

**ADDENDUM TO SECOND ROUND SUPPLEMENTARY REPORT - JOINT  
REGIONAL PLANNING PANEL  
(Sydney East Region)**

<b>JRPP No</b>	<b>2014SYE013</b>
<b>DA Number</b>	<b>DA13/278</b>
<b>Local Government Area</b>	<b>City of Botany Bay</b>
<b>Proposed Development</b>	<p>The amended development proposes the construction of mixed use building (known as Buildings A and C) comprising the following:</p> <ul style="list-style-type: none"> <li>• 8 ground floor commercial units each of at least 100m<sup>2</sup>; and,</li> <li>• 62 residential units over Building A (4-5 storeys - RL22.7 inclusive of lift overruns) and Building C (6 storeys - RL25.8 inclusive of lift overruns)</li> </ul> <p>Mix of residential component:</p> <ul style="list-style-type: none"> <li>• 4 x studios;</li> <li>• 17 x 1-bedroom units; and</li> <li>• 41 x 2-bedroom units.</li> </ul>
<b>Street Address</b>	<b>42-44 Pemberton Street, Botany</b>
<b>Applicant/Owner</b>	<b>Krikis Tayler Architects</b>
<b>Number of Submissions</b>	<b>5 – individual submissions from neighbouring/surrounding residents during the initial notification of the application.</b>
<b>Report by</b>	<b>Rodger Dowsett, Director Planning and Development</b>
<b>Date</b>	<b>9 September 2014</b>

## **1.0 PRECIS**

### **1.1 Background**

Development Application No.13/278 was received by Council on 24 December 2013. The application has been amended to reflect to the following development:

- Construction of a mixed use buildings (known as Buildings A and C) comprising:
  - 8 ground floor commercial units each of at least 100m<sup>2</sup>; and,
  - 62 residential units over Building A (4-5 storeys - RL22.7 inclusive of lift overruns) and Building C (6 storeys - RL25.8 inclusive of lift overruns);
- Mix of residential component:
  - 4 x studios;
  - 17 x 1-bedroom units; and
  - 41 x 2-bedroom units.

## **2.0 CLAUSE 4.6 EXCEPTION TO THE DEVELOPMENT STANDARD**

The proposed development seeks to vary the FSR and height of buildings applying to the proposed development. This addendum report focuses on the variations sought to the development standards in reference to the requirements of Clause 4.6 of the BBLEP 2013 stated below.

A copy of the Applicant's Clause 4.6 Exception to the Development Standard has been submitted as an attachment to this report for consideration by the Joint Regional Planning Panel.

### ***Clause 4.6 Exceptions to development standards***

- (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.*
  - (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:*
    - (a) *the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
    - (b) *the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*
- Note.** *When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E3 Environmental Management or Zone E4 Environmental Living.*
- (7) *After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
  - (8) *This clause does not allow development consent to be granted for development that would contravene any of the following:*
    - (a) *a development standard for complying development,*
    - (b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
    - (c) *clause 5.4.*

## CLAUSE 4.3 - BUILDING HEIGHT

The development application proposes a building height from 13.6 metres (parapet) adjoining the site's northern boundary through to 16.7 metres (parapet) where the building steps up to New Street 1 at its southern boundary. The overall maximum building height including lift overruns steps from 17.7 metres to 21.6 metres. The six storey element is only proposed over a length of 57 metres fronting Pemberton Street, while the five storey element presents over a length of 24 metres and the four storey element over 9.5 metres.

The development application is seeking a departure from Clause 4.3 Height of Buildings which applies to the site. The applicant has submitted a Clause 4.6 Exception to the Development Standard which addresses the requirements on Clause 4.6. A copy of which has been attached for the consideration of the JRPP.

The figure below identifies the sliding scale in building height.

Council Officers have assessed the departure to the development standard in accordance with Clause 4.6 of BBLEP 2013 and concluded that the objection is well founded in this instance and supported.



*Note: Red lines indicates the location of the 10 metre height limit applying to the B4 zone and 22 metre height limit applying to the R3 zone.*

## PRELIMINARY ASSESSMENT

**Question 1 – Is the requirement a development standard and if so is it one to which subclause 8 applies?**

The matters raised within Clause 4.6(8) are not applicable with respect to the subject development application as such this clause allows the JRPP to grant consent to a numerical departure, if the applicant addresses the provisions contained in Clause 4.6 of the BBLEP 2013.

**Questions 2 – What is the underlying object or purpose of the standard? (If there is no stated objective of the standard)**

The objectives of the development standard being Clause 4.3 Height of Buildings are outlined as follows.

*(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.*

The applicant contends that the development application meets the objectives of the development standard for the following reasons. The complete Clause 4.6 Exception to the Development Standard prepared by the Applicant has been attached for the consideration of the JRPP:

- *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 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;*
- *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 along Wilson Street.*
- *The location of taller buildings has no adverse impact by way of overshadowing, loss of views and loss of privacy.*
- *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.*

- *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.*
- *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 height of the development is consistent with the desired future character of the Precinct. 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.*
- *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.*
- *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 subject site provides an appropriate interface between the B7 zone and the R3 zone.*
- *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.*
- *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;*
- *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.*
- *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.*
- *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.*

- *The development provides a small proportion (8 commercial tenancies) along the Pemberton Street frontage. 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. 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.*
- *The residential balconies cantilever to provide weather protection to the commercial terrace and add further interest and demarcate the commercial uses.*
- *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.*
- *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.*
- *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.*

## **DETAILED ASSESSMENT OF VARIATION TO DEVELOPMENT STANDARD**

### **Question 1 – Is compliance with the development standard unreasonable or unnecessary in the circumstance of the case?**

His Honour Preston CJ sets out five alternative ways of establishing that compliance is unreasonable or unnecessary in *Wehbe v Pittwater Council* (2007) NSW LEC 827, albeit only one of these 5 ways needs to apply .

