

CLAUSE 4.6 EXCEPTION TO THE HEIGHT DEVELOPMENT STANDARD



PARKGROVE WEST Pemberton & Wilson St Precinct, Botany

1 April 2014 amended 14.3.15

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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 2013.
- 1.2 The subject site is zoned part R3 Residential and Part B4 Mixed Use under the Botany Bay LEP 2013.
- 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 ranging from 18.55 to 27.4 metres.
- 1.5 As amended, this application proposes the erection of one residential building known as Building A containing 118 residential units and the erection of two mixed use buildings known as Buildings B and C. Building B will contain 119 units and 311m² of retail space. Building C will contain 114 residential units and 170m² of retail area.
- 1.6 The unit mix of the apartments is as follows:
 - 13 x studio
 - 168 x one bed
 - 166 x two bed
 - 4 x three bed
 - Total 351
- 1.7 The development will exceed the maximum height under the Botany Bay LEP 2013.
- 1.8 The application as amended is accompanied by a letter of offer to enter into a Voluntary Planning Agreement (VPA) under Section 93F of the Environmental Planning and Assessment Act 1979. The letter of offer and Draft VPA which accompanies this application seeks to provide a substantial public benefit.
- 1.9 Clause 4.6 allows for the contravention of a development standard with approval of the consent authority.
- 1.10 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”
- 1.11 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.*

- 1.12 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.*
- 1.13 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.*
- 1.14 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* and the principles established in *Winten Developments Pty Ltd v North Sydney Council [2001] NSWLEC 46*.
- 1.15 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 FSR 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:

Part of Building	Height of roof - RL	Height to roof - metres	Maximum height to lift overrun - RL	Maximum height to lift overrun - metres
A	RL 23.7 to RL 30.00	18.55m to 25.79m	N/A	N/A
B	RL30.7	25.3m to 25.56m	RL 32.20	27.4m
C	RL 30.6	25.7m to 26.3m	RL 32.10	27.4m

- 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 to achieve the minimum required freeboard above the flood level. This constraint impacts on the height of the building.

What is the underlying object or purpose of the standard?

- 2.6 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?

- 2.7 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?***

- 2.8 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,***

- 2.9

- 2.10 Given the transitional nature of the area from industrial to residential/mixed use, the design proposes an appropriate building form that provides a strong statement building to Pemberton Street marking the western residential edge of the precinct, the location of the public park and the transition point to the B7 zone to the west of Pemberton Street.
- 2.11 The development locates taller building forms than envisaged by the controls on the western side of the precinct which is well removed from the low scale density areas along Wilson Street
- 2.12 The evolution of the Parkgrove Masterplan site has resulted in lower scale buildings forms at the interface with the low scale residential on Wilson Street (notwithstanding the Height and FSR controls) transitioning in height towards the Pemberton Street interface. The concentration of higher buildings on the western side enables an improved transition of building heights across the precinct as shown in the following images from the 3D model:



- 2.13 As demonstrated above, 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 although higher than permitted by the 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. Utilising the floor space in higher buildings enables increased ground level open space which is a direct benefit and a better outcome of the scheme.
- 2.15 The majority of the buildings are consistent with the maximum height permitted in the R3 zone. The building heights step across the site increasing to the tallest building form within the western end of Building B. The varying building heights enable a modulation to the skyline which produces an interesting and improved streetscape. 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 The increased building height on this section of the site enables the site to realise its development density as determined by the FSR control, with a minor exceedance. The first stages of the site were approved below the permitted density established by the controls. Increased building heights, appropriately located, enable the entire site to realise its maximum development density.
- 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.

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

- 2.18 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 Medium Density zone and the Mixed Use zone along Pemberton St as achieving the stated objectives which are assessed below:

R3 Medium Density Zone

To encourage residential development that co-exists and provides a transition from non-residential uses to low scale residential and provides a safe and livable environment;

- 2.19 The evolution of the Parkgrove Masterplan site has resulted in lower scale buildings forms at the interface with the low scale residential on Wilson Street (notwithstanding the Height and FSR controls) transitioning in height towards the Pemberton Street interface. The concentration of higher building forms on the western side of the site enables an improved transition of density and relationship with existing residential development on the eastern side as well as reinforcing the western residential edge of the Precinct at the transition point to the B7 zone to the west of Pemberton Street.

