



## CLAUSE 4.6 VARIATION TO FLOOR SPACE RATIO AND HEIGHT OF BUILDING DEVELOPMENT STANDARD

Mixed Use Development - 84 Broomfield Street and  
137 to 151 Cabramatta Road, Cabramatta East

Summary of proposed development of the entire site

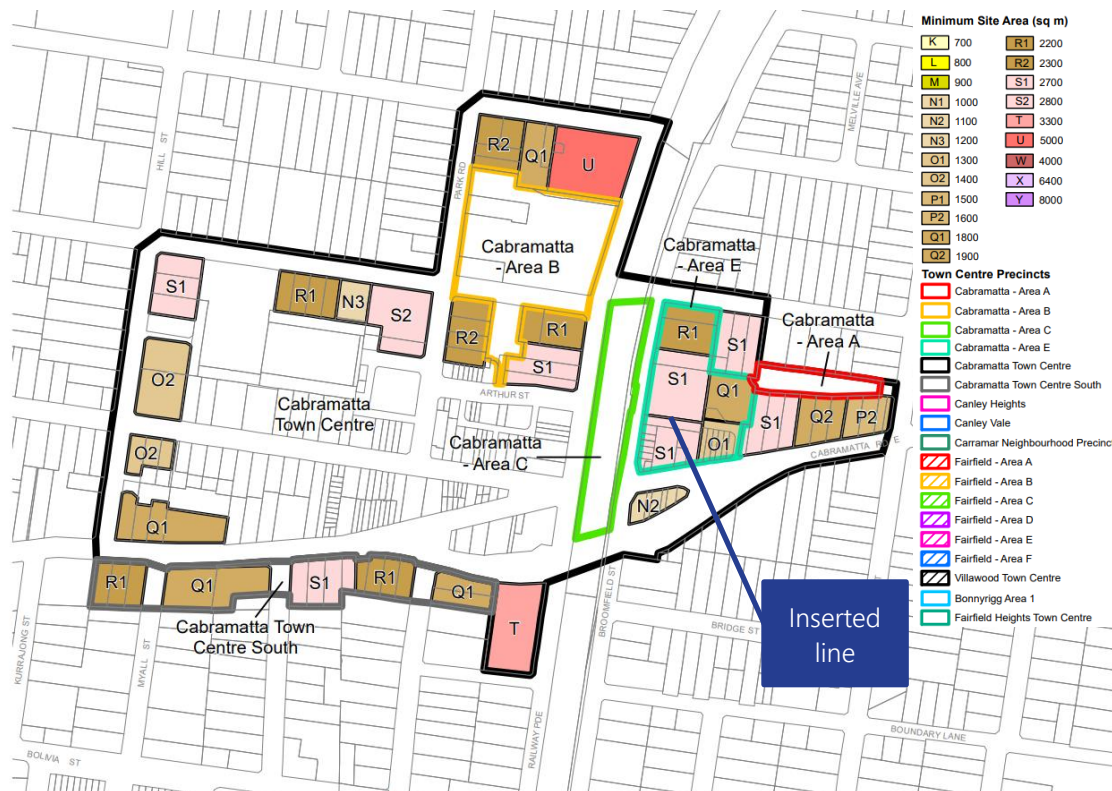
Property:	Lot 7 Section E DP 4420, 76 Broomfield St; Lot 1 DP 205759 and Lot 10 DP 255023, 84 Broomfield St; Lot 2 DP 205759, 86 Broomfield St; Lots 5, 6, and 7 DP25618, 151 Cabramatta Road East; Lot 8 DP 25618, 147-149 Cabramatta Road East; and Lot 2 DP 580587, 139 Cabramatta Rd East Cabramatta Road East.
Development:	Stages 1 and 2 of the site will include basement carparking, loading and garbage storage, the delivery of ground level retail, first level commercial and 358 residential apartments together with publicly accessible pedestrian laneways and a central square, being the focus of community and retail activities for the development.
Subject Plans:	Architectural Plans prepared by Plus Architecture Issue E dated 20.05.2024.
Council Reference:	DA 167.1/2023
Planning Panel Reference	PPSSWC-337 – Fairfield
Development Standard:	Clauses 7.2(4B) (Cabramatta – floor space ratio) and 7.3(5A) (Cabramatta-height of buildings) of <i>Fairfield Local Environmental Plan 2008</i> (the LEP)

## 1. Summary

The development application (**DA**) is for land described in this report as Stages 1 and 2 of a larger parcel rezoned via Amendment 42 on 7 October 2022 to facilitate high density mix use development opposite Cabramatta Station and with frontages to Broomfield St, Cabramatta Road East (local) and Fisher St, in Cabramatta. The DA is to be considered by the Sydney Western City Planning Panel following the finalisation of the assessment by Fairfield City Council (**Council**).

The proposed development involves the demolition of existing buildings on the land and construction of a mixed-use development on Stages 1 and 2 comprising basement car parking and three separate buildings sited to form publicly accessible pedestrian laneways and a central square. Each building contains ground floor retail, the buildings addressing Broomfield Street and Cabramatta Road East have first floor commercial premises, and residential apartments sit above the non-residential uses of each building to heights not exceeding those shown in the Maximum Height of Buildings Map in the Fairfield Local Environmental Plan 2013 (**LEP**).

Following lodgement of the DA on 2 June 2023, Council requested the Department of Planning, Housing and Infrastructure to expedite an amendment to the new planning controls inserted into the LEP using s3.22 of the Environmental Planning and Assessment Act 1979 (**EP&A Act**). Specifically, the amendment, ultimately gazetted via Map Amendment No 6 to the LEP on 15 November 2023, inserted a new line in the Cabramatta – Area E land to divide a part of the site coloured pink and marked with an “S1” on the Minimum Site Area Map. Council maintains that the line inserted via Map Amendment No 6 should apply to separate the pink area so that the minimum site area of 2,700m<sup>2</sup> must be achieved in both Stage 1 and Stage 2 to be eligible to apply the controls on the Floor Space Ratio and Height of Buildings Maps in the LEP. The line inserted into the Minimum Site Area Map in the LEP is shown in **Figure 1**.



**Figure 1 – Extract from Minimum Site Area Map with inserted line separating the pink area**

It is on record that the applicant has questioned both the use and justification to apply s3.22 of the EP&A Act to amend the LEP and has also provided legal advice outlining, on the basis of precedent, why the line inserted under Map Amendment No 6 does not limit the site area required for Stages 1 and 2 to access the maximum height limits. However, notwithstanding its position on which it continues to rely, in order to progress the determination of this DA, and for abundant caution, this Clause 4.6 Variation Request has been prepared.

