

CLAUSE 4.6 TO CLAUSE 4.4 OF ASHFIELD LEP 2013

EXCEPTIONS TO DEVELOPMENT STANDARDS – **FSR VARIATION**

*New mixed-use development with basement parking*

at

No. 120C Old Canterbury Road Summer Hill

PREPARED BY

ABC PLANNING PTY LTD

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## **ASHFIELD LEP 2013 - CLAUSE 4.6 EXCEPTION TO DEVELOPMENT STANDARDS**

This Clause 4.6 variation request has been prepared to accompany the development application for a mixed-use development comprising ground level retail, with 57 residential units contained within six - eight storeys, and three levels of basement car parking for 78 cars, plus pocket park, and green roof terrace, at Lot 100 in DP 875660, commonly known as No. 120C Old Canterbury Road, Summer Hill 2130.

Clause 4.6 of the *Ashfield Local Environmental Plan 2013* (ALEP2013) allows the consent authority to grant consent for development even though the development contravenes a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards.

This Clause 4.6 variation request takes into account the relevant aspects of the Land and Environment Court judgement from *Initial Action Pty Ltd v Woollahra Council* [2017] NSWLEC 1734, as revised by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

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

- (1) *The objectives of this clause are as follows:*
  - (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
  - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
  - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
  - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
  - (a) *the consent authority is satisfied that:*
    - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
    - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
  - (b) *the concurrence of the Director-General has been obtained.*
- (5) *In deciding whether to grant concurrence, the Director-General must consider:*
  - (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
  - (b) *the public benefit of maintaining the development standard, and*
  - (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

## SITE DESCRIPTION

The subject site consists of two individual allotments, and is legally described as Lot 1 in DP 817359 and Lot 100 in DP 875660, commonly known as No. 120C Old Canterbury Road, Summer Hill 2130.

The site is located on the northern side of Old Canterbury Road, between Edward Street and McGill Street. The subject site is an irregular shaped lot with a total site area of 1956.40m<sup>2</sup>.



Figure 1: Aerial Photograph of the Subject Site

The subject site benefits from a rezoning (planning proposal) which was from light industrial zone to B4 Mixed Land use. The Planning proposal also stipulated the Development standards for the site to be an FSR of 2:5.1, and Maximum height of RL 38.

As part of the planning proposal, a Voluntary Planning Agreement was entered into with Council on 26/03/2019. The VPA comprises the following:

- *Construction of a park of approximately 300m<sup>2</sup> located within the Land and to provide rights of way for the public access through the park to the Greenway corridor and the Lewisham Light Rail Station from Old Canterbury Road and McGill Street.*
- *Provide 2 studio units which will be allocated to Affordable Housing units. The ownership of the units will be transferred to Inner West Council at the completion of the project.*
- *Community Office Space located within retail Ground Floor – 5 Year Rental Agreement \$1 Peppercorn rent per year – 35m<sup>2</sup> office area.*
- *Provide Council a payment of \$1,045,000 million to be used for public works in the community and surrounding area (Inner West Council will provide a summary of how this payment will be allocated at a later date).*

For the planning proposal, a concept plan consisting of 62 apartments and 160m<sup>2</sup> of commercial space was developed to demonstrate what was permissible for the site. The concept built from had the lower 2 levels accommodating an elevated car parking arrangement to minimise the potential flooding impacts of the built form over a known floodway. As part of the planning proposal gateway conditions required the applicant to address a 117 Directive for building over a floodway. Cardno carried out a full flood model of the concept plan and confirm that the subject site could accommodate a building on piers over the flood storage, which was subsequently accepted by the Department of Planning with the planning proposal being recommended for approval in March 2019.

Once the planning proposal was approved, it was still a requirement to fully assess the detailed design of the build form approved in the planning proposal. As part of the detailed design in preparation of the Planning Approval design, a basement arrangement was considered for as number of key positive outcomes namely; to improve integration with the adjoining greenway which is a DCP aspiration, provide flexibility in design to deliver a green building for the wider community to enjoy and to provide better linkages to Council's Greenway by extending the greenway through to Old Canterbury Road. By relocating the car parking below the ground removes all the negative impacts associated with elevated residential car parking arrangements.

Cardno was once again engaged to update the flood modelling for a basement arrangement prior to progressing the detailed architectural design to ensure that all the flooding requirements were maintained compared with the planning proposal scheme. The results demonstrated that the site could accommodate below ground parking while meeting the flooding requirements of not making flooding worse off site. Refer to the full Flood Assessment carried out by Cardno attached to the Development Application. As a consequence of moving the car parking below the ground provided the architect flexibility in design to improve the public amenity providing for public access links to Old Canterbury Road, increased setbacks to the adjoining buildings which we note do not copy with planning controls, provide green spaces to most apartments by cutting out sections of the building. The resulting design is far superior to the one put forward in the planning proposal, while still maintaining no change in height and actually providing for a reduction in bulk due to the building cut outs.

It should be noted at the total number of apartments reduced from 62 apartments with 2.5:1 FSR down to 57 with 3.0:1 FSR. The reduction attributable to superior design of the built form and improvements to the public amenity.