To encourage improvements to the Public Domain;

- 2.20 The development results in substantial improvements to the public domain which will directly benefit future residents in this development and proposed developments to the north, as well as existing residents in the surrounding area.
- 2.21 The developer undertakes to make or provide the following development contributions that will result in substantial public domain improvements as follows:
- Reconstruction of footpath and verge along the Wilson Street frontage of 9-17 and 25-41 Wilson Street including kerb and landscaping.
 - Dedication of part of the Developer's Land to Council and construction of Pocket Park on the Developer's Land at the north east corner of the site including paving, landscaping, furniture and lighting.
 - Dedication of part of the Developer's Land to Council and construction of New Street 1 on the Developer's Land from Pemberton Street in the west to the Pocket Park in the east including the installation of public utilities within the road reserve.

- Dedication of land to Council and construction of Rancom Street extension from Pemberton Street in the west to the existing Rancom Street in the east including installation of public utilities in the road reserve. Note that the roadway of the Rancom Street extension will not join to the existing Rancom Street roadway.
- Dedication of land to Council for the widening of Pemberton Street and half road reconstruction including new footpath, kerb, gutter and verge.
- Dedication of land to Council and construction of north-south pedestrian and cycle pathway running from the Rancom Street extension to New Street 1.
- Dedication of land to Council and construction of east-west pedestrian and cycle pathway running from Pemberton Street to Lot 20 DP1178065 [adjacent to Wilson Street].
- Dedication of land to Council and construction of north-south pedestrian and cycle pathway from Botany Road to the Rancom Street extension.
- Dedication of land to Council and construction of a public park at the corner of Pemberton Street and New Street 1 including soft and hard landscaping, furniture and lighting.
- Traffic light signalisation of the intersection of Botany Road and Pemberton Street subject to approval by RMS.
- Traffic light signalisation of the existing pedestrian crossing of Botany Road close to the intersection of Wilson Street subject to approval by RMS.
- Construction of Rancom Street extension on land that is currently owned by Council.

2.22 These public domain works will provide a substantial public benefit in regards to the following key components:

- Provision of public open space in the Wilson and Pemberton Street precinct that will provide recreation opportunities for residents within the developments, nearby developments and existing residents and workers in the wider precinct. The subject site will provide much needed public open space to satisfy the future demand. It will result in improvement of the streetscape which is currently dominated by warehouse buildings and industrial yards.
- The works proposed to the surrounding street network including New Street 1, extension to Rancom Street and widening of Pemberton Street will improve vehicular movements in and around the precinct. New Street 1 will serve the new development with restricted access at its eastern end by the creation of a large central Park with deep soil landscaping. This link will be constructed to restrict traffic movements from Wilson Street which reduces traffic generation in the low density residential areas. The link also provides a pedestrian and cycle connection to the through site link and public park which improves the permeability of the precinct.
- The through site link which traverses north south across the site provides access to the public park, Banksmeadow shops and public transport. Together with the through site link provided in the approved Stage 1 of 42-44 Pemberton Street development, it will benefit residents in future developments to the north. The landscaped nature of the link will create an attractive pedestrian environment with high amenity and passive surveillance.

To ensure there is no land use conflicts on the interface between the non-residential and residential uses;

- 2.23 The buildings have been designed to ensure the units achieve high residential amenity and are appropriately integrated and designed to ensure no land use conflicts with the retail/commercial uses along Pemberton Street. The nature of the non-residential uses is likely to be local conveniences and cafes that will enhance the accessibility of these facilities for residents and improve the activation of the public park.