Of relevance to this Clause 4.6 Variation, the DA for Stage 1 has a site area for development of 3,788m<sup>2</sup>, so this stage complies with the 2,700m<sup>2</sup> based on Council's contended interpretation as to the effect of Map Amendment No 6. However, the applicant despite considerable effort has been unable to secure all land in Stage 2 resulting in a site area for development of 2,255m<sup>2</sup>, some 455m<sup>2</sup> less than the 2,700m<sup>2</sup> Minimum Site Area requirement based on Council's contended interpretation as to the effect of Map Amendment No 6. For the record, the total area of land within Stages 1 and 2 within the pink area and marked with the letter "S1" is 6,043m<sup>2</sup>. It is noteworthy that the total area of Stage 2 defined by the newly inserted line is only 2,800m<sup>2</sup>

which would, based on Council's interpretation, require the applicant to secure all but one of the smaller properties along Broomfield St with an area less than 100m<sup>2</sup>, including all units within a building that has been strata subdivided. **Figure 2** shows the stages of the development and those properties not secured for the development in Stage 2 as Site A and Site B.



Source: Plus Architecture

**Figure 2 - Site Plan, Staging and Sites not secured for Stage 2**

Site A as shown in **Figure 2** comprises a parcel of very shallow properties in three ownerships totalling 368.78m<sup>2</sup> along the Broomfield St frontage as follows:

- Lot 1 DP 25618, Lot 1 DP 203855, Lot 2 DP 650696, 88 Broomfield Street, Cabramatta (total area of 204.38m<sup>2</sup>, depth approx. 14.18m)
- Lot 3 DP 25618, 90 Broomfield Street, Cabramatta (Area 82.2m<sup>2</sup>, depth approx. 14.17m)
- Lot 4 DP 438982, 92 Broomfield Street, Cabramatta (Area 82.2m<sup>2</sup>, depth approx. 14.17m)

Site B as shown in Figure 2 comprises a three lot strata scheme at SP 10266, 143–145 Cabramatta Road East, Cabramatta that sits on a parcel of 202m<sup>2</sup>. The inclusion of this property into the development site for Stage 2 therefore requires all of the three existing owners to individually agree to sale terms. Agreement to the commercial terms for sale has not been reached with one owner in this strata scheme, therefore failing to trigger agreement of 75% of the lots in a strata scheme whereby the Owners Corporation can force the dissenting Lot Owners to join in a sale of the strata building under the *Strata Schemes Development Act, 2015*. Based on Council’s map amendment, this property, together with others would have to be purchased to meet the minimum site area requirements. . Noting that the applicant controls 1 strata lot and had an option for another which in the light of the impossibility of obtaining the third owners agreement has now lapsed.

The negotiations with property owners within Site A and Site B have been documented in the Statement of Environmental Effects (**SEE**) submitted with the DA and in the Request for Information (**RFI**) response dated 9 February 2024. The RFI response referenced and attached details of the valuations, letters of offer and a statutory declaration from the applicants representative confirming that offers were indeed sent to the right parties by registered post either directly to the owner or the owner’s representative where English is not a first language or to their legal representatives. These were provided to address the process for negotiations as established in *Karavellas v Sutherland Shire Council [2004] NSWLEC 251 (Karavellas)*.

As per Karavellas the DA, SEE and RFI response demonstrates how the isolated individual owned lots along Broomfield St can redevelop in the future, including the design of the development enabling access through the basement to a future car parking area under the properties on Broomfield St giving capacity for additional parking and hence additional development potential that they would not otherwise have.

The clause that requires the minimum site area to be achieved to access the floor space ratio and height controls in the Maps is unique to Fairfield LGA and we have found no other examples of its use in a search of other Sydney Metropolitan Area LEPs. Further, this provision, as it applies to the site, is the only example in the LGA where a boundary has been used (as inserted by Map Amendment No 6) to divide an area that is all coloured pink and to which the same development standard applies, contrary to Section 11.4 of the *Standard Technical Requirements for Spatial Datasets and Maps (STR)* produced by the then NSW Department of Planning and Environment in 2017 that states a:

*“medium black outline shall be inserted around each area that is subject to different development standards.”* (Author’s emphasis)

All other areas where this clause applies comply with the STR.

The Site is located in an area of planned high density residential and local commercial activity close to Cabramatta Railway Station. The planning for the development of this site was commenced in 2016 to set planning controls that delivered a genuine transport oriented development. As part of that process, Council advocated for the development to incorporate publicly accessible laneways that would link to a central square that could serve as a vibrant meeting place and food/retail precinct.

Since the original submission of this Planning Proposal for the parcel, Council has progressed its own “accelerated Planning Proposal” to “upzone” by increasing the height and FSR on the multi deck Council car park to the north of Stage 1 and Council owned at grade car park to the west of the site,

as well as properties fronting Cabramatta Road East to the west of the site and opposite Stage 2 of the site.

Based on Council's interpretation, should the development site nominated within the Stage 2 boundary comply with the Minimum Site Area of 2,700m<sup>2</sup>, then the proposal meets Clause 7.2(4B) and Clause 7.3(5A)(b) which enables the application of the standards shown on the FSR and Height of Building Maps under the LEP. However, if a development site does not meet the Minimum Site Area Map requirements, the development is not prohibited but could still progress with a maximum floor space ratio (**FSR**) of 2:1 and height limit of 14m. In this regard it is important for context to explore the planning outcomes Council think are appropriate for Stage 2 when the Minimum Site Area is not achieved as permitted by the LEP.

The FSR and Height of Building controls are the principal planning controls used in LEPs to guide the built form for a development on the site to ensure it is consistent with the urban form and can address the amenity considerations in which it is located. It is clear, that this area opposite the railway station has been identified for high density mixed use development as set out in the FSR and Height of Building control as shown on the LEP Maps. The DCP for the site also shows the same high density outcomes across all stages of the site.

Map Amendment No 6 inserted a line to separate the Stage 1 and 2 sites located along a substantial part of the Broomfield St frontage so that, based on Council's interpretation, each have to comply with the Minimum Site Area requirement. However, this has resulted in Stage 2 being a comparatively very small parcel with short frontages to the key intersection of Broomfield St and Cabramatta Road East (local) where the LEP height and FSR Maps as well as the DCP seek a more prominent tower to place mark the corner site.

As the adjoining Stage 1 already meets the Minimum Site Area requirement permitting buildings to be as tall as 59m and Stage 3 has the ability to be 57m as shown of the Maximum Height of Building Map, the development of Stage 2 to 14m and without requirements to acquire the minimum site area to proceed, would have poor interfaces and stark transitions to Stages 1 and 3 and a built form outcome that is incongruous with the planning for this site, the locality and push for greater densities to be delivered in close proximity to, and in this case, opposite the railway station.