This may be found if the proposal meets the objectives of the development standard notwithstanding its non-compliance with the standard.

The objectives of Clause 4.3 - Height of Buildings as specified within BBLEP 2013 are outlined as follows:

*(a) to ensure that the built form of Botany Bay develops in a coordinated and cohesive manner,*

Buildings A and C the subject of this development application falls within that part of the site zoned B4-Mixed Use. The maximum height limit is 10 metres under Clause 4.3 BBLEP 2013. The proposed development seeks a range in height from 17.5 metres (inclusive of lift overruns) to 21.6 metres (inclusive of lift overruns) for Buildings A and C respectively. This results in a non-compliance with the maximum height limit of 7.5 metres to 11.6 metres.

Table 1 below identifies the stepping in height of the amended design which identifies a variation to the height of the parapet from 13.6 metres to 20.8 metres. It is acknowledged that the definition of height within the BBLEP 2013 is not to the topmost point of the parapet but rather the extent of any lift overrun or plant equipment located on the roof. As can be seen in the amended architectural plans the location of the lift overruns are setback back from Pemberton Street and New Street 1 where they would not be visible to the public domain or adjoining developments. Therefore the visual impact of the additional height would be associated with the parapet height as seen from the public domain.

**Table 1- Amended Design Proposed Building Heights**

<b>Building</b>	<b>Parapet Height</b>	<b>Maximum Height (inclusive of lift overruns)</b>	<b>Exceedence of Building Height Control (10m) from the Parapet</b>
<b>Building A</b>	RL 18.70 to RL21.7  <b>13.6 m to 16.7 m</b>	RL22.70  <b>17.7m</b>	  <b>3.6m to 6.7m</b>
<b>Building C</b>	RL 24.80 to RL 25.0  <b>20m to 20.8m</b>	RL25.80  <b>21.6m</b>	  <b>10m to 10.8m</b>

The additional height is stepped along its frontage to Pemberton Street which considers the buildings relationship to existing developments as follows:

- In the R3 zone currently under construction building heights have been approved to 22 metres (6-7 storeys). The proposed building heights are less than those within the R3 zone which provides a transition in building height and does not dominate buildings within the Medium Density Residential zone.
- To address the low density residential context to the north where there are single and tow storey residential dwellings the proposed development has stepped the building height down from 6 storeys to 4 storeys. The intent is that this stepping of the height plane will be used as a transition to the low density residential further north (Warrana and Kurnell Streets) where the interface with building height is more sensitive.



- To the south the height limit in the B1 Neighbourhood Centre zone is 14 metres. The proposed building height is commensurate with the scale of development within the B1 zone and will not detract from the amenity of buildings located within the Banksmeadow Neighbourhood Centre.
- To the west is the B7 Business Park zone with a height limit of 12 metres. The proposed building height will be stepped back from the B7 zone as a result of road widening along Pemberton Street and an additional setback of 3 metres to the new site boundary to accommodate street trees and a new pedestrian footpath. These public domain improvements will visually shield the additional building height from the B7 zone.
- The site has a 3.5 metres wide finger projection to Wilson Street (east) which presents single and two storey residential dwellings, the proposed and recently approved building envelopes have been either centrally located within the site or front Pemberton Street, thereby moving the additional height away from the low density developments fronting Wilson Street and addressing the amenity of these surrounding properties.

It is therefore considered that the proposed building heights provide an appropriate transition along Pemberton Street to address the public domain and a stepping of the built form compared to existing buildings centrally located to the Precinct so as not to dominate the skyline. The location of the building bulk removed from sensitive low density residential areas to the north and east ensure that there is a co-ordinated and cohesive approach to the distribution of building height within the Precinct and across the subject site taking into account the context of building height within the locality.

***(b) to ensure that taller buildings are appropriately located,***

As stated above the existing built form within the locality has taller buildings centrally located within the Precinct and to the south within the B1 Neighbourhood Centre. To address this transition in building height the proposed development has stepped the building height to be in context with the R3 zone, the street corner location with New Street 1 and Pemberton Street and the B1 Neighbourhood Centre further south.

Given the location of New Street 1 along the southern boundary of the site as the new road into the Precinct the building height has been orientated to this new street corner to define the corner and provide a consistent visual presentation to New Street 1 which is consistent with Building E and to a lesser extent Building F as they present to New Street 1.

From low density residential areas to the north (Warrana and Kurnell Streets) and east (Wilson Street) the additional building height proposed will not be seen thereby preserving the visual amenity of these existing low density residential areas.

It is therefore considered that the stepping of the built form has appropriately located the taller building element centrally located within the Precinct and along Pemberton Street.

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

The desired future character of the area is detailed within Part 9C of the BBDCP2013. The vision statement for the Precinct is that *it 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.*

- As stated above given that there are low density residential area surrounding the Precinct this has prompted the location of taller buildings fronting Pemberton Street and centrally within the Precinct which are physically removed from the sensitive low density areas. The height of the buildings however do present a consistent building height with the immediately adjoining residential flat buildings in the R3 zone within the Precinct and complements the building heights existing within the B1 Neighbourhood Centre.
- A live work opportunity is provided within Buildings A and C with the commercial ground floor which activates the Pemberton Street frontage. There is diversity in housing opportunities within the site and within Buildings A and C with the provision of studios, 1 bedroom and 2 bedroom apartments. Good quality communal open space is provided within the site between Buildings A, C, D and E.
- A high standard of design has been achieved through the use of materials and finished in the buildings. With respect to RFDC the building depth does exceed the 18 metre control proposing 24 metres and 23.5 metres for Buildings A and C respectively however; the applicant has demonstrated that adequate daylight and natural ventilation can be achieved. Furthermore; an apartment depth of 8 metres could not be achieved as compliance was maintained with Council's apartment size controls which are in excess of the RFDC apartment sizes. The design has been able to satisfactorily address natural ventilation and access to daylight despite these departures from the RFDC rules of thumb. The provision of larger apartment sizes is to address the environmental context of the site given that it is affected by the 20-25 ANEF contour relating to noise associated with aircraft movements from Sydney Airport. The building shall be acoustically attenuated but the noise impacts to balconies and outdoor areas requires resident to utilise internal areas for relief from aircraft noise. To address this impact to outdoor areas and balconies Council requires larger apartment sizes to provide amenity.
- Given the orientation of the building with west facing units the applicant has indicated on the plans that louvers will be installed on the western facing balconies to address sunlight and heat loading within these apartments to provide amenity. The ceiling heights are 2.7 metres to habitable rooms which provides for adequate sunlight access to each apartment. More than 70% of apartments achieve 2 hours of solar access between 9am and 3pm as required for high density areas.

