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# Clause 4.6 Exemption to Development Standard Variation Request

Multi-storey carpark and associated works  
34-40 Hughes Street, Cabramatta



Prepared for Collins and Turner on behalf of Fairfield City Council  
Submitted to Fairfield City Council

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## 1 Introduction

This is a written request to seek a variation to a development standard in accordance with the provisions of Clause 4.6 Exception to Development Standards of the *Fairfield Local Environmental Plan 2013* (FLEP 2013). This request relates to Clause 4.3 Height of buildings of FLEP 2013.

This Request has considered the detailed guidance within the NSW Department of Planning and Environment (DP&E) guideline *Varying Development Standards: A Guide*, August 2011 (DP&E Guide) and planning system circular *PS 17-006 Varying Development Standards*, December 2017, and addresses the findings and established principles (as relevant) of the following judgments of the NSW Land and Environment Court (NSW LEC):

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 and [2015] NSWCA 248;*
- *Adbooth Pty Ltd v Botany Bay City Council [2006] NSWLEC 710;*
- *Randwick City Council v Micaul Holdings Pty Ltd (2016) 225 LGERA 94;*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118;*
- *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWLCA 245.*

The following sections of this Request critically analyse the proposed exceedance of height, its impact and reasonableness and consistency with the objectives for development in the relevant zone. This analysis also demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard in Cl 4.3 of FLEP 2013.

## 2 Planning overview

The DP&E Guide recommends that any Request to vary a development standard should confirm the planning context and relevant controls to assist the consent authority's assessment.

The following table provides a summary of the relevant planning context and of the proposed variation.

Information requirement	Comment
Relevant applicable planning instrument	<i>Fairfield Local Environmental Plan 2013</i> (FLEP 2013)
Zoning of the land	B4 Mixed Use
Objectives of the zone	Refer to Table 3
Development standard to be varied	Height of buildings
Nature of the development standard	A numerical control for the height of buildings
Relevant development standard clause	Cl 4.3(2) of FLEP 2013
Objectives of the development standard	Refer to Table 4
Development standard numeric control for the site	10 metres
Proposed numeric control	The subject site has a ground level of RL 19.700. The maximum proposed height is RL 33.43, resulting in an exceedance of approximately 3.73 metres.
Percentage variation between the proposal and the planning instrument	The proposed height exceeds the height limit by 37.3%.

Table 1: DP&E Guide recommended planning information and numeric overview

### 3 Proposed development

The proposed development is for a multi-storey car park development at Hughes Street and Dutton Lane carparks (the site). Architectural plans have been prepared by Collins and Turner (Appendix 5 of SEE).

Table 2 provides a summary of the elements which exceed the height control identified in FLEP 2013.

Element	Proposed height	Exceedance
Lift core	RL 33.43	3.73 metres
Solar panels	RL 30.6	0.9 metres

Table 2: Height exceedance summary

The proposal is largely compliant with the height control identified in FLEP 2013, however it will exceed the maximum building height in several locations as shown in Figures 1 and 2 below (Appendix 5 of SEE).

