

A background graphic featuring a dark blue diagonal band across the page. Behind this band is a grayscale image of a city skyline with several tall buildings. Overlaid on the entire background are numerous white, 3D wireframe cubes of varying sizes, some of which are partially obscured by the dark band.

Clause 4.6 Variation Request

Clause 4.4(2) Floor Space
Ratio


Proposed Mixed Use
Development

28, 28A-30 & 32-34 Victoria Street, Burwood

Submitted to Burwood Council
On Behalf of VSD Investments Pty Ltd

September 2019

REPORT REVISION HISTORY

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1. EXECUTIVE SUMMARY

This Clause 4.6 variation request has been prepared to vary *Clause 4.4(2) Floor Space Ratio* of the *Burwood Local Environmental Plan 2012* (Burwood LEP 2012) for a development application at 28-34 Victoria Street, Burwood (subject site). The development application relates to the construction of a thirty (30) storey mixed use development, with three (3) basement levels.

Clause 4.4(2) prescribes that the maximum floor space ratio (FSR) for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map. The FSR Map identifies the site to have a maximum FSR of 4.5:1. However, Clause 4.4A(5) allows a maximum FSR of 4.95:1 for the site, which the proposal complies with.

Arguably, this exception request is not required given Clause 4.4A(5) of the Burwood LEP 2012 explicitly states that despite the FSR standard outlined in Clause 4.4, a maximum FSR of up to 4.95:1 applies to the site. For abundant caution, however, this exception request has been prepared in relation to Clause 4.4(2). For information purposes, the proposal strictly complies with Clause 4.4A(5) in that a FSR of 4.95:1 is proposed, together with the necessary community infrastructure.

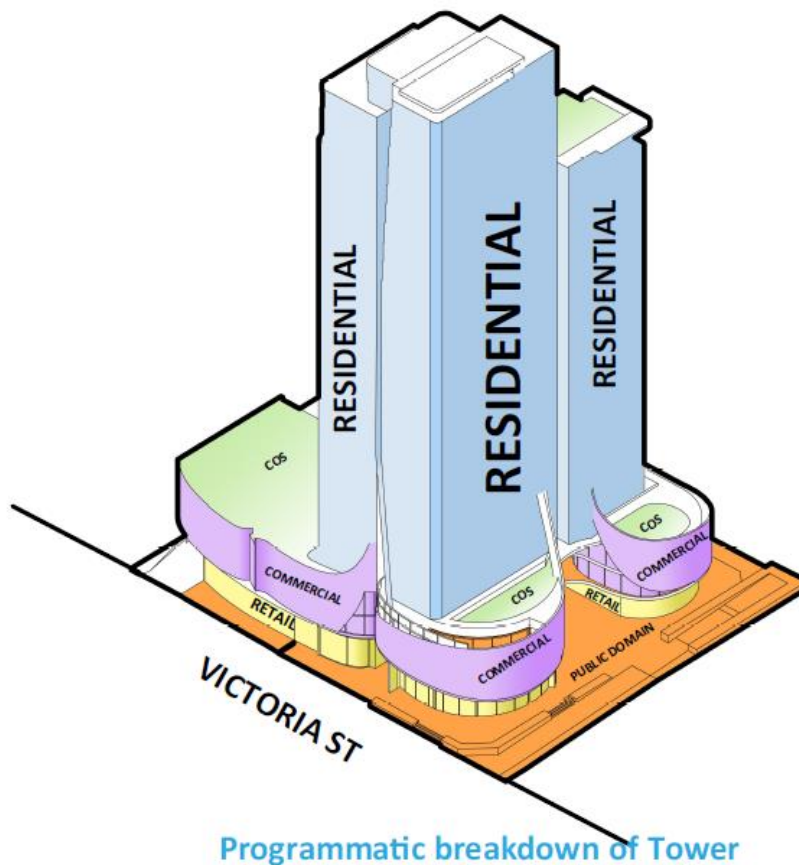


Figure 1: Distribution of floorspace within to the proposed development (Design Excellence Report).

