

CLAUSE 4.6 VARIATION STATEMENT 16 SECOND AVENUE, BLACKTOWN - MAXIMUM HEIGHT (CLAUSE 4.3)

Clause 4.3(2) of Blacktown LEP 2015 relates to the maximum height requirements and refers to the *Height of Buildings Map*. The relevant map identifies the subject site as having a maximum height of 56m. As indicated at Figure 1 below, the site has a corner location and is situated at the interface of the 56m and 64m height limit as well as being in close proximity to an area with a maximum height limit of 64m.

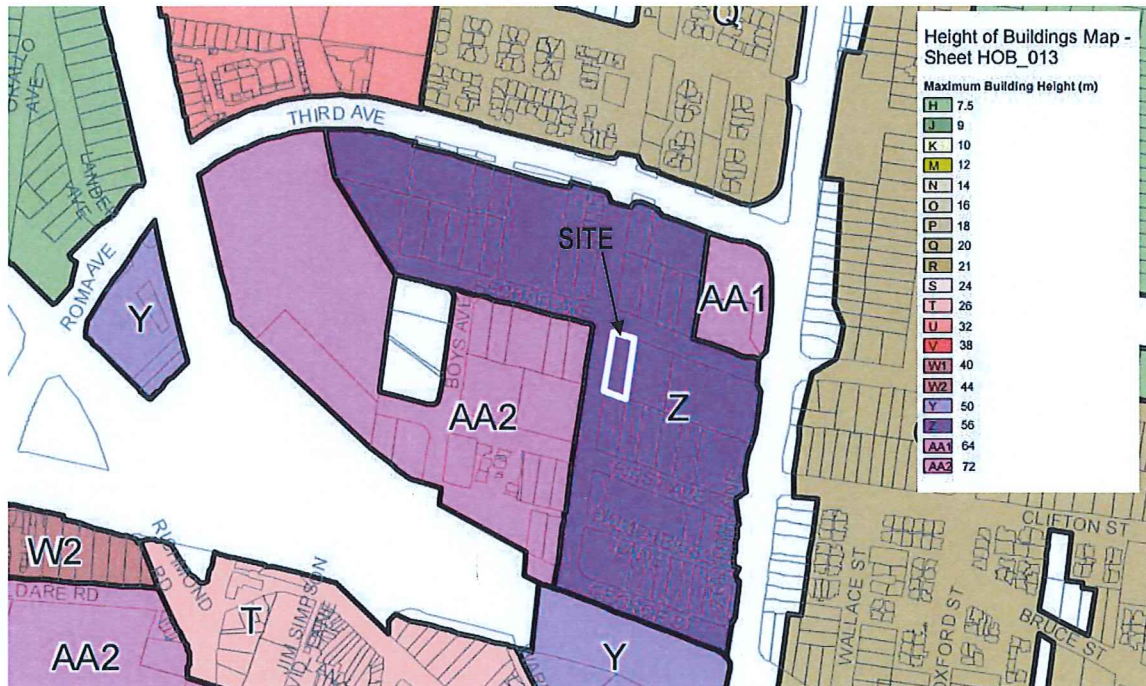


Figure 1: Extract from LEP Height Maps indicating height control context

Building height is defined as:

“ **building height (or height of building)** means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.”

The proposal exceeds the maximum permitted building height in relation to a small portion of the upper level of the development which exceeds the maximum height limit by 770mm. In addition the roof terrace and access to the roof terrace via a lift results in a further non-compliance and a maximum building height of 61.8m or a 5.8m (10.3%) exceedance.

Figure 2 below provides a sectional diagram indicating the extent of the height non-compliance. In the context of the scale of the overall proposal, the proposed will be indiscernible from a compliant scheme when viewed from the adjacent street frontages.



Figure 2: Sectional drawing indicating the extent of the height non-compliance

As indicated at Figure 2, the height non-compliance is generally limited to a 770mm portion of the upper level and the portions of the building that are required to provide access to the roof terrace and include parapet elements and lift overruns with associated service room.

In the scheme of the permitted building height, the upper level will be indiscernible from a fully compliant scheme (770mm variation for the 56m height limit which is a 1.3% variation) and it can be said that the only elements that will result in a visible height non-compliance are isolated to the elements of the building required to provide a roof terrace. Maximum height control is a "development standard" to which exceptions can be granted pursuant to clause 4.6 of the LEP.