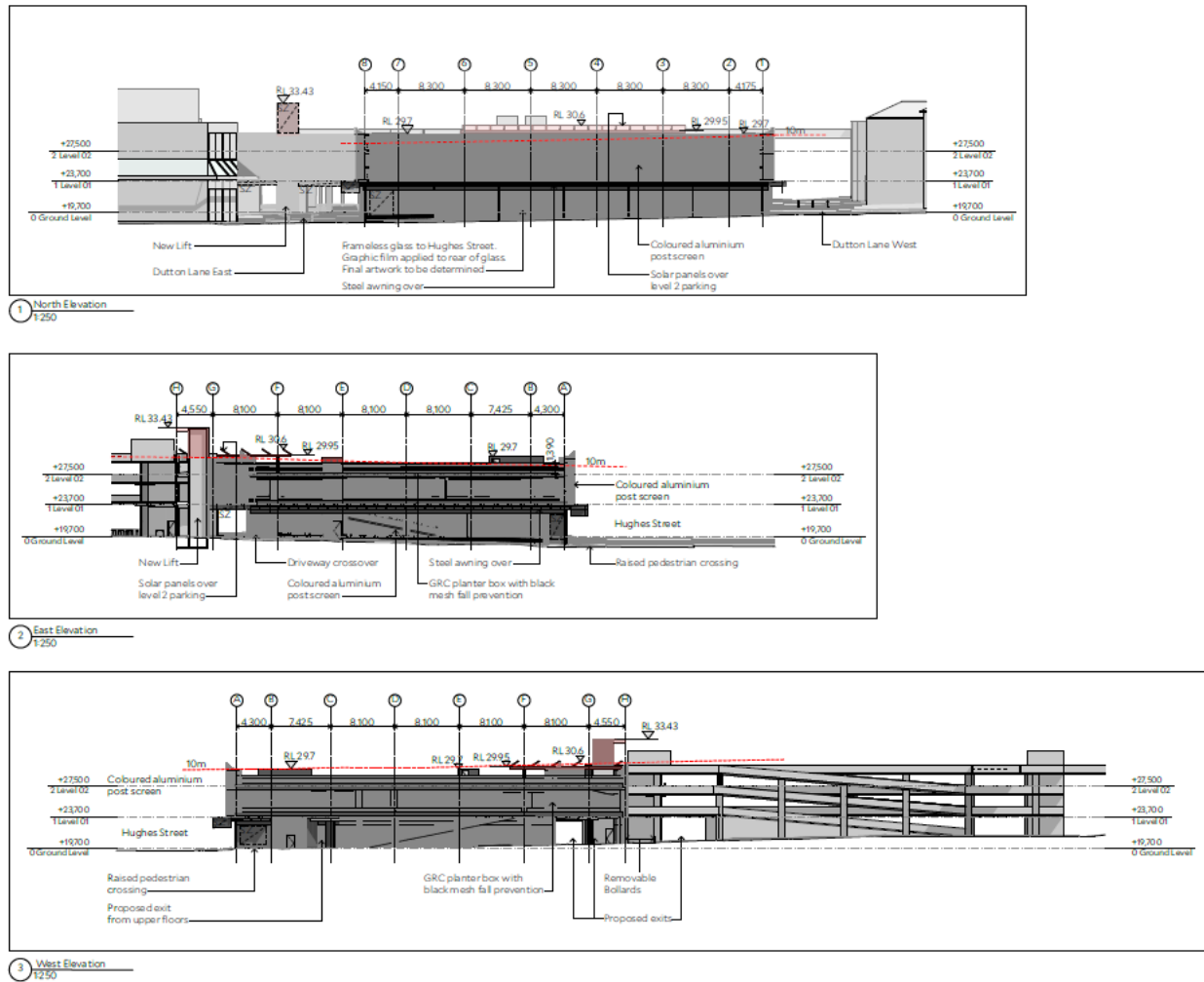


Figure 1: North, East and West Elevations, height exceedance highlighted in red (Source: Collins and Turner)





Figure 2: View of proposal from Hughes Street (lift core outlined in red, solar panels not visible from view) (Source: Collins and Turner)

## **4 Legislative context**

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

Clause 4.6 of the FLEP 2013 sets out key assessment criteria which enables Council to consider and grant development consent for a development that contravenes a development standard.

The overarching objectives of this clause are contained in subclause (1) as detailed below:

- (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.*

Subclauses (3), (4) and (5) of Clause 4.6 are relevant and development consent can only be granted subject to their consideration.

#### **Clause 4.6(3)**

Clause 4.6(3) requires that 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.*

#### **Clause 4.6(4)**

Clause 4.6(4) requires that 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.*

#### **Clause 4.6(5)**

Clause 4.6(5) requires that 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.*



## 4.2 Relevant judgments – NSW Land and Environment Court

The following key NSW LEC judgments provide guidance on key considerations in the assessment of a Clause 4.6 variation Request. These judgments focus on the degree to which a consent authority may be satisfied about the matters in Clause 4.6 and therefore further refine the requirements for variation Requests:

- *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46;
- *Wehbe v Pittwater Council* [2007] NSWLEC 827; and
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and [2015] NSWCA 248.
- *Adbooth Pty Ltd v Botany Bay City Council* [2006] NSWLEC 710
- *Randwick City Council v Micaul Holdings Pty Ltd* (2016) 225 LGERA 94
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118
- *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWLCA 245

The key findings and established principles (as relevant) of the above judgments of the NSW LEC have been considered and applied in this request.

## 5 Assessment of the variation to the development standard

FLEP 2013 contains a standard development control for all development, identifying maximum height of buildings permissible. The proposal seeks to increase the maximum 10 metre height control by approximately 37.3% to accommodate the operational requirements of the proposal.

The following assessment comprehensively considers the provisions of Cl 4.6 which has also been informed by an analysis of the relevant case law.

