



## CLAUSE 4.6 VARIATION STATEMENT

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Demolition of existing structures, removal of trees, construction of two residential flat buildings and construction of a road to be dedicated to Council

5 and 15 Rynan Avenue  
Edmondson Park

Prepared for: Abu Tony Pty Ltd

REF: M170295

DATE: 9 August 2018



## DEVELOPMENT



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## CLAUSE 4.6 VARIATION STATEMENT- MAXIMUM FLOOR SPACE RATIO (CLAUSE 4.4)

### 1. INTRODUCTION

This Variation Statement has been prepared in accordance with Clause 4.6 of Liverpool Local Environmental Plan 2008 to accompany a development application to Liverpool City Council seeking consent for demolition of existing structures, removal of trees, construction of two residential flat buildings and construction of a road to be dedicated to Council (Council Reference: DA-471/2016).

Clause 4.4 of Liverpool Local Environmental Plan 2008 relates to the floor space ratio requirements and refers to the *Floor Space Ratio Map*. The relevant maps [sheets FSR\_008 and FSR\_009] indicates that the site is subject to various maximum floor space ratios, with the north eastern portion of the site having a maximum FSR of 1:1, the south eastern portion having a maximum FSR of 0.75:1 and the north western portion of the site being subject to a maximum FSR of 0.01:1.