The Site Minimum Site Area requirement in effect seeks to "turn off" and deny the remedies established under the Land and Environment Court Planning Principle derived from Karavellas to apply to situations where landowners have not been receptive to reasonable offers to enable site consolidation for redevelopment. Indeed, the Minimum Site Area requirement disables Karavellas and places undue influence on a small number of land owners that can potential thwart a development proceeding and the broader planning outcomes that this brings.

The variation to the Minimum Site Area requirement to be able to apply the FSR and Height of Building controls shown on the Maps in the LEP is 16.85%. However, if the minimum site area is not met:

- the FSR reduces from a maximum of 6:45:1 or 14,455m<sup>2</sup> and defaults to 2:1 or 4,510m<sup>2</sup>. The total proposed FSR of Building C on Stage 2 taken from the Development Schedules prepared by Plus Architecture in the DA Design Report totals 9,646m<sup>2</sup> which represents a variation of 213.9% to the 2:1 default FSR.

- the height reduces from a maximum of 66m and defaults to 14m. The maximum height of Building C taken from the Section through Building C taken prepared by Plus Architecture in the DA Design Report is 65.85m which represent a variation of 370.36%.

While the variations to the default standard if the Minimum Site Area requirement are numerically significant, the proposed development is not incongruous with the planning outcomes expected in the area and the built form is consistent to that described on this site having regard to the DCP, and the requirement to shape and site the tower to achieve solar access to the property south and opposite on Cabramatta Road East.

In discussing the role of the planning controls as part of this Clause 4.6 variation, it is important to understand the expected outcomes should the minimum site area not be met on this stage. The default 14m height limit that applies if the Minimum Site Area is not met would cap the height of the proposed building as shown on the architectural plans at Level 3. It is noted that the proposed FSR to deliver the first 3 levels as shown on the architectural plans is 3,677m<sup>2</sup> and hence would comply with the maximum FSR of 4,510m<sup>2</sup> at 2:1.

In terms of built form outcome, there would be little to no difference to what is shown on the DA plans for this element of the building to comply with default FSR and height controls and without the requirement for amalgamation. Those parts of the site that have not been secured and incorporated into the development site would sit in the streetscape with the remainder of the proposed building around and behind as is currently proposed in the DA plans, however, the minimum site area requirement would not insist that they are incorporated into the development site.

Above Level 3 and as proposed in the DA, there is a tower that sits under the maximum Height of Building controls shown on the map. Whilst the Minimum Site Area requirement, based on Council's interpretation, would prevent this element of the building occurring, importantly, the siting of the tower is setback into the development site and does not extend over those shallow sites that have not been secured along Broomfield St. The tower element has been pulled back from the corner of Broomfield St and Cabramatta Road from that shown in Figure 5 of the DCP to meet the DCP requirements to ensure solar access to other properties adjoining the site, in this case the property to the south and opposite on Cabramatta Road East which Council rezoned after the original concept was developed. The relocated and narrower tower above the podium as shown on the DA plans is in direct response to this requirement.

It is noteworthy that the height and the built form above Level 3 would not change whether or not the Minimum Site Area requirement was complied with or even existed. The DCP allow for variations stating the *heights of buildings, siting and setbacks are to generally accord with Figures 4 and 5* (Author's emphasis). The location of the tower is consistent with the DCP to be sited to achieve solar access to any building that occurs on the site to the south consistent with the planning controls.

The tower element on Stage 2 will exceed the 2:1 FSR control under Clause 7.2(4B) and the 14m height limit under Clause 7.3(5A) not because it is above the maximum height of building anticipated in this area, but because of a minimum site area requirement. These observations best demonstrate that the Minimum Site Area control has no planning purpose to serve in regulating the built form outcomes and seeks to impose an administrative requirement that runs contrary to established caselaw in Karavellas adopted as a Planning Principle by the NSW Land and Environment Court and the long established role of height and FSR both incentivising amalgamations and controlling built form based on the site area of the proposed development.

The development of this parcel brings with it significant public benefits including a planning agreement entered into for the delivery of a pedestrian bridge to the value of \$4,601,120 and subject to indexation from October 2022 to link with the rail concourse and if this is not supported by Sydney Trains, a payment valued at 110% the cost of the indexed bridge to Council for the provision or upgrade of community facilities in the area. This is in addition to the streetscape improvements and the establishment of the centre square, all of which are tied to Stage 1 of the development.

In addition to the above, if the development were refused based on Council's interpretation of the Minimum Site Area requirement, then any future DA would be liable to payment of the Housing and Productivity Contributions which, based on the current DA, would amount to \$3,580,000 (unindexed).

There is a very real viability issue for Stage 1 proceeding at all without being able to amortise the upfront development costs against, and benefit from the revenues associated with Stage 2. The approval of Stage 2 to progress without unrealistic expectations on property acquisitions is imperative if the public benefit associated with the project is to be realised.

Based on the discussion above, the variation will have no negative impact on the streetscape and indeed a positive effect if compared to that which could occur under the 14m default height limit, or character of the area given the planned locational context of the Site.

This request for a variation to the FSR and height standard outlines the justification for the variation to the circumstances of the case and demonstrates that it is in the public interest.

## 2. Authority to vary a development standard

The objectives of clause 4.6 seek to recognise that in particular circumstances, strict application of development standards may be unreasonable or unnecessary. The clause provides objectives and a means by which a variation to the standard can be achieved as outlined below.

*(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 to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*

*(a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and*

*(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.*

*Note—*

*The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).*

*(4) The consent authority must keep a record of its assessment carried out under subclause (3).*

*(5) (Now Repealed) In deciding whether to grant concurrence, the Planning 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 Planning Secretary before granting concurrence.*

*(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—*

*(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*

*(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

*(7) (Now Repealed) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*

*(8) This clause does not allow development consent to be granted for development that would contravene any of the following—*

*(a) a development standard for complying development,*

*(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*

*(c) clause 5.4,*

*(caa) clause 5.5.*

It is noted that Clause 4.6 was amended on 15 September 2023 but did not commence until 1 November 2023. The delay in commencement was to allow councils and applicants time to prepare. The amendments only apply to development applications lodged after 1 November 2023. This DA

lodged 2 June 2023 but not determined prior to 1 November 2023 continues<sup>1</sup> to be assessed under the previous clause.