The objectives and provisions of clause 4.6 are as follows:

“ 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 Secretary has been obtained.
- (5) In deciding whether to grant concurrence, the Secretary 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 Secretary 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 all of these zones.
- (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,
 - (ca) clause 6.1 or 6.2.”

The development standards in clause 4.3 are not “expressly excluded” from the operation of clause 4.6.

Objective 1(a) of clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of subclauses 4.6(3) & (4) in order to demonstrate to Council that the exception sought is consistent with the exercise of “an appropriate degree of flexibility” in applying the

development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in subclause 4.6(6).

Objective 1(b) of clause 4.6 is addressed later in this request.

The objectives and relevant provisions of clause 4.3 are as follows, inter alia:

“ **4.3 Height of buildings**

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

- (a) to minimise the visual impact, loss of privacy and loss of solar access to surrounding development and the adjoining public domain from buildings,*
- (b) to ensure that buildings are compatible with the height, bulk and scale of the surrounding residential localities and commercial centres within the City of Blacktown,*
- (c) to define focal points for denser development in locations that are well serviced by public transport, retail and commercial activities,*
- (d) to ensure that sufficient space is available for development for retail, commercial and residential uses,*
- (e) to establish an appropriate interface between centres, adjoining lower density residential zones and public spaces.*

(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.”*

The *Height of Buildings Map* nominates a maximum height of 56m for the site. It is hereby requested that an exception to this development standard be granted pursuant to clause 4.6 so as to permit a maximum height of 57.8m in relation to the main roof structure and balustrade to the roof terrace and 61.8m or a 5.8m (10.3%) exceedance in relation to the lift overrun.

In order to address the requirements of subclause 4.6(4)(a)(ii), each of the relevant objectives of clause 4.3 are addressed in turn below.

Objective (a):

Objective (a) seeks to to minimise the visual impact, loss of privacy and loss of solar access to surrounding development and the adjoining public domain from buildings. As detailed at Section 4.3.6 of the Statement of Environmental Effects, the proposal has been designed to minimise loss of privacy and is of a contemporary aesthetic that will not give rise to detrimental visual impacts. The portions of the building that result in the most significant projections are the lift overrun and fire escape stairs. These parts of the building are centralised on the roof, will not be readily visible from surrounding vantage points and have been treated to provide visual interest at the top of the building.

As the proposal is indiscernible from a fully compliant scheme at the facade edges, the most prominent elements of the building will have the appearance of being compliant with the height controls and the development is of a scale that is reasonably anticipated at the site.

In relation to overshadowing, as detailed at Section 4.3.6 of the Statement of Environmental Effects the impacts of overshadowing are minimal and entirely acceptable. The proposal adopts a linear building form that is located on a north to south axis resulting in transient shadow impacts and a lack of concentrated impacts on any one property. The additional shadow impacts arising from the non-compliant portions of the building are negligible and insistence on strict compliance would have no material benefit.

As such, the height non-compliance will not give rise to any significant shadow impacts and the proposal satisfies Objective (a).

Objective (b):

Objective (b) seeks to ensure that buildings are compatible with the height, bulk and scale of the surrounding residential localities and commercial centres within the City of Blacktown. In our view, “compatible” does not promote “sameness” in built form but rather requires that development fits comfortably with its urban context. Of relevance to this assessment are the comments of Roseth SC in *Project Venture Developments Pty Ltd v Pittwater Council* [2005] NSWLEC 191:

“ 22 There are many dictionary definitions of *compatible*. The most apposite meaning in an urban design context is *capable of existing together in harmony*. *Compatibility* is thus different from *sameness*. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.”

In relation to the built form context, there are a number of properties that are constructed to 2 and 3 storeys in height that do not represent the intended scale and character of the locality nor does this reflect the recently approved and pending applications for residential towers in the area. As indicated at Figure 1 the intended scale of development in the area comprises buildings that range in height from 56m, 64m and 72m and will be constructed on varying sized lots that will promote interest and variation in the grain, rhythm and form of the streetscape and built environment.

Notably, the site is located on a prominent corner and the development provides an attractive and emphatic form which addresses the corner and responds appropriately to its context. Furthermore, the site is located at the interface of a street block that contains a maximum height of 72m and is situated between another site on the corner of Sunnyside Road and Second Avenue that has a building height of 64m. It is therefore not the intention of Council to have a completely homogeneous and uniform scale and height of development, but rather to promote buildings that sit within the centre hierarchy evidenced in the building height and FSR maps.