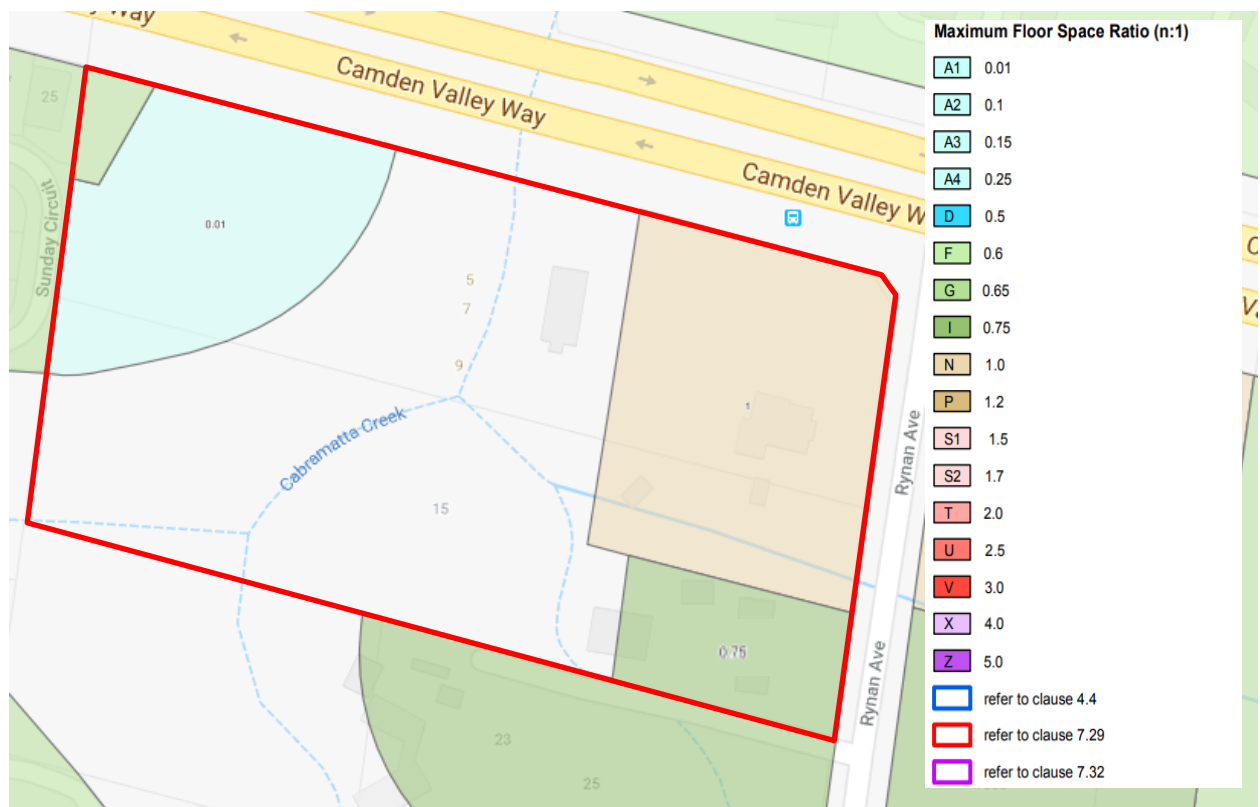


Figure 1 Floor Space Ratio applying to subject site (Source: [www.planningportal.nsw.gov.au](http://www.planningportal.nsw.gov.au))

## Clause 4.5 - Calculation of floor space ratio and site area

Clause 4.5 set out rules for the calculation of the site area of development for the purpose of applying permitted floor space ratios. Subclauses (2) to (7) relevantly provide:

*(2) Definition of “floor space ratio”*

*The floor space ratio of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area.*

**(3) Site area**

*In determining the site area of proposed development for the purpose of applying a floor space ratio, the site area is taken to be:*

*(a) if the proposed development is to be carried out on only one lot, the area of that lot, or*

*(b) if the proposed development is to be carried out on 2 or more lots, the area of any lot on which the development is proposed to be carried out that has at least one common boundary with another lot on which the development is being carried out.*

*In addition, subclauses (4)–(7) apply to the calculation of site area for the purposes of applying a floor space ratio to proposed development.*

**(4) Exclusions from site area**

*The following land must be excluded from the site area:*

*(a) land on which the proposed development is prohibited, whether under this Plan or any other law,*

*(b) community land or a public place (except as provided by subclause (7)).*

**(5) Strata subdivisions**

*The area of a lot that is wholly or partly on top of another or others in a strata subdivision is to be included in the calculation of the site area only to the extent that it does not overlap with another lot already included in the site area calculation.*

**(6) Only significant development to be included**

*The site area for proposed development must not include a lot additional to a lot or lots on which the development is being carried out unless the proposed development includes significant development on that additional lot.*

**(7) Certain public land to be separately considered**

*For the purpose of applying a floor space ratio to any proposed development on, above or below community land or a public place, the site area must only include an area that is on, above or below that community land or public place, and is occupied or physically affected by the proposed development, and may not include any other area on which the proposed development is to be carried out.*

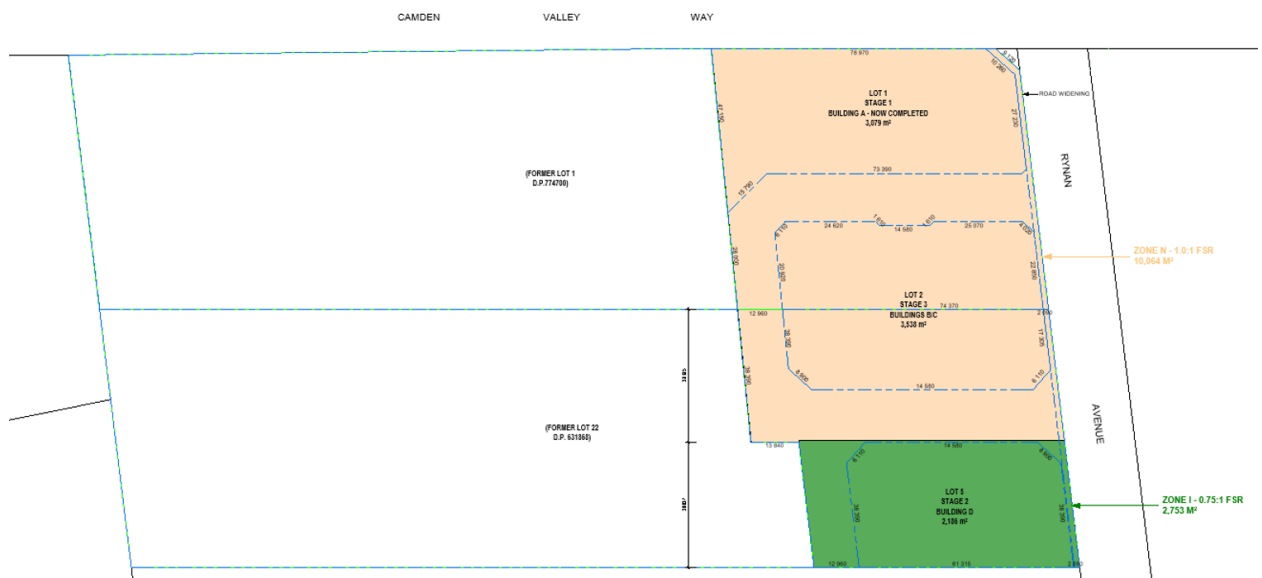
The proposal includes consolidation of the two existing lots (Lot 1 DP 774700 and Lot 22 DP 631868) and a 5 lot subdivision of the resultant site area. This incorporates the subdivision pattern as approved with DA 898/2014 and subsequent modification approval (Stage 1) with Lots 2, 3 and 4 now being enlarged. Proposed Lot 4 constitutes RE1 zoned land and will contain a riparian zone and public open space. As Lot 4 does not permit the proposed development