### 3. Development Standards to be Varied

A variation is requested to clause 7.2(4A) and clause 7.3(5A) of the LEP which specifies the floor space ratio and height of buildings on land based on its location within Cabramatta Area E of the Town Centre Precinct and that where the development has not assembled a site that meets or exceeds the area shown on the Minimum Site Area. The minimum site area of all land in Stage 2 results in a site area for development of 2,255m<sup>2</sup>, some 455m<sup>2</sup> or 16.48% less than the 2,700m<sup>2</sup> Minimum Site Area requirement based on Council's interpretation. It flows from Council's interpretation of the minimum site area that the FSR and Height of Building development standards are then required to be varied.

Both clauses seek to apply development standards as defined by s1.4 of the *Environmental Planning and Assessment Act 1979 (EPA Act)*.

For completeness, both clauses are repeated in full below with the relevant provisions to the FSR and height relevant to this clause 4.6 Variation shown in bold and italics.

#### **7.2 Cabramatta—floor space ratio**

##### ***(1) This clause has effect despite clause 4.4.***

*(2) The maximum floor space ratio for a building on land identified as "Cabramatta—Area A" on the Town Centre Precinct Map is—*

- (a) if the building is not used for the purpose of residential accommodation—1.5:1, or*
- (b) if less than 10% of the floor space is used for the purpose of residential accommodation—2:1, or*
- (c) if 10% to 50% of the floor space is used for the purpose of residential accommodation—2.2:1.*

*(3) (Repealed)*

*(4) The maximum floor space ratio for a building on land identified as "Cabramatta—Area B" on the Town Centre Precinct Map is—*

- (a) if the building is not used for the purpose of residential accommodation—2:1, or*
- (b) if less than 10% of the floor space is used for the purpose of residential accommodation—2:1, or*

<sup>1</sup> <https://www.planning.nsw.gov.au/sites/default/files/2023-09/upcoming-changes-related-clause-4-6-standard-instrument-faq.pdf>

*(c) if 10% to 50% of the floor space is used for the purpose of residential accommodation—2.2:1.*

***(4A) The maximum floor space ratio for a building on land identified as “Cabramatta—Area E” on the Town Centre Precinct Map is—***

***(a) if the building is not used for the purposes of residential accommodation—1.5:1, or***

***(b) if less than 10% of the floor space is used for the purposes of residential accommodation—2:1, or***

***(c) if 10% to 50% of the floor space is used for the purposes of residential accommodation—2.2:1.***

***(4B) The maximum floor space ratio for a building on land identified as “Cabramatta Town Centre” on the Town Centre Precinct Map is 2:1 if the site area is less than the minimum site area shown for the land on the Minimum Site Area Map.***

*(4C) The maximum floor space ratio for a building on land identified as “Cabramatta Town Centre South” on the Town Centre Precinct Map is 1:1 if the site area is less than the minimum site area shown for the land on the Minimum Site Area Map.*

*(5) The maximum floor space ratio of any air space development on land identified as “Cabramatta—Area C” on the Town Centre Precinct Map that enhances pedestrian connectivity across the railway line is—*

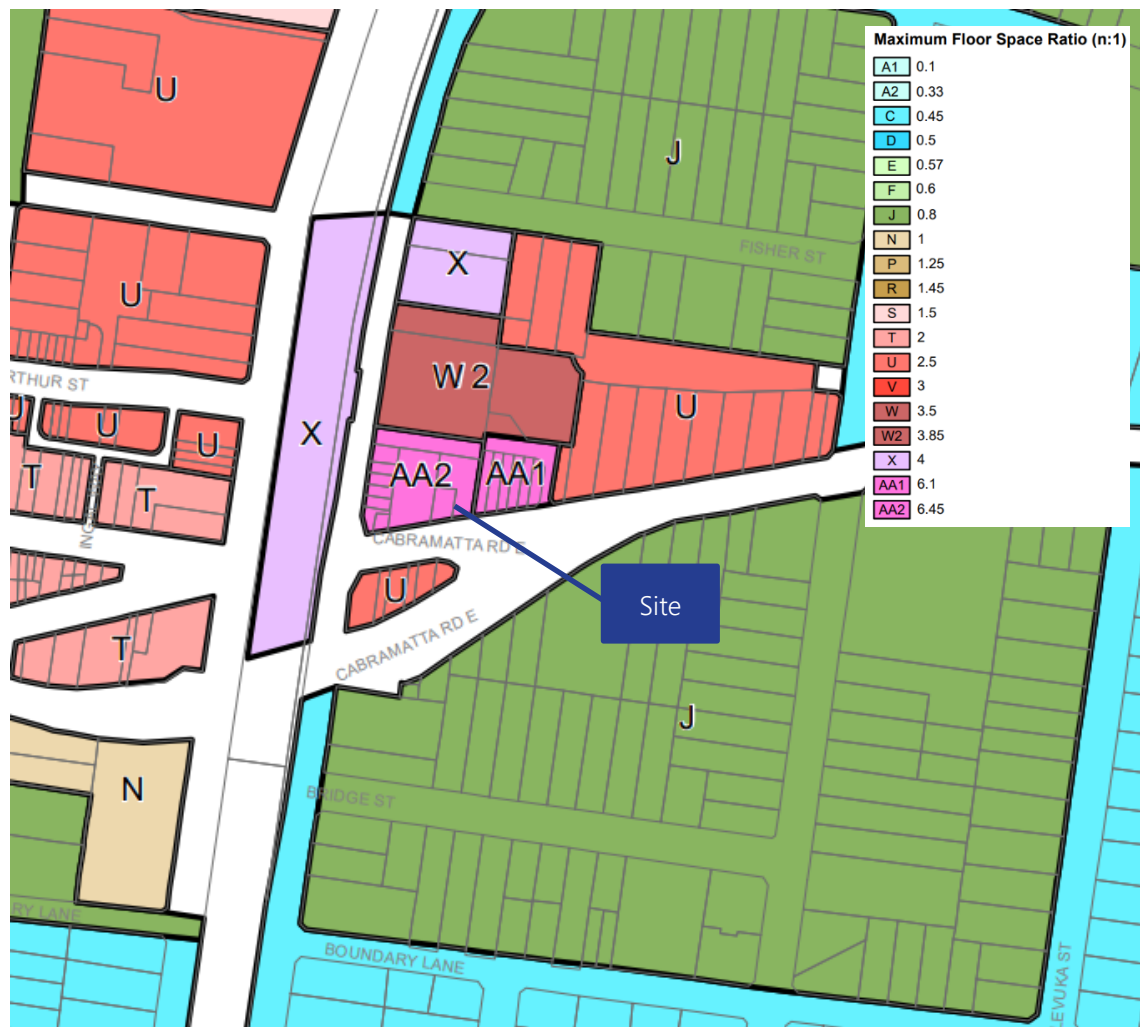
*(a) if at least 30% of the floor space is used for the purpose of residential accommodation—4:1, or*

*(b) in any other case—2.5:1.*

*(6) In this clause, air space development includes development of the air space above the railway line for commercial, entertainment, retail, residential, tourist and visitor accommodation, parking and related purposes.*

Clause 7.2(4B) overrides the Maximum Height of Building Map referenced in clause 4.4 (as per subclause 7.2(1) and is proposed to be varied to permit the development above 2:1 as shown in the DA plans for Stage 2.