- All kitchens have access to the living areas to allow for natural ventilation and more than 70% of units are cross through units which achieve natural ventilation. Energy and water efficiency has been achieved through the BASIX Certificate.
- The building separation between Building A to D is 13.5 metres and Buildings C to E is 13.2 metres which is compliant with the RFDC to allow for adequate communal open space at the ground floor and 51% of the site being available for landscaped area which adds to the amenity of the development by allowing appropriate landscaping to screen the building height from the communal open spaces and address the perceived bulk with the setbacks to the street edge and public open spaces.

With reference to the B4 zone the BBDCP 2013 states that *Employment in the precinct will be maintained by providing the opportunity for new and emerging businesses along Pemberton Street. The businesses will be compatible with residential and provide residents with a buffer to the industry to the west. In addition, this strip of businesses will provide an opportunity for a live and work environment.*

- The proposed built form fronting Pemberton Street includes eight (8) commercial ground floor tenancies of 100sqm each. This provides flexible opportunities for business development along Pemberton Street. The separate residential entries and restricting residential above the ground floor ensures that the business uses will not affect the amenity of the residential within the building.
- The commercial ground floor does provide a buffer to the industry to the west as it elevates the residential uses above the street level where the impact of industries and associated truck movements at street level would have the greatest impact on amenity. The applicant's acoustic consultant concluded that at the upper residential levels the main amenity impact was not from the industries to the west in the B7 zone but rather from noise associated within the airport and as such the building has been acoustically attenuated.

Part 9C of the BBDCP 2013 identifies the desired future character for the B4 Mixed Use zone along Pemberton Street and that *the B4 zone within the Wilson/Pemberton Street Precinct is anticipated to develop into a high quality area of mixed uses featuring medium density housing, low impact commercial and business uses and creative industries. New works in the public domain along Pemberton Street will be required such as landscaping and pedestrian pathways to improve the amenity of the Street and encourage pedestrian movement and live/work opportunities. The redevelopment of the B4 Zone is to provide a transition from non-residential in the B7 Zone in the Botany South Precinct to surrounding residential uses with the intention of buffering any adverse amenity issues created within the B7 zone.*

- As stated above the proposed development provides a mix of residential apartments with commercial on the ground floor where creative industries could emerge. The development application will provide road widening to Pemberton Street which will include improvements to the public domain including new footpaths, road surfaces, curb and guttering and street trees.

- As stated above the proposed development within the B4 zone does present a buffer to the B7 zone as stated in the desired future character for the area. The proposed mixed use development with a ground floor commercial use achieves the desired future character of the area by promoting live work opportunities with a transition to the B7 zone.

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

**Visual Impact** – As stated above and as can be seen within the figure below of the southern elevation the proposed building the height is consistent with the scale of development with the R3 zone and does not exceed to the overall building height of development within the R3 zone.

The built form has been stepped towards the north as stated previously which addresses the existing low density residential areas. The built form to Pemberton Street will be visually screened by the dedication of land for road widening and the planting of street trees within the public domain. The building form will also be setback an additional 3 metres from the new boundary line to Pemberton Street allow landscaping to occur within the front setback to address the visual presentation of the built form.

The visual presentation to existing development within the B7 zone on the opposite side of Pemberton Street is acceptable in that the residential component steps back from the ground floor commercial element and the residential balconies fronting Pemberton Street have been designed with louvers to provide visual privacy.



***Figure- Southern Elevation of the Proposed Development in relationship to the Building Height of Buildings D and F when viewed from New Street 1.***

**Views** - View loss will be experienced from Buildings D and E already approved within the Precinct to the west. Buildings D and E have been orientated north-south so any view to the west to the B7 industrial land uses would be at an oblique angle which is not a view that present a high level of amenity to the R3 zone. The view corridors to the north (city), south (Botany Bay) and east (eastern suburbs) are not impacted as a result of the proposed built form of Buildings A and C.

The building height will not exceed the existing residential flat buildings within the R3 portion of the site and will be visually shielded from the townhouses and low density residential developments to the east along Wilson Street. Building F will block these sightlines and the view corridor along New Street 1 will only afford an oblique angle of Building C behind the southern projection of Building E within the

Precinct. The location and height of the proposed development will reduce the visual impact on the sensitive low density residential area.

Privacy – The building separation as stated above complies with the RFDC requirements. High level windows have also been used where living rooms are adjacent to balconies in adjoining buildings. The layout of the units and orientation of the balconies has also resulted in privacy impacts being mitigated within the Precinct to the adjoining residential flat buildings within the R3 zone.

Separation is also provided to the south by New Street 1 which is to be dedicated for public vehicular and pedestrian access to the Precinct.

Solar Access- As stated previously the proposed development will achieve compliance with RFDC requirements for 70% solar access to apartments for 2 hours between 9am-3pm in midwinter. The development also retains adequate solar access to the communal open space within the site and minimises solar impacts to the site to the south on the opposite side of New Street 1 as has been demonstrated by the shadow diagrams supporting the development application.