2. INTRODUCTION

This is a formal written request that has been prepared in accordance with Clause 4.6 of Burwood LEP 2012. The written request seeks a variation from the FSR development standard prescribed in Clause 4.4(2) of the Burwood LEP 2012. The variation request relates to a development application submitted to Burwood Council for the construction of a 30-storey mixed use development at 28-34 Victoria Street, Burwood.

The FSR Map identifies the site to have a maximum FSR of 4.5:1. The proposal has a maximum FSR of 4.95:1, representing a variation of 10% from the standard. Although the proposal seeks to vary the maximum FSR standard prescribed in Clause 4.4(2), an exception to this clause is justified as the variation still ensures that the proposal is consistent with the objectives of the standard and the zone, and consistency with the locality's desired future character will be achieved.

Arguably, this variation request is not necessary as Clause 4.4A(5) explicitly states that, despite Clause 4.4, a maximum FSR of 4.95:1 applies to the site. Nevertheless, this variation request is provided for abundant caution. It is worth noting that the proposal strictly complies with the 4.95:1 FSR standard and includes the community infrastructure upon which the 4.95:1 FSR is contingent upon as specified in Clause 4.4A(6).

Clause 4.4A(5) and Clause 4.4A(6) is as follows:

(5) Despite clause 4.4, the floor space ratio for a building on land in Area 1 or Area 2 may exceed the floor space ratio shown for the land on the Floor Space Ratio Map if:

(a) the floor space ratio for the building does not exceed:

(i) 6.6:1—if the building is in Area 1, or

(ii) 4.95:1—if the building is in Area 2, and

(b) the gross floor area of the part of the building used for the purpose of residential accommodation does not exceed the following percentage of the gross floor area of the building:

(i) 40 percent—if the building is in Area 1, or

(ii) 70 percent—if the building is in Area 2.

(6) Subclause (5) applies in relation to proposed development only if:

(a) the proposed development on the land includes development resulting in community infrastructure or the use of land as community infrastructure, and

(b) the consent authority is satisfied that the community infrastructure is appropriate for the Burwood Town Centre, taking into account the nature of the community infrastructure and its value to the community working or residing in the Burwood Town Centre.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application.

This request has been prepared having regard to the Department of Planning, Industry and Environment's *Guidelines to Varying Development Standards* (August 2011) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

This request is structured to explicitly address the matters required to be addressed by the applicant under Clause 4.6(3) (a) and (b) for which the consent authority must be indirectly satisfied according to *Preston J in Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018. This request also addresses the matters in Sections 4.6 (4) and (5) regarding which the consent authority and delegate of the Secretary must directly form their own opinion of satisfaction.

3. STANDARD TO BE VARIED

The standard that is proposed to be varied is the FSR development standard set out in clause 4.4(2) of the Burwood LEP 2012 as follows:

The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.