### 5.1 Clause 4.6(4) – Preconditions that must be satisfied

Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard (*Initial Action v Woollahra Municipal Council* at [13] and *Al Maha Pty Ltd v Huajun Investments* at [179]).

The first opinion of satisfaction in Cl 4.6(4)(a)(i), is that this written request seeking to justify the contravention of the development standard in Cl 4.3 of FLEP 2013 has adequately addressed the matters required to be demonstrated by Cl 4.6(3). These matters are:

1. that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Cl 4.6(3)(a)); and
2. that there are sufficient environmental planning grounds to justify contravening the development standard (Cl 4.6(3)(b))

These matters are addressed in sections 5.2 and 5.3 below. The consent authority does not have to directly form the opinion of satisfaction regarding these matters but only indirectly form the opinion of satisfaction that this written request has adequately addressed the matters required to be demonstrated by Cl 4.6(3)(a) and (b).

The second opinion of satisfaction in Cl 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out.

This is addressed in section 5.4 below. The consent authority must be directly satisfied that this written request adequately addresses the matter in Cl 4.6(4)(a)(ii), which is not merely that the proposed development will be in the public interest, but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone.

The final precondition in Cl 4.6(4) that must be satisfied is that the concurrence of the Secretary of DP&E has been obtained (Cl 4.6(4)(b)). The NSW LEC has the power under Cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in Cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under Cl 4.6(4)(b), by reason of s 39(6) of the *Land and Environment Court Act*.

Nevertheless, in *Wehbe v Pittwater Council* at [41] the NSW LEC accepted that it should still consider the matters in Cl 4.6(5) when exercising the power to grant development consent for the development that contravenes a development standard. The matters in Cl 4.6(5) have therefore been addressed in section 5.5 below.

## **5.2 Clause 4.6(3)(a) – Compliance is unreasonable or unnecessary**

The five common ways in which compliance with a development standard may be considered to be unreasonable or unnecessary, as summarised by Preston CJ in *Wehbe v Pittwater Council* at [42]-[51], have been considered and assessed below in the circumstances of this case.

*Wehbe Test 1: The objectives of the standard are achieved notwithstanding non-compliance with the standard*

An assessment against the objectives of Cl 4.3 of FLEP 2013 is provided in Section 5.3, which concludes the objectives of the standard are achieved notwithstanding the area of non-compliance.

*Wehbe Test 2: The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary*

An assessment against the objectives of Cl 4.3 of FLEP 2013 is provided in Section 5.3. The purpose of the standard is to control the height of buildings. The purpose of the control is considered relevant to the development.

However, as discussed in this report, it is considered that the increase in building height facilitates the achievement of a substantially positive urban design impact.

The lift core exceeds the height limit by 37.3%, however, it is screened with a coloured aluminium post screen and a digital signage panel. The lift core is proposed on the corner of the proposed carpark structure and existing Dutton Lane Carpark. The proposed lift is essential for the operational requirements of the car park.

The lift core occupies a small floorspace and is located approximately 65 metres east of the residential development on the western boundary of the site (Figure 3). The visibility of the lift core structure from the residential development is limited due to the distance of the lift core from the site boundary and its architectural treatment.