To ensure that future development contributes to the creation of a high quality landscape environment in the Precinct;

To retain existing trees both inside and outside the site and provide suitably proportioned areas of well designed landscaping on each development site;

- 2.24 The site was formally an industrial site and as such there is no existing landscaping or trees on site. The proposed landscaping as part of this development and public domain works will significantly improve the outlook of the Masterplan site.
- 2.25 The landscape treatment creates a complimentary landscape setting for the proposed buildings and its relationship with the future public park, through-site link and existing/future streets including Pemberton Street. The range of tree species and ground covers are appropriate for the area and will significantly enhance the visual appeal of the site.
- 2.26 A large proportion of the landscaped areas are deep soil landscaping (33% of the site) which will support the growth of large canopy trees.
- 2.27 A generous amount of planters will be provided around the base of each building. This will assist in softening the built form will allowing for privacy of private open space. Natural surveillance of the public domain will still be achievable through appropriate plant species.
- 2.28 The communal open space between Building B and C will be suitably landscaped to meet the needs of future residents and visitors with a variety of plants and suitably located amenities to improve usability of the space.
- 2.29 The future park and through site links will both be dedicated to Council, the design and finish of these areas will have consideration for Council's requirements within the public domain.
- 2.30 Overall, Buildings A, B and C will be positioned to be surrounded by large tracts of open space that improve the amenity of future occupants while ensuring sufficient separation distances to maintain privacy between units.

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

- 2.31 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.
- 2.32 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 promote and encourage a high design quality of buildings; and

- 2.33 The building forms and elements are enhanced by the use of a restrained materials palette which reinforces the building modelling.
- 2.34 The buildings utilise a combination of light and darker grey tones with framed elements that are accentuated with a light to dark brown 'finish'.
- 2.35 The facade materials are a combination of masonry finishes with various earth colours and smooth rendered/ painted finishes. Vertical aluminium and timber screens provide articulation.
- 2.36 Additional architectural articulation is provided through the use of recessed balconies with living area glass lines extending to be in line with the balustrades. This combined with protruding balconies, aluminium glass balustrades and screens achieves adequate depth and modulation.
- 2.37 The buildings will provide a quality urban design outcome for the site and highly interesting addition to the skyline.

To ensure the drainage of the Precinct is not detrimentally impacted and property is protected.

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

B4 Mixed Use Zone along Pemberton Street

To encourage live/work opportunities;

- 2.39 The development provides the opportunity for employment opportunities in close proximity to residential housing by the inclusion of retail space 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;

- 2.40 As noted above, the development facilitates a significant amount of public domain works that will significantly improve pedestrian linkages and access to quality open space in the precinct.
- 2.41 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;

- 2.42 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.

- 2.43 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.
- 2.44 The incorporation of retail units which are directly accessible from Pemberton Street is an appropriate use in this location. Non-residential 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;
- 2.45 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;

- 2.46 As noted above, retail 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;

- 2.47 As noted 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.

- 2.48 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;

- 2.49 As noted above, the development provides well designed retail space along the Pemberton Street frontage. The incorporation of non-residential 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;

- 2.50 The buildings present a quality architectural outcome that will complement the approved buildings to the east in the Parkgrove development site. The buildings forms are highly articulated with design features that break down the massing of the building and provide visual interest. The main tower (Building B) incorporates strong vertical elements that create an interesting skyline. This is further addressed in the architects design statement.

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

- 2.51 The development maintains the provision of 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 and from Rancom 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.
- 2.52 The provision of the north south through site link and New Street 1 link will enable the new and existing residents to traverse north / south and east / west 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;

- 2.53 The development facilitates the widening of Pemberton Street along the full frontage of the site, the extension of Rancom Street and New Street 1 which will facilitate and improved streetscape and vehicular movement within the precinct.
- 2.54 All parking associated with the non-residential uses is contained within the basement carpark accessed off Rancom Street which enables the non-residential 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;

- 2.55 The development provides a small proportion of retail (481m²) 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 and enhance activation of the public park.

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

- 2.56 The non-residential space has been designed to provide an attractive interface with the public domain. Disabled access has been consolidated into two points (one along Pemberton and one at the corner of Rancom Street) providing access to a large paved terrace that provides direct entry to the 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.
- 2.57 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;

- 2.58 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.