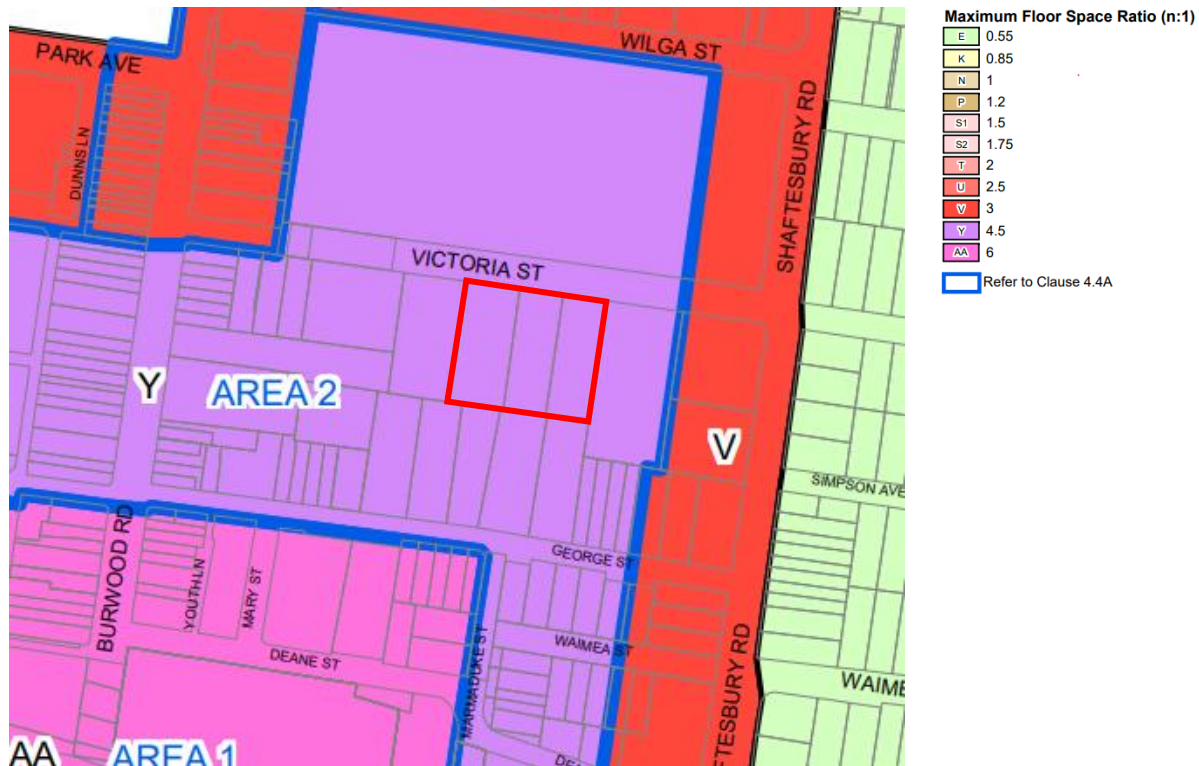


Figure 2: Extract of the FSR Map for the Burwood Town Centre, site outlined in red (NSW Legislation).

The numerical value of the development standard applicable in this instance is 4.5:1.

The development standard to be varied is not excluded from the operation of clause 4.6 of the LEP.

4. EXTENT OF VARIATION

Clause 4.4(2) prescribes that the maximum FSR on the site is 4.5:1. The proposal has an FSR of 4.95:1, representing a variation of 10%.

5. UNREASONABLE OR UNNECESSARY

In this section we demonstrate why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by clause 4.6(3)(a) of the LEP.

The Court has held that there at least five different ways, and possibly more, in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC).

We have considered each of the ways as follows.

5.1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

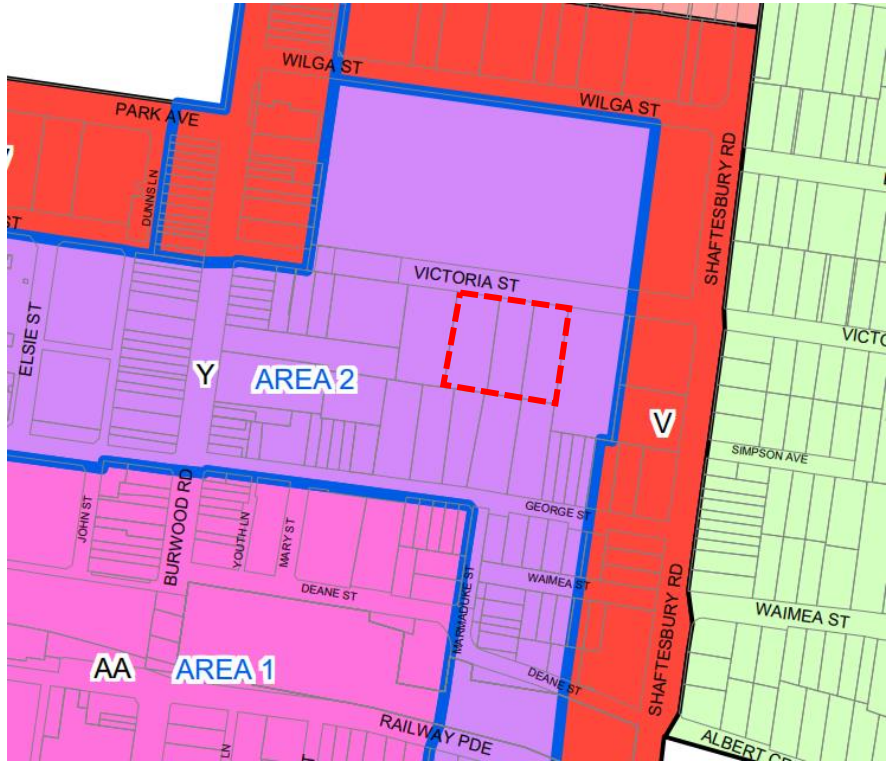
The objectives of the standard are as follows:


- (a) *to enable development density and intensity of land use to achieve an appropriate urban form,*
(b) *to focus higher development density and intensity of land use in the inner part of the Burwood Town Centre and to provide a transition in development density and intensity of land use towards the edge of the Burwood Town Centre.*

In the following table we have considered whether the elements which contravene the development standard prevent the objectives of the development standard being achieved.

Table 1: Achievement of Objectives of Clause 4.4

Objective	Discussion
(a) to enable development density and intensity of land use to achieve an appropriate urban form.	<p>The existing urban form of the Burwood Town Centre is characterised by a mix of land uses and development typologies. At street level, the Burwood Town Centre has a range of retail, commercial and food/drink premises concentrated around the spine of Burwood Road. Upper levels generally contain commercial and residential uses, with a number of residential towers in excess of 60m in height having been approved in the Town Centre area.</p> <p>The Burwood LEP 2012 contains a number of prescriptive and performance-based measures which relate to urban form. It is considered that these measures (being the Height of Buildings standard, FSR standard and various DCP controls) are a strong indicator of “<i>appropriate urban form</i>”.</p> <p>For example, Burwood LEP 2012 mapping provides that larger developments, in terms of both height and land use intensity, are anticipated towards the middle of the Burwood Town Centre, as this area has an overall increased permitted height and floor space ratio. This is demonstrated further by the Building Height Plane referenced in Clause 4.3A(2) which allows an increase in height as development moves from the edges of the town centre towards the middle of the town centre.</p> <p>The proposal complies with the Building Height Plane and steps away from the lower density zoned areas as the building gets taller. The proposal is also a tall, slender building which achieves the expected density and results in fewer impacts on adjoining land uses, the Victoria Street streetscape and Burwood skyline compared to a more “squat” building. Therefore, it can be concluded that the proposal is consistent with the anticipated heights and urban form of development within the town centre.</p>

Objective	Discussion
	<p>Clause 4.4A(5) also provides for higher density development in the inner core of the Burwood Town Centre. This provides for higher densities to be concentrated towards the inner core of the town centre with lower densities provided in the middle ring, transitioning to areas outside the town centre. This subclause provides for a maximum FSR of 6.6:1 in Area 1, being the inner core of the town centre whilst the subject site is located in Area 2, the middle ring of the town centre with a maximum FSR of 4.95:1. The proposal is located in Area 2, complies with this provision and in doing so provides an appropriate development density that is expected in this locality</p> <p>The spatial extent of these areas is provided below in Figure 3.</p>  <p>Figure 3: Extract of the FSR Map for the Burwood Town Centre, site outlined in red (NSW Legislation).</p> <p>Clause 4.4A(5) also prescribes a mix of land uses to which no more than 70% can be for residential purposes. The proposal complies with these controls. The Burwood LEP 2012 permits a range of compatible land uses within the Burwood Town Centre, inclusive of a mix of residential, commercial and retail uses. Therefore, it can be concluded that the proposal is consistent with the anticipated land use and land use intensity for the town centre.</p>
(b) to focus higher development density and intensity of land use in the inner part of the Burwood Town Centre and to provide a	<p>The subject site is located in the middle ring area of the Burwood Town Centre located approximately 175m to the east of Burwood Road, the spine of the centre.</p> <p>The proposal complies with the building height plane as well as FSR standards contained in Clause 4.3A and 4.4A(5) respectively. These standards establish an urban form which focuses taller developments, and</p>