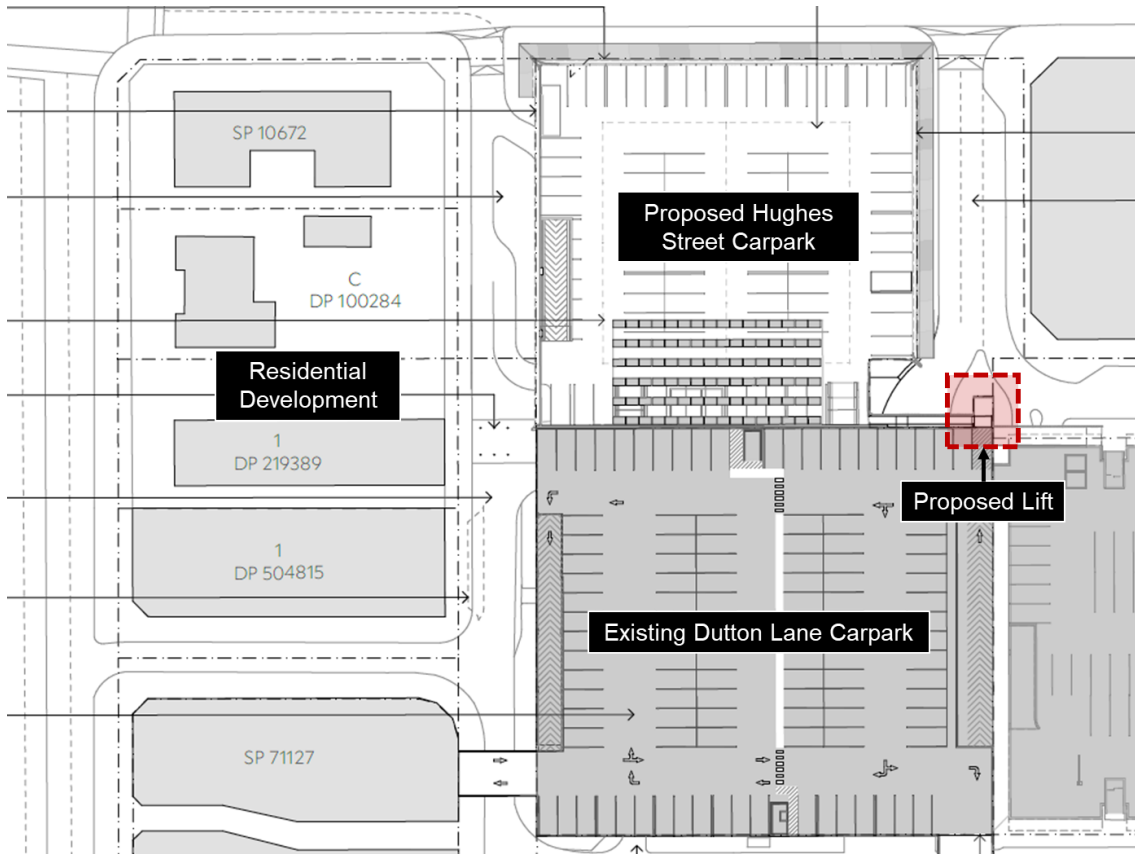


Figure 3: Proposed Lift Core in context of surrounding development (outlined in red) (Base Source: Collins and Turner)

The proposed solar panels exceed the height limit by 0.9 m and is considered negligible. The solar panels are essential for the operational requirements of the car park and are not likely to be visible from the surrounding locality (Figure 2).

Therefore, the height exceedance represents an improvement to the functionality and sustainability of the subject site.

*Wehbe Test 3: The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable*

The provision of a development that strictly complied with the height controls would result in a significantly inferior urban design outcome of the site as discussed in Section 5.2 above.

The proposal is considered superior to a strictly compliant scheme as:

- a strictly compliant proposal would result in a significant reduction in car parking spaces
- a strictly compliant proposal would result in a less sustainable structure due to the removal of the solar panels
- a strictly compliant proposal would not meet relevant operational requirements, and would therefore fail to provide sufficient accessibility
- a strictly compliant proposal would contribute less to the functionality of the Cabramatta Town Centre

Therefore, a strictly compliant scheme would fail to deliver a development of sufficiently high quality and would not provide adequate public benefit and for these reasons, compliance is unreasonable.

*Wehbe Test 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*

The proposed increase in height of the proposal is in response to accessibility and sustainability issues associated with the site and is not considered to result in the development standard being virtually abandoned or destroyed.

*Wehbe Test 5: The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone*

The land has been zoned appropriately and the controls applicable to the site are generally acceptable. The proposed development is consistent with the objectives of the zone, as discussed in Table 3 of this Request.

For the reasons outlined in this request, the proposed variation to the maximum height of buildings standard under FLEP 2013 would better achieve the objectives of the zone than a strictly compliant scheme.

### **5.3 Clause 4.6(3)(b) – Environmental planning grounds to justify contravening the development standard**

The development (including the height non-compliance) will provide for a new multi storey car park comprising 219 car parking spaces (including seven disabled car spaces) within the Cabramatta Town Centre.

In this context there are sufficient environmental planning grounds and significant public benefits to justify contravening the maximum height control. The key environmental planning grounds to justify the contravention of the FLEP 2013 are as follows:

- improved public benefit for the Cabramatta Town Centre
- improved accessibility
- improved environmentally sustainable design
- improved visual outcome

### **5.3.1 Improved public benefit**

The proposed car park is considered a public benefit for the following reasons:

- provides parking infrastructure to support the Cabramatta Town Centre
- improves access to goods, services and public transport
- contributes to the functionality of Cabramatta Town Centre
- improves the road network
- provides bicycle and disabled parking spaces which contributes to accessibility

The exceedance to the height limit enables the provision of the car park. A strictly compliant proposal would not result in the same level of public benefit.