*(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.*

Streetscape- Industrial buildings along the western side of Pemberton Street currently provide setbacks approx. 3- 15 metres from the street edge, many with established street trees within their front setbacks. Pemberton Street is currently a 12 metre wide thoroughfare with an additional 4 metre road widening to be dedicated on the eastern side which will include street tree planting and new pedestrian pathways. The built form of Buildings A & C are setback another 3m from the new property boundary. This will result in a minimum setback of 19m between the edge of the proposed residential balconies and the opposite side (western) of Pemberton Street, thereby providing adequate building separation between the B4 and B7 zones to improve the streetscape.

Skyline- Buildings A & C have identified a maximum building height of 21.6m. This height is in context with the scale of buildings within the R3 zone to the east and does not extend beyond the skyline already established by these buildings. This will also present in context with the mixed use developments located within the Banksmeadow Neighbourhood Centre to the south.

Landscape- The built form of Buildings A and C are setback from the central open space provided between Buildings D and E to the east. The landscape plan shows a visual extension to this central communal open space and during mid-winter parts of this central open space receive sunlight providing amenity. The proposed built form will also have a visual connection to the proposed public park on the Parkgrove 1 West site to the south, on the opposite side of New Street 1.

## **Conclusion**

Taking into account the above the Applicant's written request has adequately addressed this requirement.

The variation to the building height standard is such that compliance with the development standard is unreasonable or unnecessary in the circumstance of this case. Since the application meets within the objectives of the development standard there is no need to go any further and assess other matters as stated in *Wehbe v Pittwater Council (2007) NSW LEC 82*.

The proposed development meets the objectives of the development standard as demonstrated above.

Consideration of the public interest and environmental planning grounds has also been addressed below to further justify the departure from the development standard.

### **Question 2 – Are there sufficient environmental planning grounds to justify contravening the development standard?**

The Applicant's written request has not spelt out under a separate heading environment planning grounds to justify contravening the development standard, however the request makes mention of environmental planning grounds to justify contravening the development standard, reference is made to site flooding, public infrastructure and dedication of land. In the circumstances Council Officers are of the opinion that the applicant has adequately addressed this requirement.

- The site is also affected by flooding and as a result the finished floor level has been raised by 1.6 metres. The development standard did not take into account this environmental constraint which would add additional floor space to the proposed built form and therefore contravention of the development standard is supported in this case.
- The subject site is affected by road widening fronting Pemberton Street. The proposed development will dedicate the required land for road widening and provide a pedestrian footpath and street tree planting along its frontage to Pemberton Street. The improvement to the environmental amenity of Pemberton Street justifies the departure from the development standard in this case.

Council believes there are further environmental planning grounds to justify contravening the development standard including:

- As stated above and within the Clause 4.6 Assessment of Building Height, the site was previously used for industrial purposes and as a result of these land uses remediation of

the site and the Precinct as a whole has been required. The remediation of the site does justify the contravention of the development standard as it has resulted in a better environmental amenity for the area and the future public open spaces to be providing within the Precinct.

- The site is affected by the 20-25 ANEF 2033 Contour and as a result to applicant's Acoustic Consultant has recommended noise attenuation measures for the proposed buildings in accordance with AS2021-2000. Addressing this environmental planning ground will result in a better environmental outcome for the future residents and is supported as grounds for contravening the development standard in this case. This issue of acoustic amenity has also been addressed through the provision of Council's apartment sizes which provide additional floor space for each unit beyond the minimum requirements of the RFDC. It is considered that occupiers of small units would rely more heavily on outdoor areas which are adversely affected by aircraft noise. The aim of Council's control is to provide larger apartment sizes so there is a lesser reliance upon outdoor communal open space areas that are adversely affected by aircraft noise.

**Question 3 – Will the proposed development 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?**

The proposed development will be in the public interest as it has been demonstrated above that it is consistent with the objectives of the development standard.

The applicant contends that the proposed development has also satisfied the B4 Mixed Use zone objectives and is in the public interest in the following manner:

- *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.*
- *The development will provide a significant public benefit by a letter of offer to enter into a VPA for the following works:*
  - *Dedication of 474m<sup>2</sup> 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 354m<sup>2</sup> 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 77m<sup>2</sup> right of way or lot in stratum to Council for through site link.*
  - *Construction of through site link including paving.*

*Ex Gratia Pty Limited v Dungog Shire Council [2005] NSW LEC 148* has been considered with respect to Clause 4.6(4) when considered the public interest and the objectives of the B4 Mixed Use zone.

The zoning applicable to the site which solely contains the proposed Buildings A and C is the B4 Mixed Use zone fronting Pemberton Street. The R3 Medium Density Residential zone applies to the remainder of the site. Given that compliance has been achieved with Buildings D, E, and F located within the R3 zone, being a maximum of 22 metres the Clause 4.6 Variation has focused on Buildings A and C that are located within the B4 zone. Given that the variation specifically relates to the B4 zone the objectives of this zone have been considered below.

- (i) ***To provide a mixture of compatible land uses.***



- (ii) *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.*

Clause 3 under the B4 Mixed Use zone permits stand-alone residential flat buildings as well as shop top housing where a commercial element is provided on the ground floor. Whilst the zoning does permit stand-alone residential flat buildings the objectives of the zone seek a mixture of compatible land uses and an integration of suitable business, commercial and residential land uses. In response to these objectives the proposed development incorporates 8 commercial tenancies on the ground floor for business uses, integrated with residential accommodation above.

Given that the proposal has identified two land uses (residential and commercial) within a mixed use built form, both of which are permitted within the B4 zone the proposed built form achieves the objectives of the zone.