**Figure 3** is an extract of the FSR Map in the LEP showing the site within “AA2” area with an FSR of 6.45:1.



Source: LEP Height of Buildings Map – Sheet 17

**Figure 3 – Extract from the Floor Space Ratio Map**

### Clause 7.3 Cabramatta—height of buildings

**(1) The objective of this clause is to allow development to be built to the maximum permissible building height only if certain development standards are met.**

*(2) This clause has effect despite clause 4.3.*

*(3) The height of a building on land identified as “Cabramatta—Area A” on the Town Centre Precinct Map must not exceed 10 metres unless at least 50% of the building will be used for a residential purpose.*

*(4), (5) (Repealed)*

**(5A) The height of a building on land identified as “Cabramatta—Area E” on the Town Centre Precinct Map must not be greater than—**

**(a) 10m, unless at least 50% of the building will be used for the purposes of residential accommodation, and**

**(b) 14m, unless the site area will be at least the minimum site area shown for the land on the Minimum Site Area Map.**

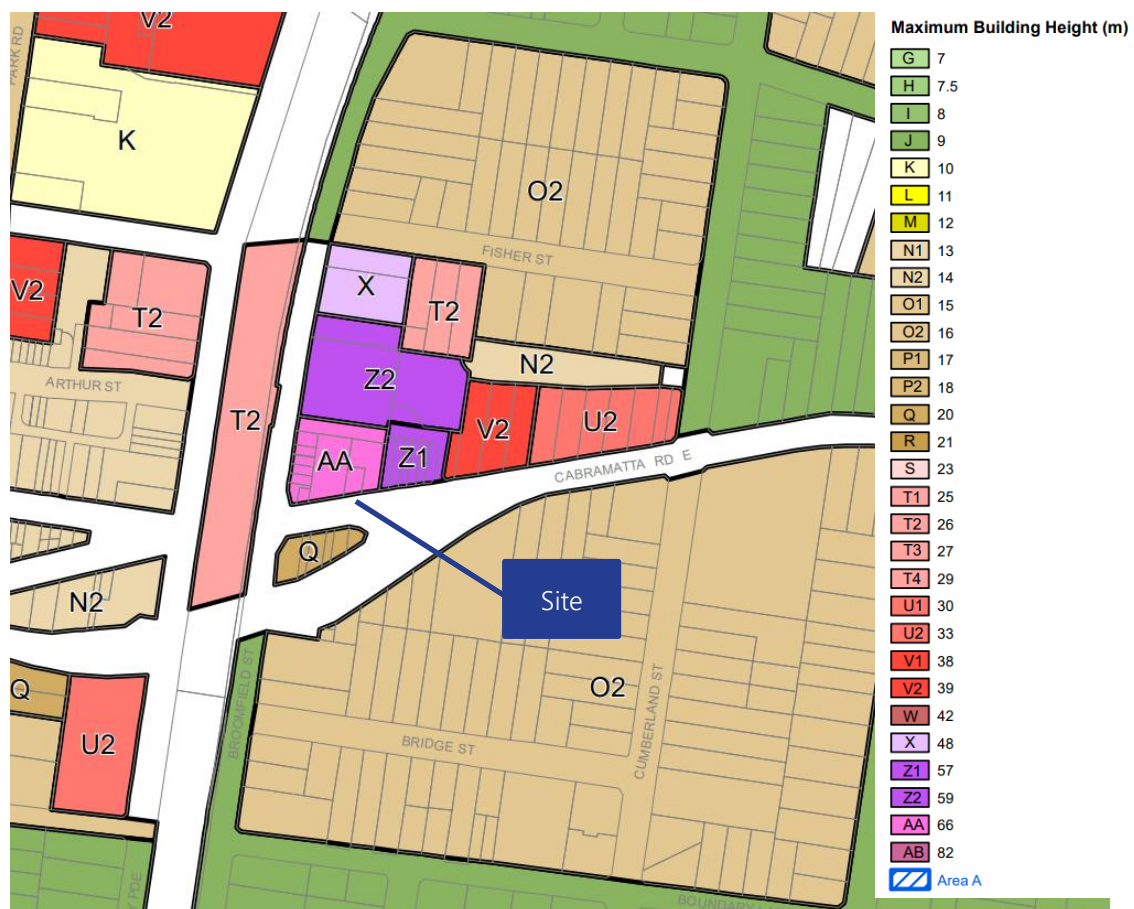
(5B) The height of a building on land identified as “Cabramatta Town Centre” or “Cabramatta Town Centre South” on the Town Centre Precinct Map must not exceed 14m if the site area is less than the minimum site area shown for the land on the Minimum Site Area Map.

(6) Despite subclause (3), the maximum height of any air space development over the railway line on land identified as “Cabramatta—Area C” on the Town Centre Precinct Map that enhances pedestrian connectivity across the railway line is 25 metres from the level of the existing railway track.

(7) In this clause, air space development includes development of the air space above the railway line for commercial, entertainment, retail, residential, tourist and visitor accommodation, parking and related purposes.

Clause 7.3(5A) is proposed to be varied to permit the development above 14m as shown in the DA plans for Stage 2.

**Figure 4** shows the Height of Building Maps applicable to the development of 66m if the minimum site area is met.



Source: LEP Height of Buildings Map – Sheet 17

**Figure 4 – Extract from the Height of Buildings Map**

The LEP Dictionary provides the following relevant definitions:

***building height (or height of building)*** means –

*(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*

*(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*

*including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

***ground level (existing)*** means the existing level of a site at any point.

#### 4. Extent of variation

The extent of the variation is set out in the following sections on Site Area, FSR and Height.