2.59 The buildings have been raised 1.6 metres above existing ground level to achieve the minimum required free board to habitable floors and access points to the basement which impacts on the overall height and scale of the buildings. Works within the precinct will address the current flooding issues to minimise the impact on existing and proposed developments.

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

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

2.61 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

2.62 Visually the buildings 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 transition in building height across the precinct. The buildings within Parkgrove West will be visible in the distance from Wilson Street being the transition point to the low density residential areas. However, as shown in the following 3D images, the increased building heights will be primarily screened by the existing approved buildings in the precinct. In addition, increased heights enables a higher proportion of ground level open space and landscaped which improves the visual amenity of the site compared with buildings compliant with the height controls.

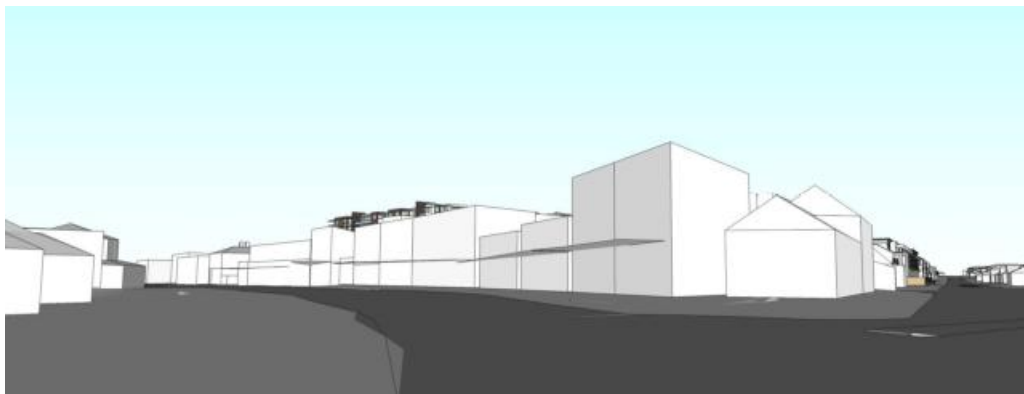
2.63 The increased building heights will not have an adverse visual impact when viewed from Wilson Street as shown below:



2.64 Similarly, the buildings will provide a transition in height along Pemberton Street that re-enforces the western edge of the Precinct and provides a steeping scale north south separated by the public park as shown below:



- 2.65 As viewed from Botany Road, the building forms are not visible. The varying building forms sit suitably in the context of the existing and future character of the Botany Road precinct as shown in the following images:



- 2.66 The building forms and elements are enhanced by the use of a restrained materials palette which reinforces the building modelling.
- 2.67 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.
- 2.68 Existing buildings within the Precinct will receive the benefit of increased ground level open space and landscaping which will improve their visual outlook.

Disruption of views

- 2.69 There are no identified views that would be adversely disrupted by the proposed building heights. 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, as demonstrated above they will not be adversely impacted by the height of the building.

Loss of privacy

- 2.70 The subject buildings complete the Parkgrove Masterplan site. As demonstrated in the Statement of Effects, the buildings are positioned to achieve compliant separation between the proposed and existing buildings on the site. Building C is setback a minimum of 3 metres from Rancom Street to the south, combined with the minimum width of Rancom Street of 7.5 to 12 metres provides in excess of 10.5 - 15 metres between the proposed buildings and the northern boundary of the Botany Road properties.
- 2.71 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.

Loss of Solar access

- 2.72 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, properties along Botany Road to the south and the approved Buildings within the first stages of the Parkgrove Masterplan site. The position and orientation of the buildings will maintain compliant levels of solar access to the properties to the south along Botany Road and the existing buildings in the Parkgrove Masterplan site,

(h) 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.