## DEVELOPMENT OVERVIEW

The proposed development is detailed in the architectural drawings and accompanying reports, and comprises:

- Mixed use Development, comprising ground level retail, 57 residential units contained within six - eight storeys, and
- Three (3) levels of basement car parking for 78 cars, plus pocket park, and green roof terrace



Figure 2: Site Plan of Subject Site

### Development Standard to be Varied

In accordance with Clause 4.4 of AELP 2013, the maximum floor space ratio control for the site is 2.5:1. The Floor Space Ratio control has been calculated in accordance with the ALEP 2013 definition: floor space ratio means:

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

As a result, and by definition, the proposed FSR exceeds 2.5:1, as illustrated in the Table 1 below:

Table 1: Proposed FSR

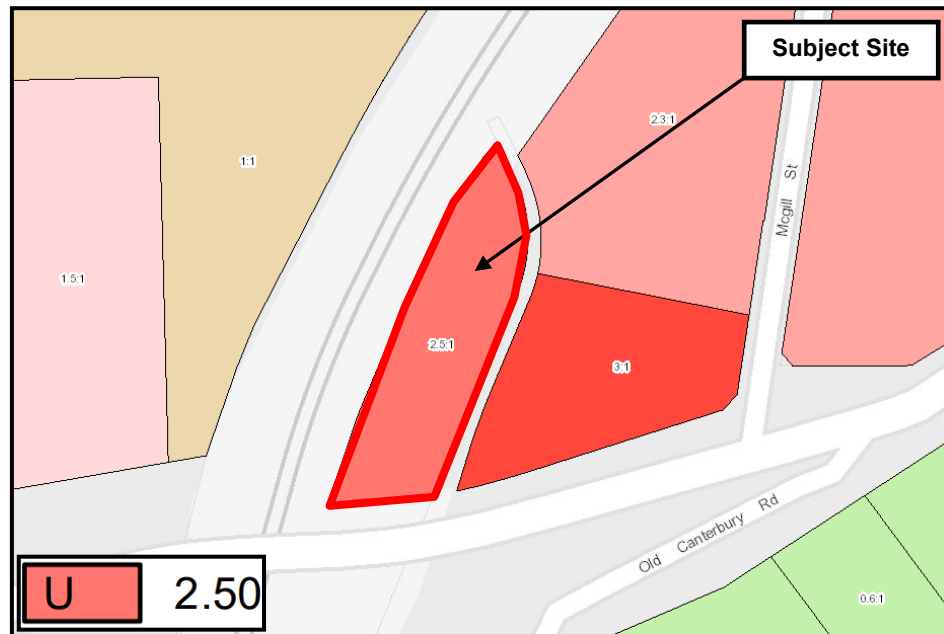
Site Area	Permitted	Proposed	Variation
1,957m <sup>2</sup>	2.5:1 (4,892.5m <sup>2</sup> )	3:1 (5,871m <sup>2</sup> )	20% (978.5m <sup>2</sup> )

The non-compliance relates to converting the lower two levels into residential levels which were allocated for the provision car parking within the Planning Proposal. The detail design of the proposed development has revealed that the providing basement car parking for the development enables these levels to be converted into residential accommodation while making no change to the built form within the approved building envelope and building height, which in turn provides for an improved appearance of the development by providing architectural cut outs into the building envelope to make way for green walls and open spaces to improve the liveability and aesthetics of the building when viewed from the precinct.

**Figure 4** below provides a diagrammatic comparison between above ground parking with an FSR of 2.5:1 and provision of residential units in place of parking with the provision of basement parking below.

## CLAUSE 4.4 FLOOR SPACE RATIO

The maximum floor space ratio development standard for the site under ALEP 2013 is 2.5:1.



**Figure 3: Floor Space Ratio Map**

The objectives of the floor space ratio development standard as per subclause 4.4(1) of ALEP 2013 are as follows:

- (a) to establish standards for development density and intensity of land use,
- (b) to provide consistency in the bulk and scale of new development with existing development,
- (c) to minimise adverse environmental impacts on heritage conservation areas and heritage items,
- (d) to protect the use or enjoyment of adjoining properties and the public domain,
- (e) to maintain an appropriate visual relationship between new development and the existing character of areas that are not undergoing, and are not likely to undergo, a substantial transformation.

## KEY QUESTIONS

### Is the Planning Control a Development Standard?

The maximum floor space ratio control prescribed under Clause 4.4 of the ALEP 2013 is a development standard capable of being varied under Clause 4.6 of ALEP 2013.

### Is the Development Standard Excluded from the Operation of Clause 4.6?

The development standard is not excluded from the operation of Clause 4.6 and is not listed within Clause 4.6(6) or Clause 4.6(8) of ALEP 2013.

### What is the Underlying Object or Purpose of the Standard?

The objectives of the floor space ratio standard as per ALEP 2013 are set out in Section 4. The underlying object or purpose of the FSR development standard is to control density, providing a built form that is compatible with the site, the scale and character of surrounding development and minimising detrimental impacts on the amenity of the locality.

### Justification for Contravention of the Development Standard

This written request is considered to justify the contravention of the development standard and addresses the matters required to be demonstrated by Clause 4.6(3), of which there are two aspects. Both aspects are addressed below:

*(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case*

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In addition, in the matter of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Justice held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

An applicant does not need to establish all of the tests or ‘ways’. **It may be sufficient to establish only one way**, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

The development is justified against the following Wehbe tests set out below:

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

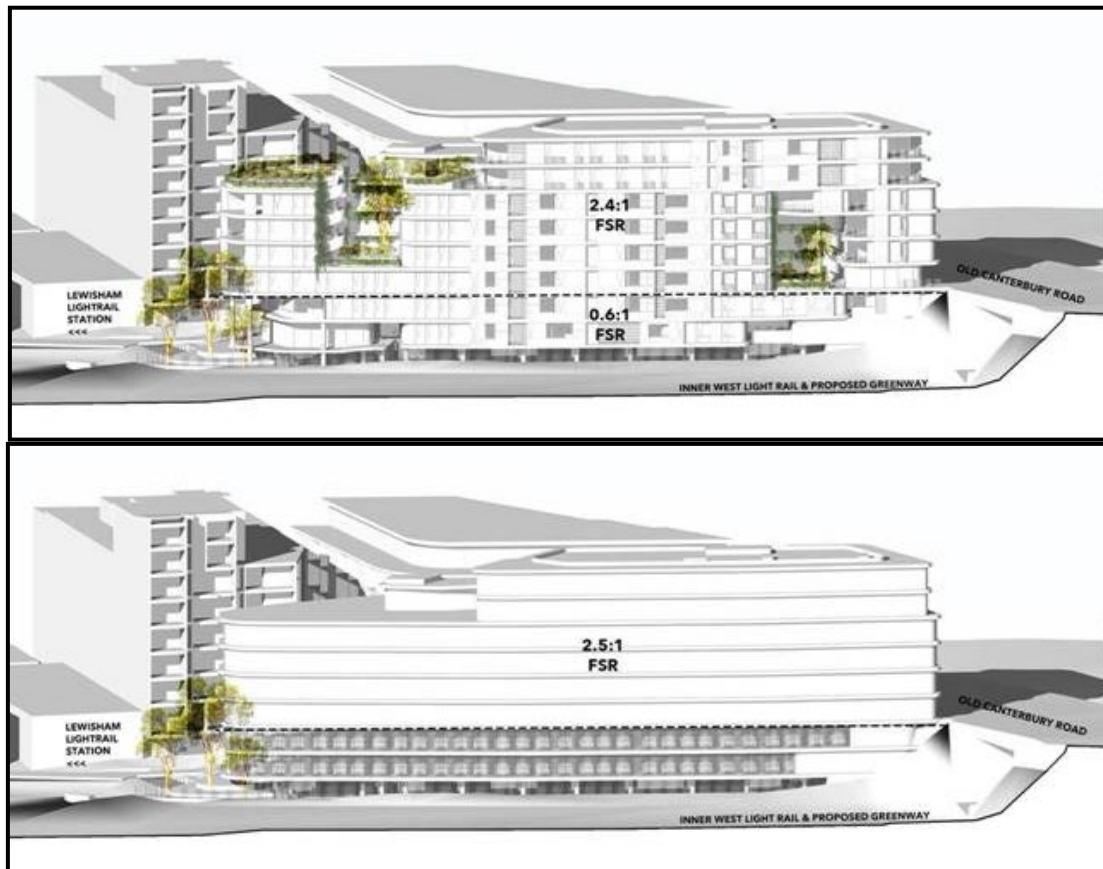
The proposed development achieves the objectives of the floor space ratio development standard as outlined within **Table 1**.

**Assessment:** It is considered that strict compliance with the development standard for FSR on the site is unreasonable and unnecessary in the circumstances for the following reasons:

- The additional FSR is provided within the lower two levels which were designated for car parking. The provision of basement car parking enables the provision of residential accommodation within the contemplated building envelope. Such outcome is considered to represent a more sustainable and efficient use of the endorsed building envelope.
- The replacement of car parking on the lower two levels with residential accommodation represents a more desirable visual outcome from an architectural and aesthetic perspective. The proposal is able to provide for garden apartments facing the greenway which is a more desirable outcome than having car parking alongside the greenway.
- Given the planning proposal and accompanying DCP included parameters for a building envelope along with six-storeys of residential accommodation with two above ground parking levels, it enables consideration of the additional FSR within those allocated parking levels being identifiable and assessed. It is considered that the above rationale



demonstrates that there are sufficient environmental grounds to permit the FSR and that the development standard is unreasonable and unnecessary. Consistency with the objectives of the FSR standard and the objectives of the B4 Mixed Use zone also confirms that the proposal is in the public interest, notwithstanding the FSR variation.



**Figure 4: diagrammatic comparison between above ground parking with an FSR of 2.5:1 and provision of residential units in place of parking with the provision of basement parking below. The diagram shows the aesthetic benefit of replacing parking with units whilst also providing for a more desirable visual relationship between the built form and the Greenway**

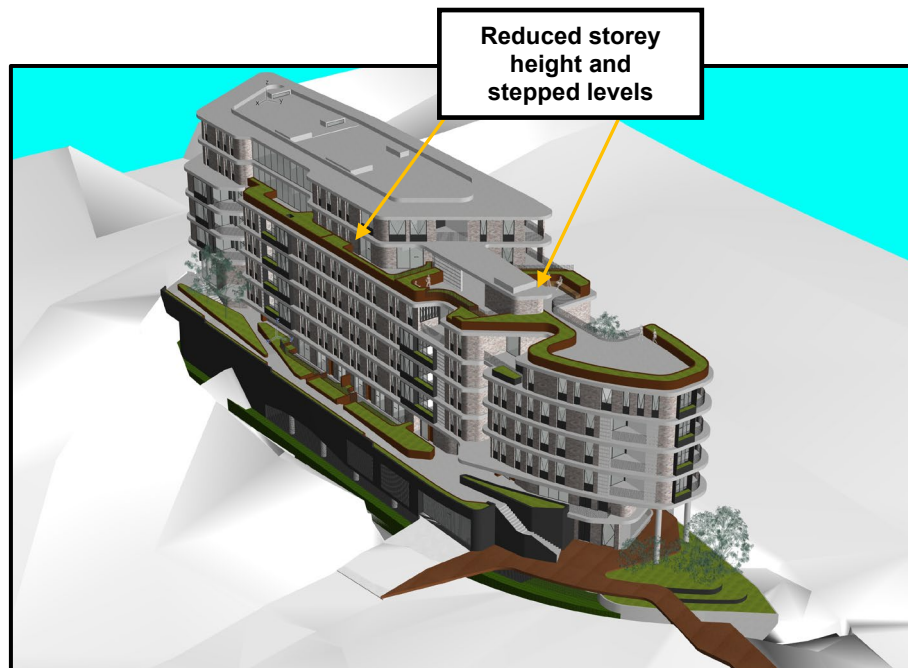
- The proposal complies with the objectives of the development standard and the B4 Mixed Use zone, indicated in the assessment at **Table 1**. Furthermore, compliance with the development standard is unreasonable and unnecessary as it is in the public interest given it is consistent with the objectives for the development within the zone.
- The proposed height, bulk and scale of the development is not considered to be visually dominant in the streetscape and will preserve the amenity of neighbouring properties, and is considered to be justified given the lack of external impacts to neighbouring properties and the streetscape in relation to significant additional overshadowing, visual and acoustic privacy, visual bulk, whilst no view impacts are identified.