### **5.3.2 Improved accessibility**

The exceedance of the maximum height limit accommodates the lift core of a new centralised lift at the intersection of the Dutton Lane Car Park and the future Hughes Street Car Park.

The proposed lift will provide pedestrian accessibility from Dutton Lane off of Hughes Street, to both Dutton Lane Car Park and the Hughes Street Car Park.

The lift core will be designed to comprise a digital signage panel that will display available parking spaces, as well as public information such as the time, temperature and Fairfield City Council events.

### **5.3.3 Improved environmentally sustainable design**

Solar panels are proposed on the rooftop of the proposed Hughes Street Car Park. The solar panels are required for the operation of the car park. The power generated is intended to support the power demand of the proposed car park, making the car park more self-efficient and environmentally sustainable.

The proposed solar panels exceed the 10 m height limit by 0.9 m. This exceedance is considered negligible and any adverse impacts of the height exceedance for the solar panels are outweighed by the environmental benefits.

### **5.3.4 Improved visual outcome**

The proposed variation in height results from the following built elements:

- lift core; and
- solar panels.

A coloured aluminium screening is proposed around the lift core. It comprises vertically aligned fine aluminium tubes in an assortment of colours. The individual colours will be identifiable when viewed closely, but when viewed from a distance the aluminium screening will appear as a more singular colour across the façade of the development.

The design of the overall proposal is unique in its experience, as the visual impact changes depending on distance, however, it is in keeping with the surrounding precinct due to its use of colour.

The lift core is located on the corner of the proposed Hughes Street Carpark and existing Dutton Lane Carpark, approximately 65 metres east of the residential development on the western boundary of the site (Figure 3).

The lift core will not detract from the overall visual impact of the proposal as the visibility of the lift core structure from the residential development is limited and its architectural treatment is in keeping with the design of the proposed car park.

Additionally, as discussed above, the lift core will be designed to comprise a digital signage panel that will display available parking spaces, as well as public information signage such as the time, temperature and Council events. The digital signage panel will be modern and in keeping with the desired future character of the locality.

The visual impact of the solar panels is negligible due to the minor height exceedance and the panels being set back from the Hughes Street boundary, therefore reducing its visual catchment.

Figure 2 shows the proposed car park viewed from Hughes Street. As shown in the photomontage, the solar panels are not visible and the lift core is integrated within the design of the proposed Hughes Street car park and the Dutton Lane car park.

In summary, the proposed increase in height is considered to result in a superior outcome for the following reasons:

- the site is consistent with the zone and development standard objectives of the FLEP 2013, as discussed in Tables 3 and 4 below,
- the proposal results in improved accessibility for the locality
- the proposal provides substantial public benefits
- the proposal results in a visually interesting development, which is not likely to have any adverse visual impact on surrounding residential development
- elements exceeding the height control are considered minor and are setback from the street and adjoining residential properties to reduce potential impact on surrounding residential development
- the proposed lift core is enhanced with a digital informative signage panel and aluminium tubing to screen the appearance of the lift core.

Strict compliance with the development standard is considered to result in an inferior outcome for the following reasons:

- it would result in the reduction of car spaces, reducing the functionality of the car park and Cabramatta Town Centre; and
- it would result in the site being less environmentally sustainable due to the removal of the solar panels.



#### 5.4 Clause 4.6(4) – Consistency with objectives

The proposed development is consistent with the objectives of the B4 Mixed Use zone as outlined in Table 3 below.

Zone B4 Mixed Use Objectives	Achievement of Objectives
<ul style="list-style-type: none"> <li><i>To provide a mixture of compatible land uses.</i></li> </ul>	<ul style="list-style-type: none"> <li>The proposal identifies the surrounding area as the Cabramatta Town Centre in the Fairfield Local Government Area (LGA).</li> <li>The proposed car park is compatible within the surrounding area, and within Precinct 2 (Commercial and larger retail area), as identified in the (CTC DCP).</li> </ul>
<ul style="list-style-type: none"> <li><i>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.</i></li> </ul>	<ul style="list-style-type: none"> <li>The site is located within the Cabramatta Town Centre and is in proximity to retail and commercial uses and the Cabramatta Rail Station.</li> <li>The proposal provides 219 car spaces for locals and visitors to use, which will encourage public transport patronage by providing car spaces in proximity to public transport.</li> <li>The proposal will encourage walking and cycling by providing safer and well-designed footpaths.</li> </ul>
<ul style="list-style-type: none"> <li><i>To support the development of Prairiewood, Fairfield and Cabramatta as the principal locations for specialist cultural, retail, business, tourist and entertainment facilities and services.</i></li> </ul>	<ul style="list-style-type: none"> <li>The provision of a car park will support the Cabramatta Town Centre as a principal location for specialist cultural, retail, business, tourist and entertainment facilities and services by providing additional car parking spaces.</li> <li>The proposed multi-storey car park is ancillary to the function of the Cabramatta Town Centre and will improve access to day-to-day goods and services for the local community.</li> </ul>