Objective	Discussion
transition in development density and intensity of land use towards the edge of the Burwood Town Centre.	<p>developments with greater land use intensity in the inner part of the Burwood Town Centre, subsequently transitioning and stepping development down to the edges of the centre.</p> <p>The proposal is for a tall, slender building in the middle ring area of the Town Centre. The design of the building gradually further reduces in bulk and scale by the stepping of the building towards the upper levels when compared to a shorter, but more “squat” building. This has the effect of reducing the visual impact of the proposal and aids in providing a transition to the edge of the Burwood Town Centre towards Shaftesbury Road. The location of the site relative to the boundary of the Burwood Town Centre is demonstrated below.</p>  <p>Figure 4: Extract showing the site relative to the Burwood Town Centre (Source: Urban Design Excellence Report).</p> <p>Given the proposal complies with these particular standards, it can be concluded that the proposal focuses taller development and development of greater land use intensity towards the inner part of the town centre in a manner anticipated by the Burwood LEP 2012 and this particular objective.</p>

As demonstrated in Table 1 above, the objectives of the FSR development standard are achieved notwithstanding the proposed variation.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC, therefore, compliance with a development standard is demonstrated to be unreasonable or unnecessary on this way alone.

For the sake of completeness, we consider the other recognised ways as follows.

5.2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;

The underlying objectives and purpose of Clause 4.4 remain relevant. Arguably, however, compliance with the clause is unnecessary given Clause 4.4A(5) explicitly allows for the proposed FSR.

5.3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.

Not applicable.

5.4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; or

The Burwood LEP 2012 was amended on 17 November 2017 to include Clause 4.4A(5).

A Clause 4.6 exception request was supported by the Sydney Eastern City Planning Panel on 25 February 2019 on the same grounds as this exception request, for development at the 'Burwood RSL site'. A Clause 4.6 exception request was supported by the Sydney Eastern City Planning Panel on 25 February 2019 on the same grounds as this exception request, for development at the 'Burwood RSL site'. The Burwood RSL site is bounded by Deane Street, George Street, Shaftesbury Road and Marmaduke Street and is approximately 200m south east of the subject site. DA 85/2017 was lodged on 29 June 2017 and proposed a "*RSL Club, hotel, entertainment and recreation facilities, over basement car parking.*" The proposal had a maximum building height of 94.6m and an FSR of 4:1. This results in a non-compliant FSR for some portions of the site, as a maximum FSR provision of 3:1 under Clause 4.4 applies to the eastern half of the amalgamated site.

The DA was approved by the Sydney Eastern City Planning Panel on 25 February 2019.

Similarly, a Clause 4.6 exception request was supported by Burwood Council on 16 August 2018 on the same grounds as this exception request for development at 23-27 George Street, immediately south of the subject site. DA 82016/179 was lodged on 16 December 2016 and proposed a 21 storey mixed use commercial/ residential development, over basement car parking. The proposal had a maximum building height of 70.15m and an FSR of 4.95:1. A maximum FSR provision of 4:1 under Clause 4.4 applies to the whole site, rendering the proposal non compliant.

As further development applications are lodged for development in the town centre, we expect that they will seek an exception to Clause 4.4 as a result of the additional FSR allowed by Clause 4.4A(5). Given these examples of significant departures from the standards, the FSR development standard has been abandoned in the approval of these developments.

5.5. The zoning of the land is unreasonable or inappropriate.

Not applicable.

5.6. Other ways

Given Clause 4.4A(5) allows for an FSR of 4.95:1 on the subject site, strict compliance with Clause 4.4 is considered unreasonable and unnecessary.

6. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

In this section we demonstrate that there are sufficient environmental planning grounds to justify contravening the FSR development standard as required by clause 4.6(3)(b) of the LEP.

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard.

Clause 4.4A(5) of the Burwood LEP 2012, which allows for the proposed 4.95:1 FSR on the subject site, is sufficient environmental planning grounds to justify contravening Clause 4.4(2) in itself.

Triggering Clause 4.4A(5) encourages a notably different as well as an improved building envelope than compared to relying on the FSR provisions in Clause 4.4(2) alone. That is, whilst it results in a taller envelope, it also results in a much more slender envelope. An envelope reliant on Clause 4.4(2) is likely to be much deeper than the proposed envelope. This results in worse amenity outcomes particularly for development on adjoining allotments as it increases overshadowing, decreases separation and results in a generally bulkier envelope. A bulkier envelope also compromises amenity for residents on the subject site as it results in greater self-overshadowing as well as reduced outlook.