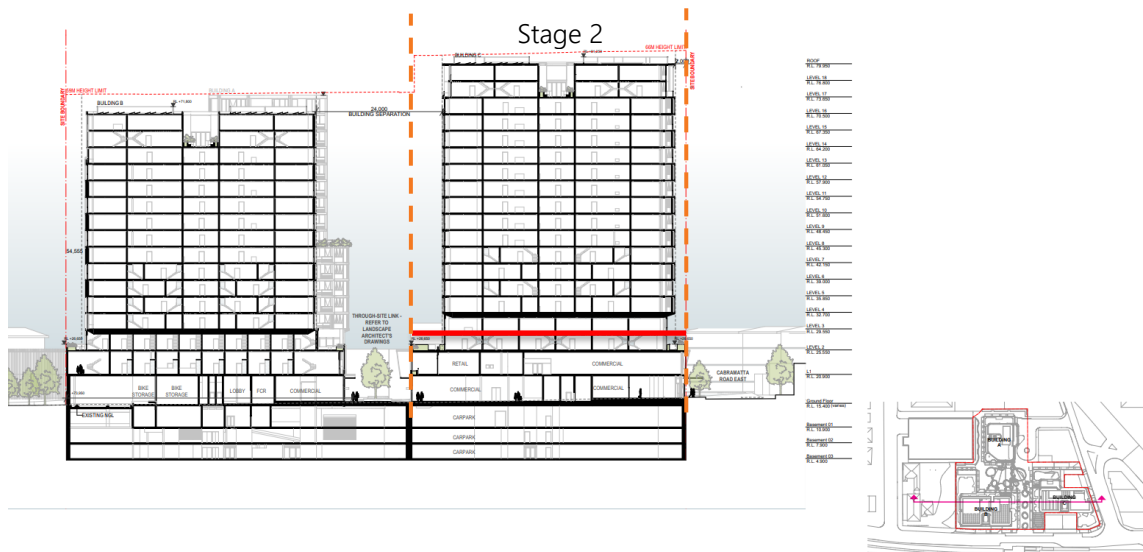
##### Site Area Variation

The extent of the variation of the minimum site area for Stage 2 is 445m<sup>2</sup> or 16.48%. As noted above the total area of Stage 2 defined by the contended effect of newly inserted line is only 2,800m<sup>2</sup> which would enable the creation of an isolated parcel of land of less than 100m<sup>2</sup> and the requirements of the Clause would be met enabling the higher FSR and Height of Building Controls anticipated by Clauses 7.2(4A) and 7.3(5B).

##### FSR Variation

Based on a site area of 2,255m<sup>2</sup>, the maximum FSR of 2:1 under Clause 7.2 permits a maximum GFA of 4,510m<sup>2</sup> within Stage 2. The total proposed FSR of Building C on Stage 2 taken from the Development Schedules prepared by Plus Architecture in the DA Design Report totals 9,646m<sup>2</sup>. This represents a variation of 213.9% to the 2:1 default FSR.

The extent of the built form that is in excess of the FSR control in clause 7.2(4B) of the LEP occurs generally above the medium red line superimposed on the reduced architectural plans at **Figure 6**.



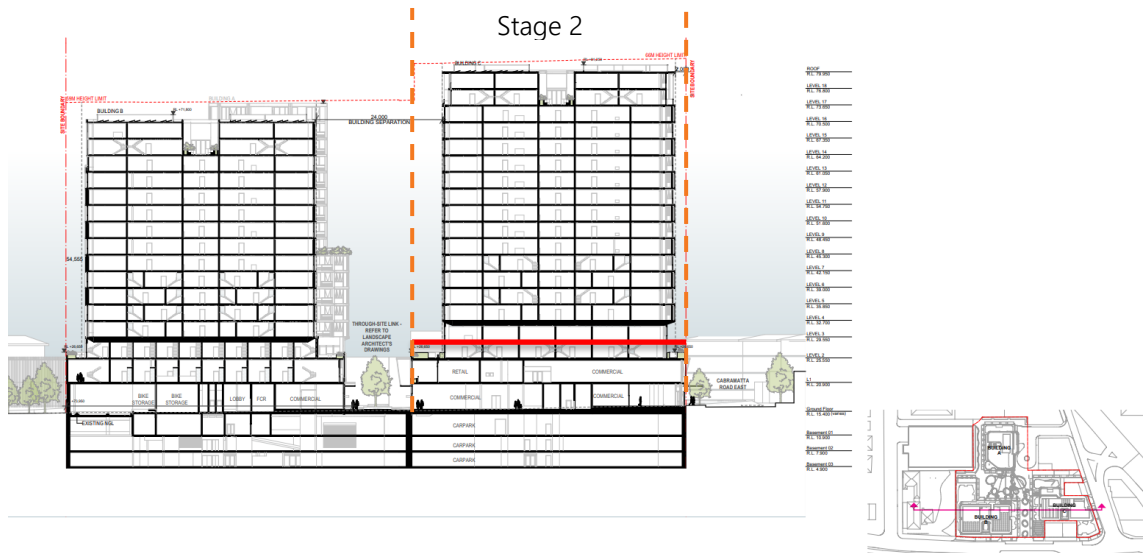
Source: Plus Architecture and marked up by GLN .

**Figure 5 - Height Compliance Diagram**

### Height Variation

The maximum height under Clause 7.3 is 14m within Stage 2. The maximum height of Building C taken from the Section through Building C taken prepared by Plus Architecture in the DA Design Report is 65.85m which represent a variation of 370.36%.

The extent of the variation for height in clause 7.3(5A) of the LEP shown for the built form that sits above the medium red line as shown in the reduced architectural plans at **Figure 6**.



Source: Plus Architecture and marked up by GLN .