### Overshadowing

- Due to the north-south orientation of the site and the proposed site layout, it is inevitable the proposal will cast additional shadow on the dwellings immediately adjoining to the east and west. However, the design of the building provides for stepped floor levels and a reduced height in the northern portion of the building to allow solar access to adjoining neighbours. In this regard, Shadow Diagrams accompanying this application indicate that the overshadowing impact is not significant, with shadows to the south and west generally falling to the light rail track and Old Canterbury Road. Furthermore, Views from the Sun Diagrams provided by Fox Johnston Architects illustrate that the adjoining easterly



neighbours existing solar access is less than 2 hours, and that solar access is reasonably retained to the eastern neighbour at 120b Old Canterbury Road and the childcare centre to the east. In this regard, two hours of sunlight is retained between 11am and 1pm during midwinter to the strip of open space adjoining the childcare centre, adjacent to the north west corner of the site.



**Figure 5: Illustrating stepped levels and reduced height to northern portion to allow solar access to No. 120 B Old Canterbury Road, No. 14 McGill Street and the childcare centre to the east.**

### Visual and Acoustic Privacy

- Visual and acoustic privacy impacts to adjoining neighbours to the east has also been carefully considered, with living rooms of apartments predominately positioned to the western elevation being substantially separated from western neighbours by the light rail line. The proposal is provided with highlight windows to bedrooms, plus POS is provided as deep-set balconies with glazing, which along with compliant building separation distances providing good separation between adjoining neighbours to the east, ensures visual and acoustic privacy is maintained in a reasonable manner. (**Figure 6**).



Figure 6: Deep-set balconies with glazed screening

- The stepped levels, separation distance, modulated building form, and screening devices also retain privacy and outlook for the neighbouring units.

### Visual Impact from Bulk and Scale

- The proposal will result in improved amenity to from the currently vacant site to neighbouring development and the streetscape with regards to improved visual impact from the high-quality contemporary mixed-use development, with good articulation including deep set balconies and fenestration, in an extensively landscaped setting including new pocket park, perimeter plantings, and landscaped common open space areas on Levels 1, 3, 4, 6, plus Level 7 green roof.
- The proposal is for the floor levels to be stepped with height, and for a reduced height to the northern portion of the built form providing for compliance with the building separation requirements of the ADG, being:
  - Levels 1 – 4 habitable/ habitable = minimum 14.14m
  - Levels 5 - 6 habitable/ habitable = minimum 15.65m
  - Levels 7 - 8 habitable/ non-habitable = 21.00m.
- The proposed reduced height and recessed green roof, with a generous building separation from the neighbours, plus articulated nature of the building, further minimises the perception of bulk and scale, diminishing the visual impact of the proposal.
- As illustrated in the photomontages (**Figures 7 & 8**), the proposal is contained within a building envelope that is compatible with the established built form of the surrounding area (**Figures 9 ,10 & 11**). It is therefore considered that the proposed development does not represent an overdevelopment of the site, or a development with an FSR expressed as bulk and scale that is not compatible with the context in which it is located.



**Figure 7: Photomontage of the streetscape**



**Figure 8: Photomontage of proposal and surrounding area**





**Figure 9: View of eastern neighbours at No. 120A and NO. 120B Old Canterbury Road. The proposal has been designed to reasonably preserve solar access and visual amenity**



**Figure 10: Photo looking east along Old Canterbury Road depicting the six-storey scale of established development.**



**Figure 11: View to adjoining western neighbours**

### **View Impacts**

- The topography of the local area, with dwellings to the east and west provided with compliant separation distance between the proposed mixed-use development and neighbouring dwellings mitigates significant view impacts.
- Views from the public domain including Old Canterbury Road, Greenway, and Lewisham West light rail station are reasonably maintained and consistent with the existing view, with no significant impact to view sharing from the proposed development.