- 2.73 The proposed buildings will be visible from the surrounding public roads and the future public park. As demonstrated in the 3D diagrams above, the building forms and heights will create an interesting skyline.
- 2.74 As discussed above, the taller building forms will sit appropriately in the context of this site, being between the B7 and approved buildings in the R3 zones. The streetscape will be significantly improved through the increased landscaped and deep soil zones that are achieved through higher building forms and reduced building footprint. The buildings will address and complement the proposed public open space on the site through the ground level interface and activation and the orientation of the retail uses.
- 2.75 For the reasons discussed above, the variation to the height control is considered appropriate.

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

- 2.76 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.

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

- 2.77 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.

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

2.78 The Council has in part abandoned the height control by the recent approval (or pending approval) of developments in the precinct beyond the LEP heights as follows:

- 42-44 Pemberton Street – approved within B4 zone 21.6 metres
- 52-54 Pemberton Street – Masterplan deferred by JRPP on 20.1.15 indicating an intention to approve Building Heights up to 8 storeys approximately 28 metres

2.79 Furthermore, 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.

2.80 The zoning of the land is appropriate being a combination of the R3 and B4 zones

2.81 The proposed development maintains compliance with the objectives of the R3 Residential and B4 Mixed Use zone.

2.82 The objectives of the R3 Residential under the Botany Bay LEP 2013 are as follows:

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

2.83 The proposed development satisfies the objectives of the R3 Residential zone, as outlined below:

- The development provides for residential uses in a highly accessible location consistent with the objectives of the zone. The development and the minor increase in density will provide for the increased housing needs in the future.
- The development results in a variety of building types that offer a variety of housing options. The density is consistent with the expectation of medium density development.
- The buildings are arranged and overlook public parks and through site links which improves the permeability and encourages pedestrian movements through the precinct.

2.84 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.

2.85 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 non-residential units which are directly accessible from Pemberton Street is an appropriate use in this location. Retail 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 the buildings is therefore ideal and will improve the internal amenity of the units;
 - The non-residential 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 non-residential 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.
- 2.86 The site is located within an area that has and is currently transitioning to provide a mixture of uses including greater residential development. The proposed development is consistent with the desired future character of the area and the zoning under Botany Bay LEP 2013 as outlined above.
- 2.87 It is therefore considered that the development notwithstanding the variation to the development standard, achieves the objectives of the R3 and B4 Mixed Use Zone.
- 2.88 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?

- 2.89 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?

- 2.90 The objective of the FSR Standard has been addressed in detail in Section 2.14 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?

2.91 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.

2.92 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 control. The flexible application of the control will achieve a better outcome on this site for the following reasons:

- The proposed variation to the height control enables the site to utilise its maximum density and compensate for the reduced density in the eastern side of the precinct.
- The increased building height reduces the building footprint and increases the opportunity for deep soil landscaping across the site.
- 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 2.18 of this report.
- The reduction in building height on the eastern side of the Masterplan site enabled a low scale townhouse interface to the low density dwellings on the eastern side of Wilson Street. Providing increased building height to utilise the density (with a minor variation to the permitted FSR) on the western side is a *better outcome* for the precinct.

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

2.94 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,*

2.95 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 R3 and B4 zones and the FSR development standard. The report has also demonstrated that the outcome on this site is appropriate and will result in a better planning outcome.

2.96 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?*

2.97 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 R3 & 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 minor increased height which increases 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 and north.
- 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.
- 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 in the eastern side of the Precinct would not enable the density of development envisaged by the planning controls on the Parkgrove Masterplan site.

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

5. *Is the Objection well founded?*

2.99 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 R3 Residential & B4 Mixed Use zones, 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.

2.100 The variation is considered well founded.

Is the variation in the public interest?

- 2.101 The overall site provides the opportunity for generous landscaped space, communal open space, public open space and a north south through site link and east west link forming New Street 1 with central park that will improve the permeability in the precinct.
- 2.102 The application provides sufficient parking to accommodate the needs of the future residents and achieves high residential amenity including compliant solar access and cross flow ventilation. As a result of the variation to the height control, increased landscaping and public open space is provided across the site which is in the public interest.
- 2.103 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 Wilson Pemberton Street Precinct and the wider Botany Bay LGA.
- 3.5 The proposed variation to the development standards is considered reasonable and necessary.