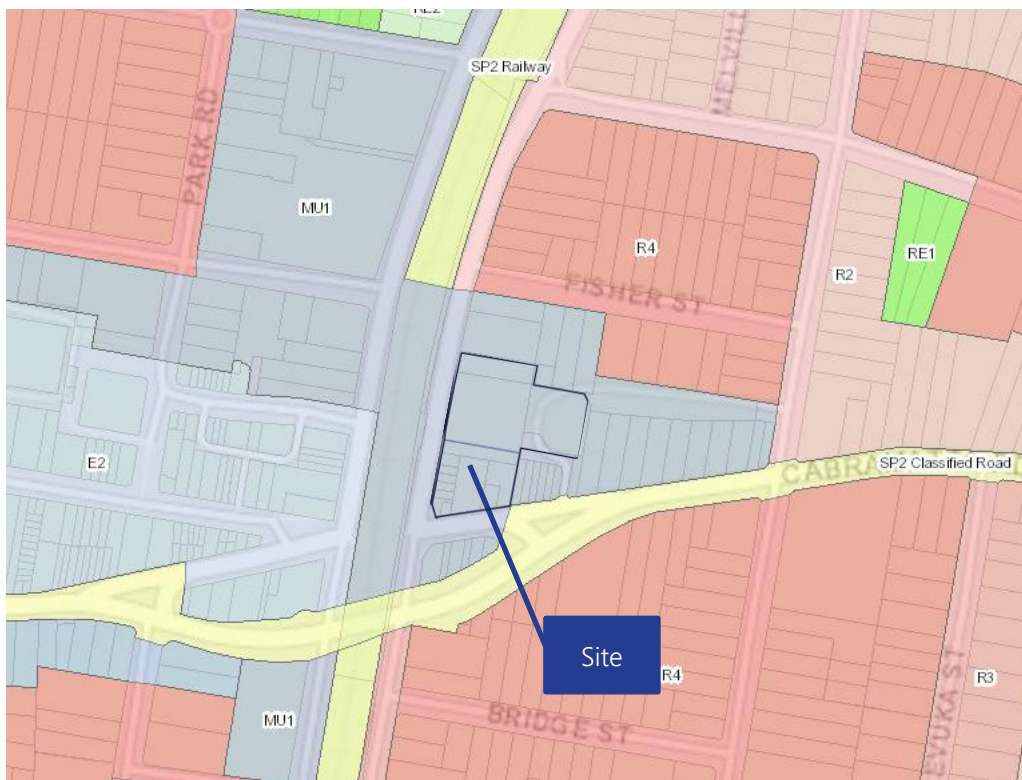
**Figure 6 - Height Compliance Diagram**

## 5. Zoning and Objectives

The zoning of the land is MU1 Mixed Use under the LEP. The objectives for this zone are:

- *To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.*
- *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*
- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
- *To support the development of Bonnyrigg, Prairiewood, Fairfield and Cabramatta as the principal locations for specialist cultural, retail, business, tourist and entertainment facilities and services.*

The zoning of the site and surrounding area is illustrated on **Figure 7**.



Source: Digital EPI Viewer

**Figure 7 - Zoning Map showing the rezoned parcel and Stage 2 area created by Map Amendment No 6**

## 6. Objectives of Clause 7.1, 7.2 and 7.3

The objectives of the height of buildings clause are articulated in Clause 7.1 Objectives of Part and 7.3 Height of Buildings as follow:

### Clause 7.1 Objectives of Part

- (a) to establish exceptions to the maximum height of buildings in Bonnyrigg, Cabramatta, Canley Heights, Canley Vale, Carramar, Fairfield, Fairfield Heights and Villawood*
- (b) to establish exceptions to the maximum floor space ratio for buildings in Cabramatta and Fairfield.*

There is no objective stated in Clause 7.2 Floor Space Ratio.

### Clause 7.3 Cabramatta -height of buildings

- (a) to allow development to be built to the maximum permissible building height only if certain development standards are met.*

## 7. Assessment

The following sections discuss the grounds for the variation to clause 7.3(5A) against the relevant provisions of clause 4.6.

Clause 4.6(3)(a) requires the applicant to provide justification that strict compliance with the maximum building height development standard is unreasonable or unnecessary in the circumstances of the case.

Decisions of the Land and Environment Court have established five potential ways for determining whether a development standard could be considered to be unreasonable or unnecessary. These include:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be

unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

In addition the Court has clarified the appropriate tests for a consideration of a request to vary a development standard, including that:

- the five ways to be satisfied about whether to invoke clause 4.6 as outlined above are not exhaustive (merely the most commonly invoked ways);
- it may be sufficient to establish only one way;
- the written request must be “sufficient” to justify contravening the development standard; and
- it is not necessary for a non-compliant development to have a neutral or beneficial effect relative to a compliant development.

It is our opinion that the proposal most relevantly satisfies the fifth of the five ways required to demonstrate that the development standard is unreasonable and unnecessary.

### **Unreasonable and Unnecessary**

The site specific Planning Proposal was for an overall site area which comprised Stages to enable the delivery of the redevelopment of the site in a structured manner. The overall development site exceeds the 2700m<sup>2</sup> minimum site area providing for the redevelopment of the site as anticipated.

Compliance with the minimum site area for Stage 2 of the development will not achieve overall site consolidation in that the owners of land within Stage 2 have been approached to be acquired to be included within the overall redevelopment. For reasons relevant to those landowners they have chosen not to participate. Every effort as set out in Karavellas has been made and documented, the punitive impact upon the remaining engaged and involved landowners is fundamentally and unreasonably restrictive of the redevelopment of the bulk of the site.

For reasons of viability, the restriction of Stage 2 will have an undue impact on the ability to realise any redevelopment of the site either under this Development Application or future development applications.

The Applicant has been engaged with Council for an extended period and with landowners within the site to achieve the site specific rezoning and development site for Stages 1 and 2 in this DA. The approach of Council, to amend the LEP after the lodging of the DA and without any consultation or notification is unfair to the Applicant. An alternative interpretation of the line on the minimum site area mapping of the LEP to that of Council is available and should be applied in the interests of fairness. The underlying planning intention of the controls is to enable and facilitate redevelopment of the site not achieve consolidation of all sites. If consolidation was intended to be the desired outcome a suitable standard should be applied to any redevelopment of the land.

Compliance with the development standards as discussed above would not result in an improved planning outcome, in that the site would not be consolidated and will in all likelihood sterilise the development potential of the overall site.

The development standard is unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not be subjected to requirement for Stage 2 to achieve a minimum site area of 2700m<sup>2</sup>, where the overall development site is 6043m<sup>2</sup> is proposed ensuring the orderly and economic development of the land.

The restriction of height within the Stage 2 site will compromise the design outcomes of the overall scheme and the intent of the LEP height of buildings and FSR Maps as well as the DCP which seek a more prominent tower to place mark the corner site.

For these reasons, the interpretation and so application of development standard is both unreasonable and unnecessary to achieve the desired planning outcomes anticipated by the overall planning controls.

### **Objectives of the standards are achieved**

Further to the inherent unreasonable and unnecessary impacts of the development standard, the proposal would satisfy the objectives of the standards to the extent relevant to the current proposal for the reasons outlined below.

#### **7.1 Objectives of Part**

*(a) to establish exceptions to the maximum height of buildings in Bonnyrigg, Cabramatta, Canley Heights, Canley Vale, Carramar, Fairfield, Fairfield Heights and Villawood,*

*(b) to establish exceptions to the maximum floor space ratio for buildings in Cabramatta and Fairfield.*

Clause 7.1 objectives provide the enabling provisions contained in Clauses 7.2 and 7.3 as they apply relevantly to Cabramatta Town Centre. The intention of the Additional local Clauses contained in Part 7 of the LEP are to encourage consolidation of smaller sites for redevelopment by incentivising FSR and Height controls. The development proposal achieves consolidation of the bulk of the site and in totality exceeds 2800m<sup>2</sup>.