it has been excluded from the site areas as per subclause (4)(a) above. Lots 1, 2, 3 and 5 constitute “site area” (i.e. the “development site”) under the provisions of Clause 4.5 as they are located within the R1 (General Residential) zoned portion of the site. The configuration of the proposed lots on the site is provided at Figure 2.



**Figure 2** Configuration and site areas of proposed lots

A maximum FSR of 1:1 applies to Lots 1 and 2, whilst for a FSR of 0.75:1 applies to Lot 5. Lot 3 (proposed road) is the subject of a FSR of 1:1 for the majority of the lot and 0.75:1 for the remainder of the lot. An overlay of the proposed subdivision and applicable maximum FSR is provided in Figure 3 below.



**Figure 3** Overlay of proposed subdivision and applicable maximum FSR

## 2. PROPOSED VARIATION

When calculated in accordance with the definition of gross floor area under the Liverpool LEP 2008, the proposed development, comprising Buildings A (now completed), B, C and D will provide a total gross floor area of 12,129m<sup>2</sup>. The total gross floor area relates to the development site (Lots 1, 2, and 5). The post-subdivision FSR for each respective lot and the FSR for the whole development site is provided in Table 1 below.

Table 1 Site Area & FSR for each proposed Lot – post subdivision					
	Lot 1	Lot 2	Lot 3	Lot 5	Total
Site Area	3,079m <sup>2</sup>	3,538m <sup>2</sup>	4,014m <sup>2</sup>	2,186m <sup>2</sup>	12,817m <sup>2</sup>
Buildings	Building A	Buildings B / C	Road	Building D	-
Proposed GFA	3,741m <sup>2</sup>	6,323m <sup>2</sup>	0m <sup>2</sup>	2,065m <sup>2</sup>	12,129m <sup>2</sup>
Permissible FSR	1:1	1:1	1:1 and 0.75:1	0.75:1	-
Proposed FSR	1.21:1	1.79:1	-	0.94	0.95:1

The implications of the subdivision of the site is a technical non-compliance with the FSR control in relation to Lots 1, 2 and 5. Should the subject application have not included subdivision, the proposal would be entirely consistent with the permitted FSR controls and there would be no such need for a justification pursuant to Clause 4.6 in relation to the FSR. The pre-subdivision FSR for each respective lot and the FSR for the whole development site is provided in Table 2 below.