In considering the impact to future developments within the B4 zone the departure from the height standard will not, as stated previously, affect the ability of adjoining sites to achieve their development potential as adequate building separation has been provided and the residential component has been design so as to reduce privacy impacts and overlooking. The stepping of building height across the site has addressed the context of built form within the Precinct by presenting a reduced building height towards the northern boundary to the low density residential beyond and a greater height towards the southern boundary to relate to the built form within the Precinct and Banksmeadow Neighbourhood Centre further south.

A variation to building height on this site does not preclude other sites within the B4 Mixed Use zone from addressing the objectives of the development standard nor the objectives of the B4 zone. This specific proposal has demonstrated compliance with both the objectives of the height standard and the zoning applicable. As a result any departures that may be identified within the B4 Mixed Use zone would need to be assessed on its merits.

### ***Public Interest***

The proposed development is consistent the objectives of the development standard and the objectives of the B4 Mixed Use zone and is in the public interest.

The proposed development as set out by the Applicant in their Clause 4.6 Exception to the Development Standard will result in land dedication for road widening and through site links which will improve the public domain and the overall transformation of the Precinct from industrial uses to a mixed use Precinct supporting medium density residential uses and employment opportunities.

### **Conclusion**

The proposed development has demonstrated consistency with the B4 zone objectives which are applicable to Buildings A and C and given the previous industrial uses of the site its redevelopment in line with the objectives of the B4 zone will be in the public interest facilitating the orderly economic development of land. A variation to the development standard is supported in this case.

#### **Question 4-**

**(a) Whether or not non-compliance with the development standard raises any matters of significance for State or Regional environmental planning;**

Clause 4.6(5) requires consideration of whether the proposed development contravenes any State or Regional Planning Policy and whether there is public benefit in maintain the development standard. The proposed variation to the height and FSR standard does not raise any matters of significance for state or regional planning. The variation is also not contrary to any state policy or ministerial directive. The City of Botany Bay local government area is nominated within the Central Subregion within the Draft Metropolitan Strategy for Sydney 2031 but the Wilson Pemberton Street Precinct is not specifically nominated within the Strategy. The Draft East Subregional Strategy nominates housing and employment targets for the Botany Bay local government area. The proposed development is contributing to the achievement of these targets. The proposed development is not inconsistent with the key deliverable identified within the Metropolitan Plan for Sydney 2036.

**(b) The public benefit of maintaining the development standard;**

There is no public benefit in maintaining the development standard in this case, but rather there is public benefit in allowing the non-compliance given the following outcomes:

- The proposed development achieves the objectives of the development standard and the objectives of the B4 Mixed Use zone.
- If the height limit was strictly adhered to in the B4 zone the upper residential levels within the buildings located within the R3 zone levels would be unduly exposed to interface impacts associated B7 zone and its industrial use. No public benefit is obtained in maintaining the 10 metre height limit in this instance.

Given the outcomes demonstrated by the proposed development there is public benefit in departing from the development standard in this case.

**(c) Any other matters required to be taken into consideration by the Director General before granting concurrence?**

Under letter dated the 13 August 2013, the Department of Planning and Infrastructure advised Council that its delegations in respect of Clause 4.6 remain and that Council does not need to apply for further delegations. Therefore, Council is not required to seek concurrence for each Clause 4.6 variation.

Council is not aware of any other matters that are required to be taken into account prior to granting concurrence.

## **CLAUSE 4.4 - FLOOR SPACE RATIO**

The amended design presents a reduction in FSR applying to the B4 zone (Building A and C) from 1.48:1 to 1.44:1 which results in a reduction from 65 to 62 residential units and a reduction in building height at the northern end of the building from 6 storeys (21.6 metres) to 4 storeys (13.6 metres). The FSR permitted within the B4 Mixed Use zone is 1:1 which results in a departure of 44% within the B4 zone.

Buildings D, E and F have been approved with an FSR of 1.59:1 which is less than the permitted FSR of 1.65:1 in the R3 zone.

The average FSR proposed over the entire site including Buildings A, C, D, E and F will be 1.54:1 which is a variation of 9.35% to the average FSR assessed over the entire site and calculated as 1.44:1.

The variation to the average FSR assessed over the entire site has been addressed through the dedication of land for new roads, pedestrian links.

The preceding assessment with respect to Clause 4.6 has demonstrated that compliance with the floor space ratio development standard is unreasonable and unnecessary in this circumstance as:

- Compliance with the objectives of the standard have been achieved;
- Compliance the objectives of the B4 zone have been achieved resulting in a development that will be in the public interest; and
- the environmental planning grounds are sufficient to support a departure in this case.

As stated previously a copy of the Applicant's Clause 4.6 Exception to the Development Standard has been attached to this report. Extracts from the Applicant's submission has been included in this report.

## **PRELIMINARY ASSESSMENT**

### **Question 1 – Is the requirement a development standard and if so is it one to which subclause 8 applies?**

The matters raised within Clause 4.6(8) are not applicable with respect to the subject development application as such this clause allows the JRPP to grant consent to a numerical departure, if the applicant addresses the provisions contained in Clause 4.6 of the BBLEP 2013.

### **Questions 2 – What is the underlying object or purpose of the standard? (If there is no stated objective of the standard)**

The objectives of the development standard being Clause 4.4 Floor Space Ratio are outlined as follows:

*(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.*

The applicant contends that the development application meets the objectives of the development standard for the following reasons.