In our view, the proposal provides a suitable and compatible built form that appears compliant with the maximum building height at the street edge and therefore presents as a scale that is consistent with its context. The roof terrace elements provide a functional and recessive component on the top of the building with lift overruns that will not be readily visible. As such, the proposal provides a scale of development that is compatible and does not give rise to a jarring appearance in the context of the permitted height limits.

In light of the above, the proposal will exist in harmony with the desired future character of development in the area and is consistent with objective (b).

Objective (c):

Objective (c) seeks to define focal points for denser development in locations that are well serviced by public transport, retail and commercial activities. This objective is satisfied by the hierarchy of height limits that are established on the height of buildings maps. Notably, the subject site is located adjacent to properties that have a height limit of 72m. The proposal will not detract from the focal point achieved by buildings that comply with the 72m height limit, rather it will provide a transitional form that assists with promoting the focal points of the Blacktown Centre.

Therefore, the minor height exceedances at the street edge of the building and the recessive building elements that exceed the height limit as identified above are not antipathetic to this objective.

Objective (d):

This objective seeks to ensure that sufficient space is available for development for retail, commercial and residential uses. The proposed development makes efficient use of the site and the applicable height limit to provide residential accommodation in a location that is both highly desirable and suitable for such a level of density. The proposal complies with the required ceiling heights by providing residential levels that contain 3m heights floor to floor and a 3.2m high floor to floor level for the retail component. Voids are incorporated in the layout to further provide the intended spatial proportions of the ground floor retail element. As such, the proposal provides a 19 level mixed use development with sufficient floor to ceiling heights within a form that is generally indiscernible from a compliant scheme.

Objective (e):

This objective seeks to establish an appropriate interface between centres, adjoining lower density residential zones and public spaces. This objective is not particularly relevant to the subject site that is located centrally within the commercial core of the Blacktown Centre and is not located in the vicinity of public spaces. The proposal will not compromise the transitioning of development at the periphery of the centre nor will it impact on the transition of the building form to public places.

The proposed development is therefore consistent with the objectives for maximum height, despite the numeric non-compliance.

Clause 4.6(4) also requires consideration of the relevant zone objectives. The objectives of the B4 – Mixed Use zone are as follows:

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

The proposed development is entirely consistent with the objectives of the B4 zone as it represents a suitable integration of commercial and residential uses at the site, in a location that is suitable for the level of density proposed.

Sufficient Environmental Planning Grounds

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, the assessment of this numerical non-compliance is guided by the recent decision of the NSW LEC *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 whereby Justice Pain ratified the decision of commissioner Pearson.

On “planning grounds” and in order to satisfy that the proposal meets objective 1(b) of clause 4.6 in that allowing flexibility in the particular circumstances of this development will achieve “a better outcome for and from development”. In this particular case, the height non-compliance is almost entirely attributed to the provision of common open space area on top of the building in the form of a roof terrace. A small degree of the non-compliance relates to the ceiling and roof of the upper level, however, as discussed this represents a 1.3% variation to the height requirement and a building form that is indiscernible from a fully compliant building.

Therefore, it can be said that the need to exceed the height limit is almost entirely attributed to the provision of a roof terrace to provide significantly more than the required common open space area at the site with clear amenity benefits for the future occupants of, and visitors to, the development.

That is, the inclusion of the terrace in the development (with facilities equitable access) represents an improved urban design outcome for the subject site. This means that there are sufficient environmental planning grounds to justify the variation of the height control, **particularly** given that:

- the development has been designed to minimise impacts on neighbouring properties and likely future adjoining properties;
- strict compliance with the building height standard would result in no material built form benefits;
- the proposed height non-compliance does not relate to parts of the building that contribute to calculable floor space;
- the proposed height variation will not be visually dominant from the street frontages of the site or adjoining properties; and
- the variation improves residential amenity in terms of providing two alternative common open space area with different characteristics and varied solar access properties at different times of the year to allow flexible use.
- The ADG promotes the inclusion of rooftop terraces in residential flat design.

Insistence on Compliance is Unreasonable and Unnecessary

Returning to Clause 4.6(3)(a), in *Wehbe v Pittwater Council* (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

“ An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.”

The judgement goes on to state that:

“ The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;
5. The zoning of the particular 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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Having regard to all of the above, it is our opinion that compliance with the maximum height development standard is unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives.