Table 2 Site Area & FSR for each respective lot - Pre Subdivision				
Zoning	Zone N			Totals
Site Area	10,064 m <sup>2</sup>			12,817 m <sup>2</sup>
Permissible FSR	1.0:1			-
Buildings	A	B/C	A,B, C	D
Gross Floor Area	3,741 m <sup>2</sup>	6,323 m <sup>2</sup>		-
Total Proposed GFA	10,064 m <sup>2</sup>			12,129 m <sup>2</sup>
Permissible Floor Space	10,064 m <sup>2</sup>			12,129 m <sup>2</sup>
Floor Space Exceedance	NIL			-
Actual FSR (excluding proposed public road / road widening)	1.0:1			-

As clearly shown in the table above, the maximum permitted FSR has been distributed across the entire development site and the form of development and resultant yield across the site is consistent with the intended density under the LEP. However, the proposal results in a technical non-compliance as each part of the site is to be subdivided to allow for the construction of the residential flat buildings and the construction and dedication of the proposed roads.

It is a reasonable expectation and widely accepted practice that density can be extracted out of land which is dedicated as part of either a development application process or voluntary planning agreement. In the case of the subject site, the density that is afforded to the site collectively is allocated to proposed buildings A, B, C and D and the technical non-compliance with the FSR control results from the necessary land subdivision.

### 3. OBJECTIVES AND PROVISIONS OF CLAUSE 4.6

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 6.4, 6.5, 6.6, 7.22, 7.23, 7.24, 7.25, 7.26, 7.26A, 7.27, 7.28, 7.29 or 7.30."*

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).

#### **4. COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE (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.

Compliance with the maximum FSR is considered to be unreasonable and unnecessary as the objectives of that standard are achieved for the reasons set out in this statement. For the same reasons, the objection is considered to be well-founded as per the first method underlined above.

Notably, under Clause 4.6(4)(a)(ii) a consent authority must now be satisfied that the contravention of a development standard 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. Clause 4.6(4)(a)(ii) is addressed in Section 6 below.

## **5. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS (CLAUSE 4.6(3)(b))**

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, it is considered that there is an absence of any material impacts of the proposed non-compliance on the amenity of the environmental values of the locality, the amenity of future building occupants and on area character.

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", it is noted that the proposed variation to the maximum FSR is a technical non-compliance arising from the subdivision of the site into smaller parcels of land. It is considered that applying flexibility to the FSR controls in this instance will allow for the permitted density to be provided across the development site and the associated subdivision will assist with realising the intended development form in the area. Specifically, the subdivision proposed will allow for the construction of the proposed apartments and the dedication of a local road to Council that will ultimately assist with access and redeveloping the adjoining property to realise the intended development outcome at the site and the area.

The level of density provided across the development as a whole, is commensurate with the level of activity that is to be expected as a result of the applicable FSR controls. Insistence on strict compliance with the FSR control would require the withdrawal of the subdivision aspect of the proposal and would result in a less desirable urban outcome



**6. 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 (CLAUSE 4.6(4)(a)(II))**

**Objectives of Development Standard**

The objectives of Clause 4.4 are as follows:

- (a) to establish standards for the maximum development density and intensity of land use, taking into account the availability of infrastructure and the generation of vehicle and pedestrian traffic,*
- (b) to control building density and bulk in relation to the site area in order to achieve the desired future character for different locations,*
- (c) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,*
- (d) 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,*
- (e) to provide an appropriate correlation between the size of a site and the extent of any development on that site,*
- (f) to facilitate design excellence in the Liverpool city centre by ensuring the extent of floor space in building envelopes leaves generous space for the articulation and modulation of design.*

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)- to establish standards for the maximum development density and intensity of land use, taking into account the availability of infrastructure and the generation of vehicle and pedestrian traffic**

Objective (a) seeks to establish standards for the maximum permitted density to manage impacts on the availability of infrastructure and the generation of vehicle and pedestrian traffic. The subject site is a large residentially zoned parcel of land. The site as a whole, has been designed to provide less than the maximum permitted gross floor area that has been afforded to the site. The density that was applied to the site was done so in light of the strategic context of the area and the ability of the local infrastructure, roads and services to accommodate that density. As the proposal relates to a technical non-compliance arising from subdivision of the site into smaller parcels of land, the level of density provided across the development site as a whole, is commensurate with the level of activity that was expected as part of drafting the FSR controls.