- *As amended, the development proposes a total GFA of 20,276m<sup>2</sup> which equates to a FSR across the site entire site of 1.54:1. As the site extends across two FSR zones, the average FSR permitted across the entire site is 1.44:1. The variation to the FSR control is 0.1:1. A variation of 7%. The subject application seeks to utilise the remaining FSR to enable the site to achieve its development density envisaged by the controls.*
- *The minor variation is offset by the substantial public benefits including:*
  - *Dedication of 474m<sup>2</sup> 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 354m<sup>2</sup> 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 77m<sup>2</sup> 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.*
- *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.*

- *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.*
- *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.*
- *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.*
- *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.*
- *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;*
- *The nature of the proposed development is appropriate adjacent to the Business Park zoning which has a focus on commercial and light industrial uses.*
- *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.*
- *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 and the design will minimise the impact from the B7 zone on the remainder of the precinct.*
- *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. 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.*

- *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. 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.*
- *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.*
- *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.*
- *The residential balconies cantilever to provide weather protection to the commercial terrace and add further interest and demarcate the commercial uses.*
- *Works within the precinct will improve the existing stormwater drainage and reduce flooding impacts. 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.*



**Figure- 3D View of the proposed built form along Pemberton Street looking south**

## DETAILED ASSESSMENT OF VARIATION TO DEVELOPMENT STANDARD

### Question 1 – Is compliance with the development standard unreasonable or unnecessary in the circumstance of the case?

His Honour Preston CJ sets out five alternative ways of establishing that compliance is unreasonable or unnecessary in *Wehbe v Pittwater Council* (2007) NSW LEC 827, albeit only one of these 5 ways needs to apply .

This may be found if the proposal meets the objectives of the development standard notwithstanding its non-compliance with the standard.

The objectives of Clause 4.4 Floor Space Ratio as specified within BBLEP 2013 are outlined as follows:

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

In the case of *CSA Architects Pty Limited v Waverley Council* [2007] NSWLEC 575 consideration was given to the objective of *intensity* of a land use when considering a departure from an FSR development standard. The intensity of a land use ‘*generates additional demands for parking ect, which need to be met by the development.*’

In considering the *intensity* of the proposed development at 42-44 Pemberton Street, Botany the additional floor space provides for 8 commercial tenancies on the ground floor and 62 residential units above. Given that the basement car park provides 16 spaces for the commercial units, 103 spaces for the residential component and 7 visitor spaces in compliance with Council’s car parking requirement the *intensity* of the proposed development has been sufficiently addressed with respect to its impacts on parking.

It should also be noted that the intensity of the proposed use with respect to traffic movements would also be minimal as the proposed development only includes a nominal amount of commercial floor space which would not generate a significant volume of traffic or parking impacts. The hours of operation of these commercial tenancies can also be conditioned to an intensity of land use compatible with the residential uses within the buildings and within the Precinct.

Other land uses permitted in the B4 Mixed Use zone including child care centres, educational establishments, function centres, hotel or motel accommodation, light industries, passenger transport facilities, registered clubs, recreational facilities (indoor). These other uses may result in parking, traffic, hours of operation and heavy vehicle movements that are more intense than that of the proposed development.

Therefore the proposed development in presenting a shop top housing development with commercial on the ground floor and residential above presents an intensity of land use that is more commensurate with the existing residential developments within the Precinct and the wider low density residential area. The intensity of the proposed

development including the 8 commercial tenancies would not adversely affect the traffic and parking within Pemberton Street nor the operation of the B7 zone on the opposite side of Pemberton Street as sufficient parking has been accommodated within the subject site.

The development *density* proposed is greater than what the standard permits however the additional density of development as demonstrated in the Clause 4.6 Assessment for building height has been appropriately located within the Precinct, removed from the low density residential areas to the north and east.

The setback to the B7 zone including the dedication of land for road widening to Pemberton Street has also allowed for an increased density of development fronting Pemberton Street as sufficient separation distances between developments in the B7 zone will be established to allow for streetscape and public domain improvements to visually screen the additional density proposed.

The additional floor space beyond the 1:1 FSR standard also preserves the interface between the R3 and B7 zones by providing a density of development to buffer any amenity impacts arising from the uses within the B7 zone. Whilst this is achieved through the provision of additional residential floor space within the B4 zone this residential floor space is acoustically attenuation and louvers included to western facing balconies to provide visual and acoustic amenity.

Therefore, even though the proposed development present an increase in the density of development the treatment of that additional floor space has been sufficiently addressed and the intensity of development has also been accommodated through compliance with Council's BBDCP 2013 for the provision of car parking.

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

The proposed development has provided a mix of uses that allow for live work opportunities within the Precinct whilst also providing separation between the commercial ground floor and residential above. The seamless nature of the commercial and residential uses is shown through the design of the building where by the commercial is located on the ground floor and does not dominate the built form.

The design articulates the façade through the modulation of the built form and use of contrasting materials and finishes to reduce the visual bulk and scale of the development.

The desired future character has been address above with respect to building height which is a key element in determining the bulk and scale of a development. However the FSR objectives also identify a need for the FSR to also reflect the existing character of an area and areas undergoing substantial transformation.

The B7 Business Development zone on the opposite side of Pemberton Street will undergo substantial transformation over the long term and the existing character should only be considered in the short to medium term. In this instance the existing character has been considered below however a greater weight has been applied to the



desired future character of the B7 zone which is anticipated to be light industrial uses and high technology industries. The bulk and scale of the proposed development will not detract from the desired future character of the of the B7 zone as the development will be suitably screened from Pemberton Street with public domain improvements.

The existing bulk and scale of development within the B7 zone is single and two storey factories with first floor offices these operations are internal focused with their industrial uses. The proposed development provides better visual relief to its mass through the articulation of the building façade fronting Pemberton Street, the use of different balcony treatment and building materials and the use of cross through units to provide a distinction between Buildings A and C. These architectural features contrast the warehouses within the B7 zone which are a majority of bulky, single fronted buildings with only window and roller door openings providing relief to the building mass. The provision of a high quality built form within the B4 Mixed Use zone improves the character of the area.

The bulk and scale of the proposed development has also been appropriately located in the context of the scale of development centrally located within the Precinct within the R3 zone and removed from the bulk and scale of development in the low density areas within Wilson Street and Warrana and Kurnell Streets to the north. The bulk and scale proposed is also consistent with that proposed further south within the Banksmeadow Neighbourhood Centre which provides for mixed use (shop top housing) developments).