Therefore, insistence upon strict compliance with that maximum building height development standard in this instance is unreasonable and on the basis of the above, the statutory tests set out in Clause 4.6 of Blacktown LEP are satisfied.

CLAUSE 4.6 VARIATION STATEMENT 16 SECOND AVENUE, BLACKTOWN – FLOOR SPACE RATIO (CLAUSE 4.4)

Clause 4.4(2) of Blacktown LEP 2015 relates to the maximum floor space ratio and refers to the *Floor Space Ratio Map*. The relevant map identifies the subject site as having a maximum FSR of 6.5:1. As indicated at Figure 1 below, the site has a corner location and is situated at the interface of a street block that has an FSR of 8.5:1, as well as being in close proximity to an area with a an FSR of 7.5:1.

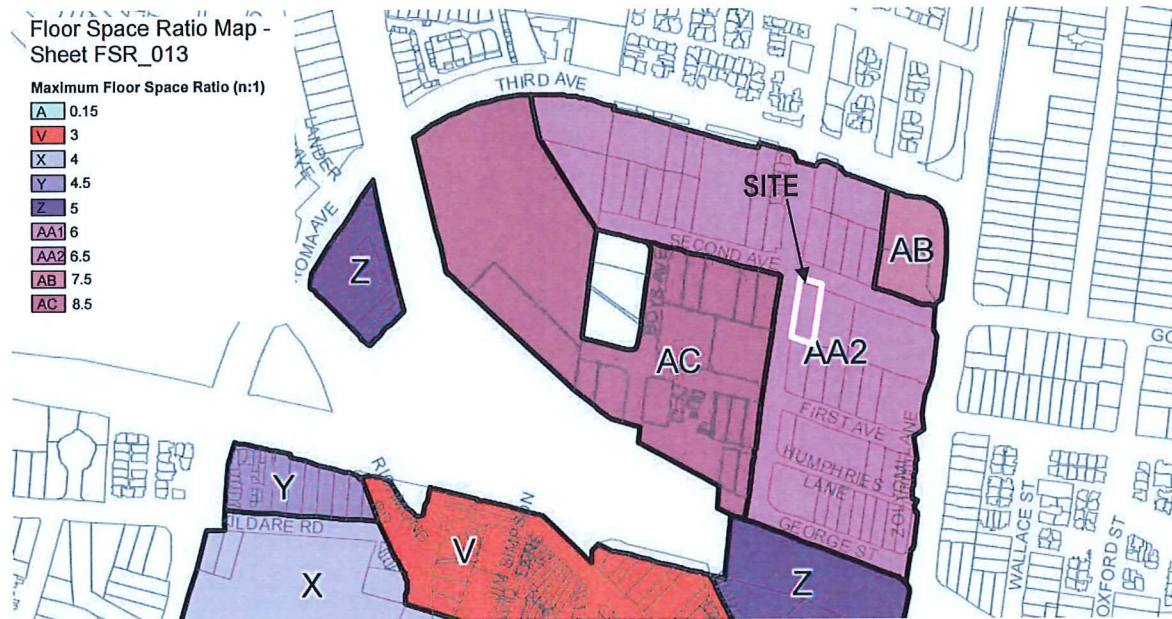


Figure 1: Extract from LEP FSR Maps indicating FSR control context

When calculated in accordance with the LEP definition, the proposal results in a gross floor area of 8,668.90m² and an FSR of 7.64:1. The proposal exceeds the maximum permitted gross floor area by 1,291.40m² resulting in a 14.9% variation to the maximum permitted FSR.

The extent of the proposed non-compliance results from a building form that fills the volumetric scale available as a result of achieving the building height limit within a suitable building envelope. As discussed at Annexure C, the proposal results in a 770mm variation in relation to the ceiling of the upper level of the building and it can therefore be said that the external appearance of the development is commensurate with a scale reasonably expected at the site and is indiscernible from a fully compliant scheme.

The maximum FSR control is a “development standard” to which exceptions can be granted pursuant to clause 4.6 of the LEP.

The objectives and provisions of clause 4.6 are as follows:

“ **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 Secretary has been obtained.
- (5) In deciding whether to grant concurrence, the Secretary 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 Secretary 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 all of these zones.
- (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,
 - (ca) clause 6.1 or 6.2."

The development standards in clause 4.4 are not "expressly excluded" from the operation of clause 4.6.