### **Internal Amenity**

There are no internal amenity grounds that would determine that the additional FSR should not be granted, including:

- Provision of a high level of internal amenity as demonstrated by compliance with key amenity criteria within SEPP 65 Design Quality of Residential Apartment Development and the Apartment Design Guidelines, plus the Inner West Comprehensive Development Control Plan 2016 for both the General Provisions and for Precinct Guidelines for 120C Old Canterbury Road. In this regard, the proposal achieves the following SEPP65/ ADG compliance:
  - 70.2% solar compliance to living and private open space areas
  - 61% cross ventilation
  - Unit size compliance
  - Private open space compliance
  - Common open space outperformance
  - DSZ area outperformance
  - Storage space compliance
  - Car parking compliance.
- The site is well serviced by public transport being within close proximity to numerous bus routes and stops located on Old Canterbury Road, and being an easy 100m walking

distance, via a safe path of travel, to the Lewisham West light rail station, providing connection to shopping centres, services and facilities within major centres.

- Provision of a high-quality deep soil landscaped communal open space 'pocket park' area to the north of the site, plus the provision of landscaped perimeter plantings, and common open space areas on Levels 1, 3, 4, 6, and Level 7 green roof garden. The extensive plantings contribute to the landscaped character and amenity of the development. In this regard, the proposal provides a 51.57% (1009.3m<sup>2</sup>) of the site as deep soil zone.

Despite the non-compliance, the proposal achieves the objectives of the development standard and the zoning, as demonstrated in the following table:

**Table 2: Assessment against the Objectives of the Development Standard and Land Use zone.**

<b>Consistency with the objectives of the FSR standard in the LEP</b>	
<b>Objectives</b>	<b>Assessment</b>
<p><b>4.4</b> <i>(1)(a) to establish standards for development density and intensity of land use,</i></p>	<p><b>Complies</b></p> <p>The proposed distribution of built form and massing of the buildings across the site is consistent with that which has been approved under the Planning proposal. The approved building envelopes are the result of a considered analysis of the context of the site and the desire to deliver a positive urban design outcome by converting the two lower levels from carparking to residential, and providing basement carparking for the proposed development.</p> <p>The cornerstone of this approach to the site is to provide a various residential and mixed use building typologies and scale. This serves to generate a high level of visual interest with modulation to the skyline and meets the various housing needs of the community with housing to suit families through to single occupants.</p> <p>The bulk and scale of the proposed development is consistent with that which is anticipated for the site by the Planning proposal.</p> <p>The approval of the Planning Proposal recognised the environmental capacity of the overall site having regard to its favourable location in proximity to public transport. The proposed development is consistent with the height of development approved under the Planning proposal as well as the desired future character for the subject site and will sit comfortably within the context of the site with no significant adverse impacts to adjacent properties or the public domain.</p> <p>The proposed development supports the economic and orderly development of land, as intended by the ALEP2013 and IWDCP2016 controls, including the Precinct Guidelines for 120C Old Canterbury Road. The proposed mixed-use development is permitted in the B4 Mixed Use zoning of the site, and is consistent with the intent for development on the subject site. It is considered that the proposed built form represents a suitable infill development within the desired future character for the site.</p> <p>This objective is considered to be of a strategic nature and does not require assessment.</p>
<p><b>4.4</b> <i>(1)(b) to provide consistency in the bulk and scale of new development with existing development,</i></p>	<p><b>Complies</b></p> <p>Pursuant to Clause 4.4 of the ALEP2013, the site is subject to a maximum FSR of 2.5:1. The proposal is for an FSR of 3:1, which is a 20% variation from the numerical development</p>

	<p>standard. However, the proposed FSR is considered to be justifiable based upon the following factors:</p> <p>The additional FSR is provided within the lower two levels which were designated for car parking. The provision of basement car parking enables the provision of residential accommodation within the contemplated building envelope. Such outcome is considered to represent a more sustainable and efficient use of the endorsed building envelope.</p> <p>The replacement of car parking on the lower two levels with residential accommodation represents a more desirable visual outcome from an architectural and aesthetic perspective. The proposal is able to provide for garden apartments facing the greenway which is a more desirable outcome than having car parking alongside the greenway and pocket park.</p> <p>The proposed built form when viewed from the streetscape is consistent with existing mixed-uses developments in the locality (<b>Figures 9, 10 &amp; 11</b>). In this regard, the RFB apposite the site at No. No. 120A and No. 120B Old Canterbury Road, is provided with a maximum FSR of 3:1 under the ALEP2013.</p> <p>The proposed mixed-use development is suitably articulated with deep set balconies and fenestration, stepped floor levels, in an extensively landscaped setting, including new pocket park, perimeter plantings, and landscaped common open space areas on Levels 1, 3, 4, 6, plus reduced height and recessed Level 7 green roof.</p>
<p><b>4.4</b> <i>(1)(c) to minimise adverse environmental impacts on heritage conservation areas and heritage items,</i></p>	<p><b>Complies</b></p> <p>The subject site is not heritage listed or within a heritage conservation area. However, the site is in proximity of a heritage item of local significance under ALEP2013, being Item 619 - Former Flour Mill Complex. In this regard, no heritage items are affected, and an impact on to the heritage item is not expected.</p>
<p><b>4.4</b> <i>(1)(d) to protect the use or enjoyment of adjoining properties and the public domain,</i></p>	<p><b>Complies</b></p> <p>An adverse impact on the amenity of the streetscape or adjoining or neighbouring land is avoided with the proposal not resulting in any additional visual or acoustic privacy impacts, visual impact from the height, bulk and scale, significant additional overshadowing, loss of views, or impacts to traffic and parking.</p> <p>The reduced height and recessed roof garden, stepped floor levels, compliant building separation from adjoining neighbours, plus the articulated nature of the building further minimises the perception of bulk and scale, diminishing the visual impact to the streetscape and adjoining neighbours.</p> <p>Visual and acoustic privacy impacts to adjoining neighbours have also been carefully considered, with living rooms of apartments oriented to the western elevation with substantial building separation to neighbours to the west, separated by the light rail line. Window openings to the eastern elevation are proposed to be highlight windows to bedrooms, while balconies are proposed with glazing and deep-set.</p> <p>Due to the north-south orientation of the site and the proposed site layout, it is inevitable the proposal will cast a shadow on the dwellings immediately adjoining to the east and west.</p>