Table 3: Consistency with B4 zone objectives

An assessment against the objectives of CI 4.3 of FLEP 2013 has been undertaken in Table 4 below. As the proposed development is consistent with the objectives for development of the zone in which it is proposed to be carried out, it is in the public interest.

CI 4.3 Objectives	Achievement of Objectives
<i>(a) to establish the maximum height for buildings,</i>	<ul style="list-style-type: none"> <li>• Clause 4.3 limits the building height to 10 m.</li> <li>• The proposal exceeds the maximum height; however, the exceedance is limited to the lift core and solar panels, which make up a small portion of the subject site.</li> <li>• The exceedances are considered minor.</li> </ul>
<i>(b) to ensure that the height of buildings complements the streetscape and character of the area in which the buildings are located,</i>	<ul style="list-style-type: none"> <li>• The proposed additional height is considered to complement the streetscape and character of the area in which it is located.</li> <li>• The proposed lift core exceeds the height limit by 3.73 m, however, the lift core will be framed with coloured aluminium tubing, inspired by the locality. It will also comprise a digital clock and have informative signage.</li> <li>• The lift core will result in a positive visual impact on the streetscape, as it is in keeping with the character of the commercial area.</li> <li>• The proposed solar panels exceed the height limit by 0.9 m. This is considered minor and is not considered to detract from the streetscape and character of the area.</li> </ul>
<i>(c) to minimise the visual impact, disruption of views, loss of privacy and loss of solar access to existing development.</i>	<ul style="list-style-type: none"> <li>• The proposal will not result in the loss or disruption of views. The position of the lift core is located between Dutton Lane Car Park and the proposed multi storey Hughes Street Car Park. This results in the lift core being substantially set back from Hughes Street and Dutton Lane, reducing the visual impact on surrounding residential development.</li> <li>• The height exceedance of both the proposed lift core and solar panels will not result in the loss of solar access to residential development. Reduction in solar access to existing car parking is considered to be negligible.</li> </ul>

Table 4: Consistency with CI 4.3 objectives

## **5.5 Concurrence of the Secretary – Clause 4.6(5)**

### **5.5.1 Clause 4.6(5)(a) – Matters of significance for State or regional planning**

The proposed exceedance of the maximum height of building for the site does not raise any matters of State or regional planning significance as:

- the development is not of a size or nature to have more than local impact;
- overall the increase in height is minor in the context of the surrounding area;
- there are no significant amenity or environmental impacts; and
- the site is not a site designated to be of State significance.

### **5.5.2 Clause 4.6(5)(b) – Public benefit in maintaining the development standard**

As demonstrated in the previous sections of this report, the variation to the development standard would establish the best design response for the site. Conversely a strictly compliant development would result in a smaller, less accessible and environmentally sustainable car park structure.

In light of the significant public benefits arising from allowing a variation, it cannot be reasonably assumed that there is any public benefit in maintaining the existing maximum height of building control.

## **5.6 Is the objection well founded?**

For the reasons outlined in previous sections, it is considered that the objection is well founded in this instance and that granting an exception to the development standard can be supported in the circumstances of the case.

## **6 Conclusion**

Clause 4.6 allows for flexibility in the application of development standards in appropriate circumstances and this Request has been shown to satisfy the provisions of Cl4.6 of the FLEP 2013.

It has been demonstrated that compliance with the 10 metre height control under Cl 4.3 of the FLEP 2013 is unnecessary and unreasonable given the specific circumstances of the proposal. In addition, sufficient environmental planning grounds have been provided to justify contravening the development standard.

The proposal is consistent with the objectives of the development standard and the B4 Mixed Use zone. Given the high standard of the proposal and public benefits, in addition to the consistency with the zone objectives, the development is in the public interest.

Overall, and for the reasons set out above, the proposed development represents a superior outcome for the site and it is therefore justified and appropriate that the development standard be varied as proposed.