Figure 5: Analysis of building envelope with compliant height and FSR. Building envelope is bulkier with less setbacks/separation, resulting in greater overshadowing and reduced outlook (Source: Urban Design Excellence Report).



Figure 6: Analysis of envelope reliant on FSR and height provided for by Clauses 4.4A and 4.3A. Envelope is thinner, allowing for greater setbacks/separation with subsequently reduced overshadowing and improved outlook (Source: Urban Design Excellence Report)



Figure 7: Shadow impact from a compliant 60m height envelope. Note: shadows have a wider surface area and concentrate over a particular surface area (Source: Urban Design Excellence report)

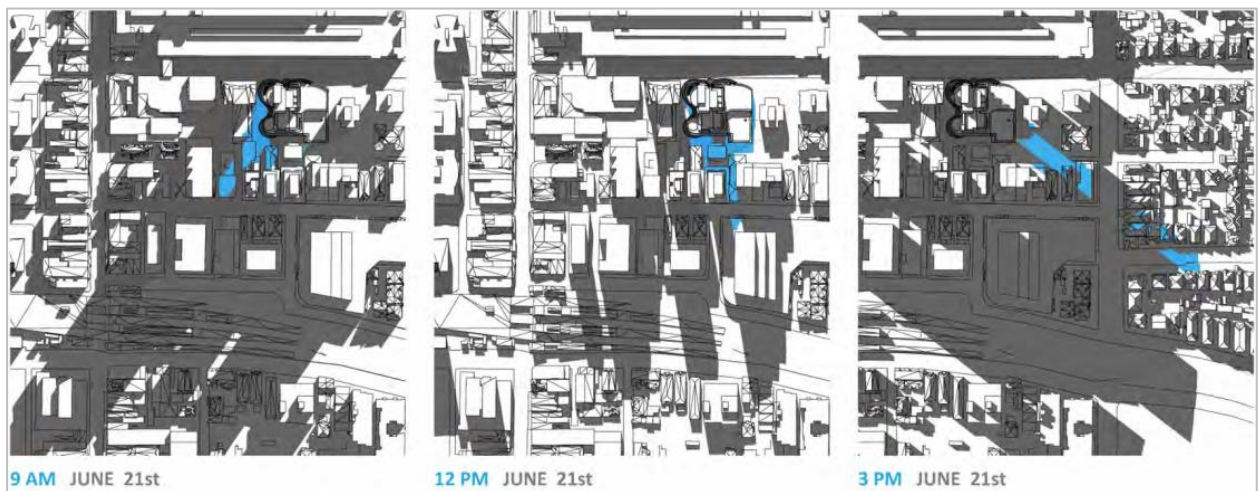


Figure 8: Proposal's shadow impacts showing a smaller affected surface area and faster moving shadow (Source: Urban Design Excellence Report)

In this case, Clause 4.4A(5) and the resultant contravention to Clause 4.4(2) achieves good design and amenity in the built environment, which are objectives of the EP&A Act. The additional GFA also achieves the economic use of the land given it provides more housing opportunities as well as more commercial/retail floor space, which is also an objective of the EP&A Act.

7. PUBLIC INTEREST

In this section we explain how 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 as required of the consent authority by clause 4.6(4)(a)(ii) of the LEP.

In **Section 5** it was demonstrated that the objectives of the development standard are achieved notwithstanding the variation of the development standard.

The table below considers whether the proposal is also consistent with the objectives of the zone.

Table 2: Consistency with Zone Objectives.