Objective 1(a) of clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of subclauses 4.6(3) & (4) in order to demonstrate to Council that the exception sought is consistent with the exercise of "an appropriate degree of flexibility" in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in subclause 4.6(6).

Objective 1(b) of clause 4.6 is addressed later in this request.

The objectives and relevant provisions of clause 4.4 are as follows, inter alia:

- “
- (1) *The objectives of this clause are as follows:*
 - (a) *to establish maximum floor space ratios as a means of controlling the density, bulk and scale of buildings,*
 - (b) *to establish the maximum floor space available for development for commercial premises, taking into account the availability of infrastructure and the generation of vehicular and pedestrian traffic.*
 - (2) *The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.”*

The *Floor Space Ratio Map* nominates a maximum FSR of 6.5:1 for the site. It is hereby requested that an exception to this development standard be granted pursuant to clause 4.6 so as to permit a maximum FSR of 7.64:1.

In order to address the requirements of subclause 4.6(4)(a)(ii), each of the relevant objectives of clause 4.4 are addressed in turn below.

Objective (a):

Objective (a) seeks to to establish maximum floor space ratios as a means of controlling the density, bulk and scale of buildings. In responding to this objective, consideration of controlling density is separated from the considerations of bulk and scale of a development as they are understood to relate to separate matters, as follows:

Controlling Density

Controlling density in an urban centre though the allocation of FSR is a strategic mechanism that is not an exact science, nor is it intended to be an exact science. With increased density comes increased traffic generation, increased pedestrian activity and demand on services as well as economic activity and ultimately the vitality of an urban centre resulting in the need to balance density.

By virtue of identifying varying FSR requirements in the Blacktown Centre that range from 3:1 to 8:1 and in the vicinity of the site range from 6.5:1, 7.5:1 and 8.5:1, indicates the clear strategic intention of Council to encourage high density living environments to foster urban vitality and economic activity in an area that is ideally suited for high density due to nearby transport interchanges and commercial services.

In addition, the greater the FSR requirement the more uncertainty as to the actual density that it will generate in terms of household sizes and resultant population. By way of example, low density FSR on a small site will provide limited opportunities to allocate a range of dwelling sizes and will ultimately result in a relatively predictable unit yield. Alternatively a larger FSR provides increased floor area and therefore additional opportunities to vary dwelling structures that may accordingly result in a vastly different population density at a site. With this in mind, it cannot be taken that an FSR variation of the extent proposed will result in a dwelling density that is significantly beyond what is expected at the site by the applicable FSR requirement.

Notably, the site has an area of 1,135m² resulting in a realisable GFA of 7,377.5m² on the basis of a 6.5:1 FSR. The proposed GFA of 8,668.90m² exceeds the maximum requirement by 1,291.40m². The total dwelling yield at the site is 106 apartments including 1 x studio, 19 x 1 bedrooms, 80 x 2 bedrooms and 6 x 3 bedrooms. This equates to 198 individual bedrooms in total and therefore assumed to be a possible 198 people, on the basis of bedrooms being occupied by individuals.

A compliant scheme at the site (maximum GFA of 7,377.5m²) that provides 3 bedroom dwellings at 90m² could result in up to 74 x 3 bedroom apartment and a total of 221 bedrooms. In this event, a fully compliant scheme could ostensibly generate a density that is in excess of the proposal. As such, it cannot be said that the extent of the FSR variation proposed results in a density that is beyond what is expected at the site in the context of the site being a dense urban area and the wide range of possible density outcomes resulting from an FSR of 6.5:1.

Bulk and Scale

The acceptability of the “bulk” of a building and its “scale” is a question of whether the building form at the site is acceptable in its context or desired future context and furthermore whether such building form is compatible with the surrounding locality. Notably, the terms “scale” relates to *a certain relative or proportionate size or extent*. It is therefore the intention of this objective to control building bulk to the extent that it is compatible with the surrounding locality.

The distribution of density at the site has been undertaken by providing the ideal building envelope and duplicating this envelope to the maximum building height, whilst incorporating articulation by stepping facades and materiality. The resultant form is compatible with the desired future character of the area in terms of its bulk and scale.

For a building to be “compatible” does not promote or require “sameness” in built form but rather requires that development fits comfortably with its urban context. Of relevance to this assessment are the comments of Roseth SC in *Project Venture Developments Pty Ltd v Pittwater Council* [2005] NSWLEC 191:

“ 22 There are many dictionary definitions of *compatible*. The most apposite meaning in an urban design context is *capable of existing together in harmony*. *Compatibility* is thus different from *sameness*. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.”