The bulk and of development is commensurate with that of the residential flat buildings within the R3 zone with respect to the building depth as Buildings D, E and F also present a mix of cross through and single aspect apartments consistent with Council's unit sizes.

***(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,***

The assessment against the SEPP65 design principles has considered the human scale of development fronting Pemberton Street and the visual relationship between the B7 zone and the proposed bulk and scale within Buildings A & C. The separation provided by Pemberton Street and its future road widening will address the visual dominance of the proposed built form and improve the pedestrian amenity along Pemberton Street.

In the immediate locality all areas are undergoing transformation including the B7 zone, the R3 zone and the B1 Neighbourhood Centre zone affecting Banksmeadow shops. The only areas not undergoing change is within the R2 zones on the opposite side of Wilson Street, within Kurnell and Warana Streets to the north. The proposed development will be suitable shielded from these sensitive receivers by already approved developments within the Precinct most notably Building D, E and F within the subject site. Building D, E and F present buildings heights greater than that of the proposed development.

The FSR proposed by Buildings A & C is consistent with the R3 zone and will not visually detract from the development within the B7 zone on the opposite side of Pemberton Street as stated previously suitable separation has been achieved with improvements to the public domain.

***(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,***

The bulk and scale will be visible along Pemberton Street, New Street 1 and centrally within the Precinct itself from the major public open spaces. The bulk and scale is consistent with other buildings within the Precinct including Buildings D, E and F within Parkgrove 2 and Building D within Parkgrove 1. There is a graduating of building height and bulk centrally within the Precinct and a graduation of bulk and scale along Pemberton Street from the north adjoining sensitive residential uses adjoining 52-54 Pemberton Street through to the Banksmeadow Neighbourhood Centre to the south which currently contains 2-5 storey buildings. The proposed built form will not be out of character or context with the prevailing pattern of the development within the Precinct.

The proposed bulk will not be beyond the approved height limit set within the R3 zone thereby not introducing any additional bulk to the skyline beyond that permitted within the R3 zone.

As stated previously the streetscape to Pemberton Street and the dedication of New Street 1 will improve the proposed development and the presentation of its bulk and scale when viewed from the street.

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

- The bulk of building will not affect the development site to the south being Parkgrove 1 (west) by overshadowing as can be seen in the shadow diagrams submitted with the application.
- The proposed development provides compliant separation distance between buildings within the site and to adjoining sites to achieve environmental amenity through natural ventilation and solar access.
- The proposed development maintains sufficient solar access to adjoining buildings and public open spaces for their use and enjoyment.

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

It is acknowledged that the site coverage requirement and minimum landscape area control outlined in the BBDCP 2013 have been exceeded however this development site cannot be considered in isolation. This site is located within the

Wilson Pemberton Street Precinct which will include a substantial public park to the south directly opposite New Street 1. This public open space is to benefit all developments within Parkgrove 1 and 2.

The development and its extent are shared with that of Buildings D, E and F through a basement car park level which extends under all four buildings. Therefore to consider the extent of development as being solely related to Buildings A and C is unrealistic. Buildings A and C also have the benefit of the already approved central communal open space which serves Building D, E and F. When considered as a combined development site with Buildings D, E and F the size and extent of development is considered to be reasonable.

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

The increased FSR proposed will generate an increased demand for building materials and construction thereby supporting the economic stimulation within the construction phase of development. The additional residential population proposed by the development will also provide increased stimulus to the local centres therefore increased commercial activity and use of existing services. The proposed development also includes 8 commercial tenancies which will contribute to the economic viability of the B7 zone and the Banksmeadow Neighbourhood Centre to the south.

**Conclusion**

Taking into account the above the Applicant's written request has adequately addressed this requirement.

The variation to the floor space ratio standard is such that compliance with the development standard is unreasonable or unnecessary in the circumstance of this case. Since the application meets within the objectives of the development standard there is no need to go any further and assess other matters as stated in *Wehbe v Pittwater Council (2007) NSW LEC 82*.

The proposed development meets the objectives of the development standard as demonstrated above.

Consideration of the public interest and environmental planning grounds has also been addressed below to further justify the departure from the development standard.

**Question 2 – Are there sufficient environmental planning grounds to justify contravening the development standard?**

The Applicant's written request has not spelt out under a separate heading environment planning grounds to justify contravening the development standard, however the request makes mention of environmental planning grounds to justify contravening the development standard, reference is made to site flooding, public infrastructure and dedication of land. In

the circumstances Council Officers are of the opinion that the applicant has adequately addressed this requirement.

- The site is also affected by flooding and as a result the finished floor level has been raised by 1.6 metres. The development standard did not take into account this environmental constraint which would add additional floor space to the proposed built form and therefore contravention of the development standard is supported in this case.
- The subject site is affected by road widening fronting Pemberton Street. The proposed development will dedicate the required land for road widening and provide a pedestrian footpath and street tree planting along its frontage to Pemberton Street. The improvement to the environmental amenity of Pemberton Street justifies the departure from the development standard in this case.

Council believes there are further environmental planning grounds to justify contravening the development standard including:

- As stated above and within the Clause 4.6 Assessment of Building Height, the site was previously used for industrial purposes and as a result of these land uses remediation of the site and the Precinct as a whole has been required. The remediation of the site does justify the contravention of the development standard as it has resulted in a better environmental amenity for the area and the future public open spaces to be providing within the Precinct.
- The site is affected by the 20-25 ANEF 2033 Contour and as a result to applicant's Acoustic Consultant has recommended noise attenuation measures for the proposed buildings in accordance with AS2021-2000. Addressing this environmental planning ground will result in a better environmental outcome for the future residents and is supported as grounds for contravening the development standard in this case. This issue of acoustic amenity has also been addressed through the provision of Council's apartment sizes which provide additional floor space for each unit beyond the minimum requirements of the RFDC. It is considered that occupiers of small units would rely more heavily on outdoor areas which are adversely affected by aircraft noise. The aim of Council's control is to provide larger apartment sizes so there is a lesser reliance upon outdoor communal open space areas that are adversely affected by aircraft noise.