Objectives of B4 Mixed Use zone	Discussion
To provide a mixture of compatible land uses.	<p>The proposal provides a mix of commercial, retail and residential uses, providing 6,296m² of commercial gross floor area and 14,694.0m² of residential gross floor area. The proposal achieves the requirement to provide no more than 70% of GFA for residential uses as required by Clause 4.4A(5). The proposal also provides the community infrastructure as required by Clause 4.4A(6) which is an additional use.</p> <p>The split of commercial floorspace is as follows:</p> <ul style="list-style-type: none"> Commercial (Level 2): 1,788.00 m² Retail (Level 1, Ground): 2,438.00 m² Café / Restaurant (Ground): 2,070.00 m² <p>These uses are located on the podium floors of the development and no residential uses are located on the same floor as commercial uses. This reduces the impacts of visual and acoustic privacy within the building, as well as adjoining developments, thereby rendering such uses compatible.</p> <p>The commercial and/or retail tenancies are likely to offer services for residents of the development, or adjoining developments. Further, the commercial and/or retail tenancies may offer employment opportunities for the development's residents, or residents in adjoining developments.</p> <p>The surrounding area has a mixture of commercial, retail and café/ restaurant uses and this development is compatible with the existing and expected land uses in the Burwood Town Centre and the B4 Mixed Use zone. The variation in FSR allows for an additional mix of compatible uses to be provided within the proposed development, particularly within the commercial podium portion of the development.</p> <p>For these reasons, the proposed uses are compatible, as sought by the objective.</p>
To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport	<p>The proposal provides a mix of commercial, retail and residential uses. The layout of the commercial floors is logical, with ground floor retail and restaurants/ cafes, a first floor supermarket and retail precinct with high visibility and easy access from the ground floor and second floor commercial offices. Residential uses are located on upper floors.</p> <p>The proposal includes a through site link to the west of the site. This through site link has also been adopted to the site to the south at 23-27 George Street. This</p>

<p>patronage and encourage walking and cycling.</p>	<p>through site link is well designed and provides pedestrian access and associated opportunities for increased legibility and connectivity throughout the Burwood Town Centre. This encourages walking and cycling in the area.</p> <p>The proposal is also located in a highly accessible area of Burwood and Greater Sydney which encourages public transport usage. The site is located within the Burwood Town Centre approximately 150m to the east of Burwood Road, a major local road, 700m south of Parramatta Road and 300m to the north of Burwood railway station, an interchange station on the T1 Western Line, T2 Inner West and Leppington Line and T9 Northern Line. In addition, Burwood is an interchange for numerous bus services which link the site with Parramatta, Ryde, Bankstown, Campsie and the Inner West.</p> <p>Further, the site is located immediately south of the Burwood Westfield shopping centre and 400m from Burwood Plaza, both of which, along with Burwood Road shops, contain a range of retail offerings. As such, the proposal encourages the integration of commercial, retail and residential uses in an accessible area, as sought by the objective.</p> <p>The variation to the FSR standard maintains this objective. The variation to the FSR standard allows for a compatible mix of residential, community infrastructure, commercial, restaurant/café and retail land uses to be provided within the proposed development. This is achieved through limiting residential floor space to 70% of total GFA and providing community infrastructure as required by Clause 4.4A (5) and (6). Further, these land uses are provided in an accessible location which will encourage the use of public transport and walking and cycling, given its close proximity to Burwood railway station and public transport.</p>
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As demonstrated in **Table 2**, the proposal is consistent with the objectives of the zone and in **Section 5** it was demonstrated that the proposal is consistent with the objectives of the development standard. According to clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

8. STATE OR REGIONAL ENVIRONMENTAL PLANNING

In this section we consider whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and the public benefit of maintaining the development standard, and any other matters required to be taken into consideration by the Secretary before granting concurrence required by clause 4.6(5).

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application.

As demonstrated previously, the proposal is consistent with the objectives of the zone and the objectives of the development standard and in our opinion, there are no additional matters which would indicate there is any public benefit of maintaining the development standard in the circumstances of this application.

Finally, we are not aware of any other matters required to be taken into consideration by the Secretary before granting the concurrence of the Secretary required by clause 4.6(4)(b).

9. CONCLUSION

This clause 4.6 variation request demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention;
- The development achieves the objectives of the development standard and is consistent with the objectives of the B4 Mixed Use zone.
- The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard; and
- The variation does not raise any matter of State or Regional Significance.

On this basis, therefore, it is appropriate to exercise the flexibility provided by clause 4.6 in the circumstances of this application.