	<p>However, the design of the building provides for stepped floor levels and a reduced height in the northern portion of the building to allow solar access to adjoining neighbours. In this regard, Shadow Diagrams accompanying this application indicate that the overshadowing impact is not significant, with shadows to the south and west generally falling to the light rail track and Old Canterbury Road. Furthermore, Views from the Sun Diagrams provided by Fox Johnston Architects illustrate that the adjoining easterly neighbours existing solar access is less than two hours, and that solar access is reasonably retained to the eastern neighbour at 120b Old Canterbury Road and the childcare centre to the east. In this regard, two hours of sunlight is retained between 11am and 1pm during midwinter to the strip of open space adjoining the childcare centre, adjacent to the north west corner of the site.</p> <p>The topography of the local area, plus compliant building separation that provides good separation distance between the proposed mixed-use development and neighbouring dwellings mitigates significant view impacts. Views from the public domain including Old Canterbury Road, Greenway, and Lewisham West light rail station are reasonably maintained, with no significant impact to view sharing from the proposal.</p> <p>The proposal is for 78 car parking spaces and three motorcycle spaces provided within three levels of off-street basement car parking, accessed via a new vehicular bridge from McGill Street, which being compliant with the DCP requirements, ensures no significant traffic and parking impacts in the surrounding local area.</p>
<i>(e) to maintain an appropriate visual relationship between new development and the existing character of areas that are not undergoing, and are not likely to undergo, a substantial transformation.</i>	<p><b>Complies</b></p> <p>The subject site is located within the Former Flour Mill Complex, being redeveloped from its historical land use. In this regard, the area has been undergoing substantial transformation, with the proposal in accordance with the desired future character for the area as expressed by the IWDCP2016, including the provisions of the Precinct Guidelines: 120C Old Canterbury Road.</p>
<b>Consistency with the objectives of the B4 Mixed Use Zone</b>	
<b>Objectives</b>	<b>Assessment</b>
<ul style="list-style-type: none"> <li>• To provide a mixture of compatible land uses.</li> <li>• 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.</li> <li>• To enhance the viability, vitality and amenity of Ashfield town centre as the primary business activity, employment and civic centre of Ashfield.</li> <li>• To encourage the orderly and efficient development of land through the consolidation of lots.</li> </ul>	<p><b>Complies</b></p> <p>The proposed mixed-use development is permitted in the B4 Mixed Use zoning of the site, and is consistent with the intent for development on the subject site. It is considered that the proposed built form represents a suitable infill development in accordance with the desired future character for the site.</p> <p>The proposal provides for a variety of housing types, with a mix of studio, one, two, three, and four-bedroom units within a mixed-use retail and residential context.</p> <p>The proposal provides a high-quality contemporary residential accommodation with high-quality internal amenity for residents with no adverse external amenity impacts to adjoining neighbours.</p> <p>The proposed FSR variation is therefore not considered to generate any inconsistency with the zone objectives.</p>

Based on the above assessment, it is considered that strict compliance with the LEP FSR standard is unreasonable and unnecessary in this instance.

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

As discussed above, the proposal is consistent with the underlying objectives of the FSR standard and therefore strict application of the FSR control would prevent the desired development outcome of this well located site to public transport, schools and shopping precinct. The following commentary further supports the case that it's unreasonable and unnecessary to strictly enforce the compliance with FSR in this case:

Whilst the development standard has not been abandoned by Council, Council have evidently accepted flexibility in the application in this standard on a comparable project.

**Table 3: FSR Variations**

DA Number	Address	Determination date	FSR Variation
DA/2018/686	Annandale	21/04/2020	137.07%
DA/2019/530	Leichhardt	01/06/2020	9.85%
0102019000176.1	Summer Hill	12/05/2020	17.8%

This demonstrates that strict compliance to the FSR control has not been a consistent pattern of decision making and that approvals have been granted on merit grounds for variations to this standard.

*(b) that there are sufficient environmental planning grounds to justify contravening the development standard*

The Land & Environment Court matter of Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 2018, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and
- there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development

There are sufficient environmental planning grounds to justify contravening the development standard:

- The proposed distribution of built form and massing of the buildings across the site is the result of a considered analysis of the context of the site and

desire to deliver a positive urban design outcome that will deliver a diversity of housing and commercial product for the site area and a collection of various residential building typologies and scale.

- As a consequence of moving the car parking below the ground provided greater flexibility in design to increase set backs to the adjoining buildings, provide green spaces to most apartments by cutting out sections of the building. The resulting design is far superior to the one put forward in the planning proposal, while still maintaining no change in height and actually a reduction in bulk due to the building cut outs
- Despite the additional density, the proposal still complies with the maximum ALEP building height control for the site.
- Given the above point, the additional FSR therefore does not give rise to a building form greater than one could ordinarily expected on the site under the controls.
- The proposal will deliver a high quality development in close proximity to public transport that will increase the vibrancy of the precinct.
- The proposal now allows for connectivity to Old Canterbury Road, rather than using the right of way access. This provides better integration into the wider Inner West plans of the Greenway pedestrian and cycle ways.
- The density proposed does not prevent achievement of the 9 principles of SEPP 65.
- There are no unacceptable adverse impacts in terms of shadow, view, visual and acoustic privacy impacts resulting from the proposed variation to the floor space ratio development standard which would warrant strict compliance.
- The proposed density will not result in an acceptable impact on local traffic conditions.
- The proposed variation allows for the most efficient and economic use of the land.
- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the wider local community.
- Having regard to the planning principle established in the matter of Project Venture Developments v Pittwater Council [2005] NSWLEC 191 most observers would not find the proposed development offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context

