

2.70 The Planning Control at Clause 4.3 of the Botany Bay LEP is a development standard as identified in Section 2.1 of this report.

2. What is the underlying object or purpose of the standard?

- 2.71 The objective of the Height Standard has been addressed in detail in Section 2.10 of this report. The assessment confirms that the development meets the objectives.

3. *Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act?*

- 2.72 The objectives of Clause 4.6 are:

To provide an appropriate degree of flexibility in applying certain development standards to particular development; and

To achieve better outcomes for and from development by allowing flexibility in particular circumstances.

- 2.73 The objectives of the Clause seek to allow 'flexibility' in the application of the controls. This development is considered an appropriate form of development that warrants the flexible application of the Height of Buildings control. The flexible application of the control will achieve a better outcome on this site for the following reasons:

- The increased building height on this section of the site enables the site to realise its development density as determined by the FSR control and accordingly achieving a better economic outcome than would otherwise be achieved if compliance with the height control was enforced. Without a variation to the height control, the precinct could not be developed in a cohesive manner that achieves the density anticipated by the controls.
- The development facilitates significant improvements to the public domain that will benefit future residents within the development and the wider community as addressed in Section 2.20 of this report.
- A higher 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.

- 2.74 It is therefore considered that the development meets the objectives of Clause 4.6.

- 2.75 The objects of the Act at 5(a)(i) and (ii) are:

(a) to encourage:

(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

(ii) the promotion and co-ordination of the orderly and economic use and development of land,

- 2.76 The non-compliance with the development standard does not hinder the attainment of the relevant objects for the following reasons:

- The variation to the height control does not impact on the ability to achieve the proper management, development and conservation of natural and artificial resources. The increased height will have no increased impact on natural features and the ability to service the development.

- The variation to the height standard enables the orderly and economic use of the land. This report has demonstrated that the development meets the objectives of the B4 zone and the height development standard. The report has also demonstrated that the outcome on this site is appropriate and will result in a substantial public benefit.

2.77 It is therefore considered that the development meets the relevant objectives of the Act.

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

2.78 Compliance with the height development standard is unreasonable and unnecessary for the following reasons:

- It has been demonstrated that notwithstanding the variation to the standard, the development meets the objectives of the standard, the objectives of the B4 zone and the desired future character of the area.
- The development maintains high levels of residential amenity to surrounding properties and the public domain. The development will not unreasonably overshadow adjoining properties and the scale and height is appropriate in the context of the B7 zoning opposite the site to the west and approved built form to the east.
- The layout of the buildings and setbacks ensures that a high level of both visual and aural privacy will be maintained to surrounding properties.
- 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. 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.
- The increased number of car parking spaces required to service the additional residential units within the development will not unreasonably affect the existing traffic network as demonstrated in the accompanying traffic impact assessment.
- Compliance with the standard would be unreasonable as the built form proposed results in an appropriate interface at the zone boundaries between non-residential uses to the west and consistent with the approved built form to the east. Decreasing the height of the buildings along Pemberton Street will not provide a strong edge to Pemberton Street and will diminish the transitional nature of this part of the site.

2.79 Based on the above it is therefore considered that compliance with the standard is unreasonable and unnecessary.

5. *Is the Objection well founded?*

2.80 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.

2.81 The variation is considered well founded.

Is the variation in the public interest?

2.82 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.*

2.83 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.

2.84 The density of development sought is a minor variation (less than 10%) of the FSR control and accordingly, the proposed heights will enable the site to realise its density to further support the availability and affordability of housing in the area. The development will facilitate additional residential accommodation in an area where demand is not being fulfilled by the controls.

2.85 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.

2.86 A variation to the height control is in the public interest.

3.0 CONCLUSION

- 3.1 The variation to the development standards relating to Clause 4.3 of the Botany Bay LEP 2013, in respect of height 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 height 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.