The urban context of the area is changing and there are a number of properties that are constructed to 2 and 3 storeys in height that do not represent the intended scale and character of the locality.

The site is located on a prominent corner and the development provides an attractive and emphatic form that addresses the corner and responds appropriately to its context. Furthermore, the site is located at the interface of a street block that contains a maximum height of 72m and FSR of 8.5:1 and is situated between another site on the corner of Sunnyhold Road and Second Avenue that has a building height of 64m and FSR of 7.5:1. It is therefore not the intention of Council to have a completely homogeneous and uniform scale and height of development in the area, but rather to promote buildings that sit comfortably within the centre hierarchy of which the proposal does.

To insist on strict compliance would result in the removal of gross floor area from each level that is less than the area of a 2 bedroom apartment. In doing so, this would not result in a dramatically different scale and form of development than the proposal, which in our view sits comfortably in the desired streetscape and context of the area.

The proposed development is therefore consistent with the objectives for maximum FSR requirement, despite the numeric non-compliance.

Clause 4.6(4) also requires consideration of the relevant zone objectives. The objectives of the B4 – Mixed Use zone are as follows:

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

The proposed development is entirely consistent with the objectives of the B4 zone as it represents a suitable integration of commercial and residential uses at the site, in a location that is suitable for the level of density proposed.

Sufficient Environmental Planning Grounds

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, the assessment of this numerical non-compliance is guided by the recent decision of the NSW LEC *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 whereby Justice Pain ratified the decision of commissioner Pearson.

The merits of the proposal on “environmental planning grounds” need to be balanced with the burden that strict compliance places on the site and whether strict compliance will result in a better or neutral outcome. The development has been designed to provide a high quality urban outcome by activating the street, providing legible pedestrian points, a defined podium level as well as a distinctive tower element. Insisting on strict compliance in this instance could result in the massing of a development that is not readily discernible from the proposal with no built form benefits and could place unreasonable burden on the development and the inability to provide residential density in an area that is ideally suited to the level of density proposed.

This site represents a unique circumstance where variation to the FSR requirement is warranted. The site is located on a significant corner and provides an emphatic corner presentation with the tower element maintaining a consistent, yet articulated, façade to the upper level. In addition, the site is located at the interface of a street block that has an FSR of 8.5:1 and in close proximity to a site that has an FSR of 7.5:1. The degree of variation proposed will allow for a level of density that is consistent with the strategic intention of the site and a building height that is indiscernible from a compliant building as well as providing a transitional form to the adjoining higher density properties.

Therefore on environmental planning grounds, the site location and its proximity to higher density areas provides an opportunity for a transitional density within a building height that is consistent with Council's expectations for the site. To require strict compliance would therefore result in an unreasonable burden on the development with no demonstrable built form benefits and as such the proposal results in a better outcome relative to the site.

Insistence on Compliance is Unreasonable and Unnecessary

Returning to Clause 4.6(3)(a), in *Wehbe V Pittwater Council* (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

- “ An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.”

The judgement goes on to state that:

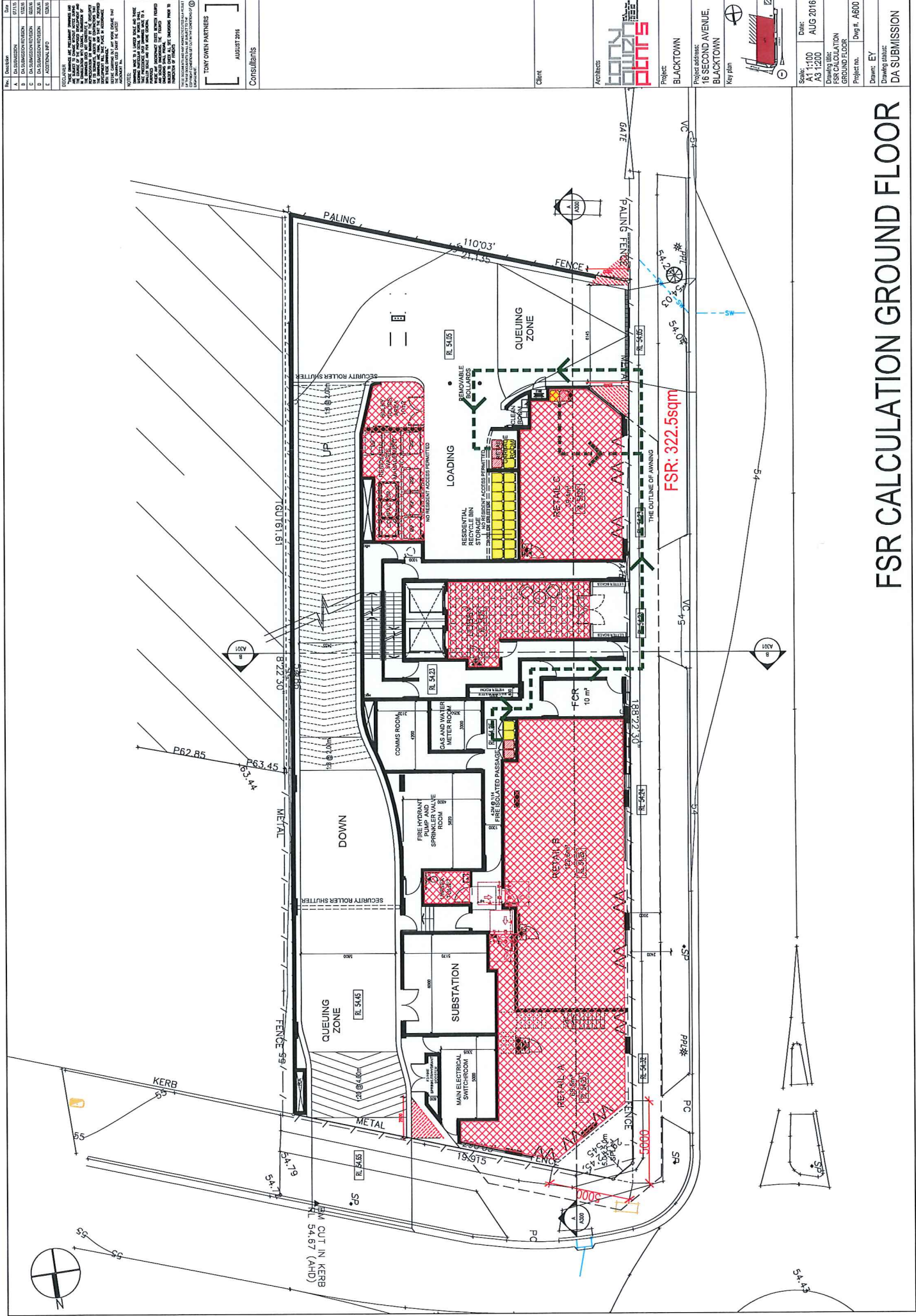
“ The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;
5. The zoning of the particular 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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Having regard to all of the above, it is our opinion that compliance with the maximum FSR development standard is unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives.

Therefore, insistence upon strict compliance with that maximum FSR development standard in this instance is unreasonable and on the basis of the above, the statutory tests set out in Clause 4.6 of Blacktown LEP are satisfied.



(Design DA)

Development Application

Project:	Blacktown			Project	950	Date 23.08.2016
Project Address:	16 Second Avenue Blacktown					
Site Area:	1,135.00 sqm					
Consent Authority:	BLACKTOWN COUNCIL					
FSR Calculation						
			FSA			
level 18	Residential		510.70 sqm			
level 17	Residential		510.70 sqm			
level 16	Residential		510.70 sqm			
level 15	Residential		510.70 sqm			
level 14	Residential		510.70 sqm			
level 13	Residential		510.70 sqm			
level 12	Residential		510.40 sqm			
level 11	Residential		510.40 sqm			
level 10	Residential		510.40 sqm			
level 9	Residential		510.40 sqm			
level 8	Residential		510.40 sqm			
level 7	Residential		510.40 sqm			
level 6	Residential		510.40 sqm			
level 5	Residential		510.40 sqm			
level 4	Residential		515.80 sqm			
level 3	Residential		549.00 sqm			
level 2	Parking					
level 1	Retail		134.2 sqm			
Ground Level	Retail		322.5 sqm			
					Hight limit=56	
			8,212.20 sqm			
GROSS FLOOR AREA			8,668.90 sqm			
Site Area			1,135.00 sqm			
FSR			7.64 : 1			
DCP ALLOWABLE FSR			6.50 : 1	7,377.50 sqm		
			OVER	1,291.40 sqm		