Accordingly, objectives 7.1(a) and (b) would be achieved.

#### **7.3 Cabramatta – height of buildings**

*(1) The objective of this clause is to allow development to be built to the maximum permissible building height only if certain development standards are met.*

It is noted that Clause 7.2 does not have a stated objective but is arguably seeks to achieve the same as Clause 7.3(1) but in relation to FSR.

The development standard to be met is the minimum site area as interpreted by Council as 2700m<sup>2</sup> for Stage 2. As has been discussed above the planning outcome of imposing the minimum lot size is a less desirable outcome and compliance with the lesser FSR and Height of Building control would not result in the consolidation of the Stage 2 land. Overall, a development site well in excess of the 2700m<sup>2</sup> minimum site area is contained within the development proposal and the reduction in yield is lesser planning outcome than can be achieved by variation of the development standards.

Accordingly this objective would be achieved.

The resultant development proposal allows for the maximum floor space and height of building for the Development Site to be achieved, which is appropriate given the planning and locational context described above.

**Are there sufficient environmental planning grounds to justify contravening the development standard? (Clause 4.6(3)(b))**

The environmental planning grounds which support the variation of the development standards relate to:

- Redevelopment of the site in a manner consistent with the site specific Planning Proposal.
- Public Benefits including the planning agreement for the delivery of pedestrian bridge and streetscape improvements and the establishment of the centre square.
- Redevelopment of aging and fragmented commercial development.
- Increase in housing provided in an accessible location adjacent to the existing railway station and associated infrastructure in Cabramatta Town Centre.

While the term “environmental planning ground” is not defined the Act defines the environment as:

**environment** *includes all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings.*

The redevelopment of the site will affect both individuals and broader social groups by providing for upgrades of both public and private domains within the development site, increasing both housing stock and choice and will maximise the opportunity of a location that has good accessibility to employment opportunities. The Site is ideally located at Cabramatta Train Station and Town Centre that provide access to employment or employment opportunities.

Consequently, the proposal would be consistent with the following objects of the EP&A Act at s.1.3:

*(c) to promote the orderly and economic use and development of land,*

*(g) to promote good design and amenity of the built environment.*

In addition to the above, there is an absence of material negative impacts resulting from the proposed variation from the height of building standard.

**Public interest**

The proposed development is in the public interest because it:

- Facilitates a development that is consistent with the objectives of the standard and the intent of the MU1 zone under the LEP. Consistency, with the objectives of the standards has been addressed above.
- Provides additional housing within the Sydney metropolitan region.

- The occupants and users of the development will utilise public transport facility comprising the Train Station and associated bus services which represent a significant government investment.
- The redevelopment will support the vibrancy of Cabramatta Town Centre, maintaining commercial and community uses of the site at ground level and podium levels.

In regard to the first point, the objectives of the *MU1 Mixed Use zone*

### **Zone MU1 Mixed Use zone**

#### **1 Objectives of zone**

- • *To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.*
- *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*
- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
- *To support the development of Bonnyrigg, Prairiewood, Fairfield and Cabramatta as the principal locations for specialist cultural, retail, business, tourist and entertainment facilities and services.*

The development is consistent with, or is not antipathetic to, the objectives of the above zone for the reasons discussed above and below.

The proposed development is consistent with the objectives of the MU1 Mixed Use zone in the following ways:

- The proposed development will provide for the housing needs of the community in the form of apartments within RFBs and shop top housing.
- The proposed shop top housing component of the development includes a commercial component that will provide facilities and services to meet the needs of residents, in support of the Cabramatta Town Centre.
- The proposed development will ensure that housing densities are concentrated in a location accessible to public transport, employment, services and facilities. The Site is located in the Cabramatta Town Centre where a broad range of community facilities, retail and commercial businesses, and employment opportunities are and will be available.

The proposal, including the variation of the development standards, achieves the objectives of the Act in the following ways:

- Section 1.3(c), as the proposed development, is below the maximum height of building development standard anticipated in the rezoning of the land for redevelopment and the overall development will promote the orderly and economic use and development of the land by not posing any adverse amenity impacts on adjoining development and the public

domain. But for the minimum site area requirement a height and FSR breach would not arise. The variation will support the broader viability of the overall redevelopment of the site.

- Section 1.3(g) as the proposed development promotes good design and amenity of the built environment by concentrating higher densities adjacent to Cabramatta Railway Station and within Cabramatta Town Centre, making the site highly accessible achieving greater amenity for future residents.

For the reasons above and the assessment provided within this request, there are sufficient environmental planning grounds to justify the contravention of the height of buildings development standard.

***Consideration of concurrence by Director-General (Clause 4.6(4)(b) & (5))***

Concurrence to the proposed variation is not required by the Secretary pursuant to clause 4.6(4)(b), as we understand that the relevant consent authority has the necessary delegation as set out in the Assumed Concurrence Notice issued by the Secretary of the Department of Planning and Environment dated 21 February 2018 (attached to DPE Planning Circular PS 20-002 dated 5 May 2020).

Despite this, the proposed variation to the maximum height of building standard is not considered to be detrimental to any matters of significance for state or regional environmental planning.

In the circumstances of the application, there is no public benefit in maintaining the development standard. To the contrary and consistent with the objectives of clause 4.6, allowing the variation will facilitate a development that achieves better and appropriate outcomes and represents an appropriate degree of flexibility in applying a development standard.

In relation to clause 4.6(5)(c), we note that no other matters have been nominated by the Secretary for consideration.

## 8. Conclusion

A variation to the strict application of Council’s minimum site area control of Clauses 7.2(4B) and 7.3(5B) and so to enable the application of upper FSR and building height standards is considered appropriate for development on. Lot 7 Section E DP 4420, 76 Broomfield St; Lot 1 DP 205759 and Lot 10 DP 255023, 84 Broomfield St; Lot 2 DP 205759, 86 Broomfield St; Lots 5, 6, and 7 DP25618, 151 Cabramatta Road East; Lot 8 DP 25618, 147-149 Cabramatta Road East; and Lot 2 DP 580587, 139 Cabramatta Rd East Cabramatta Road East.

The heights of buildings and FSR proposed by the development results in an optimum outcome for the Site that provides negligible impacts and enables the redevelopment of the overall site as envisioned by the relevant planning control in Cabramatta Town Centre and adjoining lands.

The proposal meets the intent of the height of building and FSR standard and in accordance with clause 4.6 of the LEP, demonstrates that the development standard is unreasonable and unnecessary in this case and that the variation is justified.

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