**Question 3 – Will the proposed development 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?**

The applicant contends that the proposed development has satisfied the B4 Mixed Use zone objectives and is in the public interest in the following manner:

- *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.*
- *The development will provide a significant public benefit by a letter of offer to enter into a VPA for the following works:*
  - *Dedication of 474m<sup>2</sup> 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 354m<sup>2</sup> 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 77m<sup>2</sup> right of way or lot in stratum to Council for through site link.*
  - *Construction of through site link including paving.*

*Ex Gratia Pty Limited v Dungog Shire Council [2005] NSW LEC 148 has been considered with respect to Clause 4.6(4) when assessment the public interest and the objectives of the*

zone- B4 Mixed Use zone and the impact to the remaining B4 Mixed Use zone fronting Pemberton Street.

The zoning applicable to the site is the B4 Mixed Use zone fronting Pemberton Street and the R3 Medium Density Residential zone applying to the remainder of the site. Given that compliance has been achieved within the R3 zone, being a maximum FSR of 1.59:1. The Clause 4.6 Variation has focused on Buildings A and C that are located within the B4 zone. Given that the variation specifically relates to the B4 zone the objectives of this zone have been considered below.

***(i) To provide a mixture of compatible land uses.***

***(ii) 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.***

Clause 3 under the B4 Mixed Use zone permits stand-alone residential flat buildings as well as shop top housing where a commercial element is provided on the ground floor. Whilst the zoning does permit stand-alone residential flat buildings the objectives seek a mixture of compatible land uses within the zone and an integration of suitable business, commercial and residential land uses. In response to these objectives the proposed development incorporates 8 commercial tenancies on the ground floor for business uses, integrated with residential accommodation above to satisfy this B4 zone objective.

Given that the proposal has identified two land uses (residential and commercial) within a mixed use configuration, both of which are permitted within the B4 zone the proposed built form achieves the objectives of the zone even though the proposed development exceeds the FSR standard.

In considering the impact to future developments within the B4 zone the departure from the FSR standard will not, as stated previously, affect the ability of adjoining sites to achieve their development potential as adequate building separation has been provided and the residential component has been designed so as to reduce privacy impacts and overlooking. The stepping of building height across the site has addressed the context of built form within the Precinct by locating the bulk and scale of the built form away from sensitive residential areas.

A variation to FSR on this site does not preclude other sites within the B4 Mixed Use zone from addressing the objectives of the development standard nor the objectives of the B4 zone. This specific proposal has demonstrated compliance with both the objectives of FSR and the zoning applicable. As a result any departures that may be identified within the B4 Mixed Use zone would need to be assessed on its merits.

### ***Public Interest***

The proposed development is consistent with the objectives of the development standard and the objectives of the B4 Mixed Use zone and is in the public interest.

The proposed development as set out by the Applicant in their Clause 4.6 Exception to the Development Standard will result in land dedication for road widening and through site links

which will improve the public domain and the overall transformation of the Precinct from industrial uses to a mixed use Precinct supporting medium density residential uses and employment opportunities.

## **Conclusion**

The proposed development has demonstrated consistency with the B4 zone objectives which are applicable to Buildings A and C and given the previous industrial uses of the site its redevelopment in line with the objectives of the B4 zone will be in the public interest facilitating the orderly economic development of land. A variation to the development standard is supported in this case.

### **Question 4-**

#### **(a) Whether or not non-compliance with the development standard raises any matters of significance for State or Regional environmental planning;**

Clause 4.6(5) requires consideration of whether the proposed development contravenes any State or Regional Planning Policy and whether there is public benefit in maintain the development standard. The proposed variation to the height and FSR standard does not raise any matters of significance for state or regional planning. The variation is also not contrary to any state policy or ministerial directive. The City of Botany Bay local government area is nominated within the Central Subregion within the Draft Metropolitan Strategy for Sydney 2031 but the Wilson Pemberton Street Precinct is not specifically nominated within the Strategy. The Draft East Subregional Strategy nominates housing and employment targets for the Botany Bay local government area. The proposed development is contributing to the achievement of these targets. The proposed development is not inconsistent with the key deliverable identified within the Metropolitan Plan for Sydney 2036.

#### **(b) The public benefit of maintaining the development standard;**

There is no public benefit in maintaining the development standard in this case, but rather there is public benefit in allowing the non-compliance given the following outcomes:

- The proposed development achieves the objectives of the development standard and the objectives of the B4 Mixed Use zone.
- If the height limit and FSR was strictly adhered to in the B4 zone the upper residential levels within the buildings located within the R3 zone levels would be unduly exposed to interface impacts associated B7 zone and its industrial use. No public benefit is obtained in maintaining the 10 metre height limit or the 1:1 FSR in this instance as it would not produce a bulk and scale of development that would adequately address the interface between the B7 and R3 zones.

Given the outcomes demonstrated by the proposed development there is public benefit in departing from the development standard in this case.

**(c) Any other matters required to be taken into consideration by the Director  
General before granting concurrence?**

Under letter dated the 13 August 2013, the Department of Planning and Infrastructure advised Council that its delegations in respect of Clause 4.6 remain and that Council does not need to apply for further delegations. Therefore, Council is not required to seek concurrence for each Clause 4.6 variation.

Council is not aware of any other matters that are required to be taken into account prior to granting concurrence.

**RECOMMENDATION OF THE SUPPLEMENTARY REPORT**

It is the recommendation of this addendum report be included to the second round supplementary report that the Joint Regional Planning Panel (JRPP) received on 22 August 2014, and that as the consent authority the JRPP approve the application subject to conditions of consent detailed within the second round supplementary report.