**Objective (b) - to control building density and bulk in relation to the site area in order to achieve the desired future character for different locations,**

Objective (b) seeks to achieve the desired future character for different locations through massing and the density of development. As previously discussed, the proposed FSR non-compliance is technical and would not arise if it was not for the subdivision of the land. Notably, the development could be configured to provide a road that consisted of a right of way across two separate lots, rather than the creation of a lot that was to be dedicated as a road. In this instance there would be no numerical non-compliance. That being said, there is no difference between the resultant density and form of development as proposed, to that which does not include subdivision. As such, the proposal represents a form of development across the site that is consistent with the level of density afforded to the site. The proposal is therefore consistent with Objective (b).

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

Objective (c) seeks to minimize adverse environmental effects on the use or enjoyment of adjoining properties and the public domain. The development has been designed and sited to ensure that no significant or adverse environmental impacts result on the adjoining properties. This has been considered in detail in the submitted Statement of Environmental Effects which details with impact arising from overshadowing, view loss and aural and visual privacy. Despite the technical non-compliance proposed, in relation to Lots 1, 2 and 5 there are no adverse environmental impacts on adjoining properties, future adjoining properties or the public domain.

**Objective (d) 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**

Objective (d) intends on maintaining 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. As discussed, the proposal complies with the applicable FSR across the site which is located in an area that is undergoing significant change. The permitted density is comfortably accommodated across the site and despite the technical non-compliance, the proposal will result in a development that will sit comfortably within the desired future built form context.

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

Objective (e) seeks to provide an appropriate correlation between the size of a site and the extent of any development on that site. This objective is satisfied by the imposition of the FSR control, of which the proposal complies with across the entirety of the site. Redevelopment of the subject site in the form proposed is therefore consistent with objective (e).

**(f) to facilitate design excellence in the Liverpool city centre by ensuring the extent of floor space in building envelopes leaves generous space for the articulation and modulation of design**

Objective (f) applies to the Liverpool Centre and is therefore not relevant to the site.

**Zone Objectives**

Clause 4.6 (4) also requires consideration of the relevant zone objectives. The objectives of the Zone R1 General Residential are as follows:

- “ • To provide for the housing needs of the community.
- To provide for a variety of housing types and densities.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To ensure that housing densities are broadly concentrated in locations accessible to public transport, employment, services and facilities.
- To facilitate development of social and community infrastructure to meet the needs of future residents.

The zone objectives overlap to a large extent with the objectives of the maximum FSR control and have been addressed above. Further to that, the proposal is consistent with the objectives as it provides housing that is compatible with the needs of the community and adds to the variety of housing types by proposing a suitable range of residential apartment types in an area that is currently dominated by detached dwellings. The density of housing is compatible with the future provision of public transport to the Edmondson Park Urban Release Area and the proposal will not hinder the development of social and community infrastructure.



## **7. WHETHER CONTRAVENTION OF THE DEVELOPMENT STANDARD RAISES ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING (CLAUSE 4.6(5)(a))**

Contravention of the maximum FSR development standard proposed by this application does not raise any matter of significance for State or regional environmental planning.

## **8. THE PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD (CLAUSE 4.6(5)(b))**

As detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the maximum FSR, as such there is no public benefit in maintaining strict compliance with the development standard.

Whilst, the proposed lot density exceeds the maximum FSR when assessed on a (proposed) lot by lot basis, overall the proposal complies with the applicable FSR development standard. That is, the exceedance is a technical non-compliance and the density is consistent with the envisaged density for the site as a whole.

## **9. CONCLUSION**

The non-compliance proposed is technical in nature and would result in the same development form at the site without the subdivision aspect of the proposal. The subdivision is reasonably necessary and appropriate as part of this application and as such the outcome achieved by this proposal is superior to that of a scheme that has been designed to comply on each lot, with resultant implications on the ability to provide the intended residential density.

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 standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation supported.