*The objects specified in section 5(a)(i) and (ii) of the EP&A Act are 'to encourage:*

- (i) proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the*

*social and economic welfare of the community and a better environment,*

- (ii) *the promotion and co-ordination of the orderly and economic use and development of land...*

The proposed development is consistent with the aims of the Policy and the objects of the EP&A Act in that:

- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- Strict compliance with the FSR control would result in an unreasonable reduction in the appropriate density for the site which has already been established by the Planning proposal.
- The proposed variation allows for the most efficient and economic use of the land.

**Assessment:** The assessment under the unreasonable and unnecessary section of this Clause 4.6 variation demonstrates that there are sufficient environmental grounds to permit the variation in this instance.

In this regard, it is reiterated that the proposed height variation is not responsible for any streetscape, overshadowing, privacy, view, heritage, visual impact from bulk and scale, or traffic and parking impacts.

On the basis of the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed FSR non-compliances in this instance.

On this basis, there are sufficient environmental grounds to permit the variation.

## **Other Matters for Consideration**

*4(a)(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*

*Clause 4.6(4) (a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that 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.*

*The proposal's consistency with the objectives of the development standard have been addressed in detail in this clause 4.6 request.*

*Clause 4.6(4) also requires consideration of the relevant zone objectives*

*The objectives of the B4 Mixed Use zone are:*

- *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.*
- *To enhance the viability, vitality and amenity of Ashfield town centre as the primary business activity, employment and civic centre of Ashfield.*

- To encourage the orderly and efficient development of land through the consolidation of lots.

*The proposed development facilitates a mixture of retail and business uses in a highly accessible location which will maximise public transport patronage and encourage walking and cycling for the local community. Residential apartments are integrated with the retail and business premises offering and will ensure a critical mass of occupants is achieved to ensure a vibrant outcome for the site.*

*For the reasons given the proposed development of site is considered to be consistent with the objectives of the B4 Mixed Use zone.*

*For the reasons outlined in the table above the proposal is in the public interest as the development is consistent with the objectives of the development standard, and the land use objectives of the zone.*

**Assessment:** The above assessment demonstrates that the proposed FSR satisfies the objectives of the FSR standard and the B4 Mixed Use land use zone.

Furthermore, it is considered that the variation does not raise any matters of public interest as there are no public views or detrimental streetscape outcomes associated with the FSR variation.

The development is in the public interest given the proposed FSR variation provides for the provision of a mixed-use development, on a currently vacant site, including retail land use and a variety of residential accommodation, with the provision of 57 residential units comprising 1 x studio, 7 x one-bedroom, 33 x two-bedroom, 14 x three-bedroom, and 2 x four-bedroom. All proposed units have excellent internal amenity, and are in an accessible location being within easy walking distance of public transport including the Lewisham West light rail station.

Given that the proposal is consistent with the desired future character for the area nominated by the specific controls in the LEP and DCP, and that there are no adverse or unreasonable impacts to the broader community, it is considered that there are no public interest matters which would prevent a variation to the FSR control.

*(5) In deciding whether to grant concurrence, the Director-General must consider:*

*(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning*

**Assessment:** The proposed FSR variation allows for the orderly and economic use of land as envisaged by the *Environmental Planning and Assessment Act, 1979*.

The proposed FSR allows for achievement of a compatible building envelope without creating a development with overbearing height, bulk or scale and without compromising the desired future character of the area.

The proposed FSR is therefore consistent with the State and Regional Policies, particularly urban consolidation principles which seek to provide additional height and density near transport and established services.

## Concurrence

The Secretary's concurrence under clause 4.6(4) of the LEP has been delegated to the Council by written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018. That concurrence may also be assumed by the Court pursuant to s39(6) of the Land and Environment Court Act.

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

*The proposed development achieves the objectives of the floor space ratio development standard despite the non-compliance.*

*It has been demonstrated that the proposed variation arises from the fact that the Planning proposal did not consider the possibility of basement levels to accommodate the parking for the development and therefore the additional FSR will not result in an adverse environmental impact on the neighbourhood amenity and streetscape.*

*Furthermore, there is precedent that the consent authority has accepted variations to the FSR control for comparable proposals.*

*As such, there would be no public benefit in maintaining the development standard in this case.*

**(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.**

**Assessment:** There are not considered to be any additional matters to consider beyond those discussed above.

**Conclusion**

Strict compliance with the FSR development standard contained within clause 4.4 of Ashfield LEP 2013 has been found to be unreasonable and unnecessary in the circumstances of the case. In addition, there are sufficient environmental planning grounds to justify the proposed variation which is in the public interest. In this regard it is reasonable and appropriate to vary the FSR development standard to the extent propose.

The exceedance of the FSR can be accommodated on the site. This additional FSR does not give rise to any LEP building height variation.

It has also been demonstrated that the proposed FSR meets the objectives of the standard and the zone in which the site is located, to an equal or better degree than a development with a compliant FSR.

For reasons mentioned herein, this clause 4.6 variation is considered well founded

For reasons mentioned herein, this Clause 4.6 variation is forwarded in support of the development proposal at No. 120C Old Canterbury Road Summer Hill and is requested to be looked upon favourably by the consent authority.

### 1.1.2 NSW LAND AND ENVIRONMENT COURT: CASE LAW

Several key New South Wales Land and Environment Court (NSW LEC) planning principles and judgements have refined the manner in which variations to development standards are required to be approached.

The correct approach to preparing and dealing with a request under clause 4.6 is neatly summarised by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118:

*[13]The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. 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.*

*[14]The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5 at [28]; *Winten Property Group Limited v North Sydney Council* (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].*

*[15]The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.*



**[16]**As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe v Pittwater Council* at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.

**[17]**The first and 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: *Wehbe v Pittwater Council* at [42] and [43].

**[18]**A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: *Wehbe v Pittwater Council* at [45].

**[19]**A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: *Wehbe v Pittwater Council* at [46].

**[20]**A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: *Wehbe v Pittwater Council* at [47].

**[21]**A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: *Wehbe v Pittwater Council* at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in *Wehbe v Pittwater Council* at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning

*changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*

*[22] These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

*[23] As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*

*[24] The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].*

*[25] The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant’s written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). As I observed in *Randwick City Council v Micaul Holdings Pty Ltd* at [39], the consent authority, or the Court on appeal, does not have to directly form the opinion of*

satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant's written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction: see *Wehbe v Pittwater Council* at [38].

**[26]** 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. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in cl 4.6(4)(a)(ii).

**[27]** The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, 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 in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).

**[28]** The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21

*February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.*

*[29]On appeal, the Court 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 Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: Fast Buck\$ v Byron Shire Council (1999) 103 LGERA 94 at 100; Wehbe v Pittwater Council at [41].*

In November 2019, in the matter of *Abrams v Council of the City of Sydney* [2019] NSWLEC 1583 (*Abrams*), Commissioner Gray approved a development consent for a four-storey mixed use development containing 11 residential apartments and a ground floor commercial tenancy with a FSR exceedance of 2.63:1 compared to the permitted 1.5:1, as well as a building height exceedance of up to 250mm. The FSR as approved by the Land and Environment Court therefore exceeded the development standard control by approximately 75%.

When considering the FSR variance, Commissioner Gray found at [48]-[49] that:

...the request establishes that whilst a similar scale of development could be achieved with a compliant FSR through the use of internal voids and courtyards, such an approach would result in disproportionate and inefficient floor plans with large parts of the building being an empty shell...

I am therefore satisfied that the appropriate built form outcome that is achieved through the proposed development justifies the contravention of the FSR development standard, which is the means by which that outcome is achieved...

Commissioner Gray then further went on to find at [51] that "...a proposal with compliant FSR would appear out of character with the scale of development in the immediate context and would result in an unbalanced corner when viewed from the northern side of Power Avenue".

It is important to note that in *Abrams*, the Land and Environment Court did not accept an argument from the Council that departure from the relevant development standards would create an undesirable precedent. Conversely, Commissioner Grey held, at [70] that "...in circumstances where the matters required by cl 4.6(4) of the SLEP are satisfied such that flexibility should be afforded and the development is otherwise acceptable on its merits, the development is not objectionable in itself and there is no undesirable precedent occasioned by its approval".

Furthermore, in November 2019, Commissioner Walsh upheld a development consent for a three-storey building containing a hardware and building supplies use with a variation to the FSR standard of 1.27:1 compared to the permitted 1.0:1: *Artazan Property Group Pty Ltd v Inner West Council* [2019] NSWLEC 1555 (*Artazan*

Property Group). In granting the development consent, and the 27% FSR variation, Commissioner Walsh held that the objectives of the FSR standard were achieved notwithstanding the non-compliance, as it was demonstrated that the proposed building was “visually compatible with the existing and desired future character of the area” (at [73]).

More recently, in the matter of SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112, the Court granted development consent to a six-storey shop top housing development that relied on a clause 4.6 written request for an FSR exceedance of 3.54:1 compared to the permitted 2.5:1, being a 41% variation, and a further 4.6 written request for a building height exceedance of up to 6.51m above the 14.7m height control, being a variation of 44%.

Despite the considerable departures from the relevant development standards, Acting Commissioner Clay SC held that the “proposed building [was] an excellent response to its context...the streetscape as a consequence is coherent and consistent” (at [74]). Further, Acting Commissioner Clay SC found at [106] that:

The strategies are achieved with the proposed building notwithstanding it exceeding four storeys...there will be a coherent street scale, compatible with existing urban fabric. It is a high-quality architectural design that positively contributes to the streetscape. A coherent street definition is provided.

When considering whether the development was consistent with the objectives of the standard, Acting Commissioner Clay SC held at [84] that:

...It cannot be that simply being in excess of the height control means that the objective to minimise visual intrusion is not met. If that was the case, then there would be very great difficulty in ever establishing consistency with the objective.

The above case law clearly demonstrates the well-established Land and Environment Court line of authority that there is no legal impediment to the grant of approval based on the numerical extent of non-compliance provided the test set out in clause 4.6 is met.

For completeness, the variation sought by proposed development scheme would be suitable for assessment against the provisions of clause 4.6, as established by the above case law. What is important to note is that cl 4.6(4)(a) does not place any numerical limitation on

the variation available by way of cl 4.6. Rather, cl 4.6(4)(a) establishes that a consent authority must focus on establishing whether compliance is unreasonable or unnecessary in the circumstances, and on the environmental planning grounds established by the written variation request.