

Attachment C

**Clause 4.6 Variation Request –
Floor Space Ratio**

APPENDIX T

CLAUSE 4.6 REQUEST FOR EXCEPTION TO DEVELOPMENT STANDARD

FLOOR SPACE RATIO CONTROL – SYDNEY LEP 2012

1 INTRODUCTION

This request for an exception to a development standard is submitted in respect of the Floor Space Ratio (FSR) development standard within clause 4.4 of the Sydney Local Environmental Plan 2012 (LEP). The request relates to the proposed Concept Development Application (Concept DA) for the 42-50 Parramatta Road, Forest Lodge site which incorporates the construction and use of the proposed new Central Sydney Ambulance Station over part of the site at as well as a development envelope for a future mixed use development over the remainder of the site. This document should be read in conjunction with the Statement of Environmental Effects (SEE) for this Concept DA.

The request for exception to a development standard is founded on recent relevant case law. In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 Preston CJ considered clause 4.6 in relation to a breach of the building height control in clause 4.3 of the Woollahra Local Environmental Plan 2014. Whilst many of the comments are directly referable to a clause 4.6 exception request in relation to building height, the majority however remains pertinent to the consideration of the clause 4.6 request for a FSR control. *Initial Action v Woollahra* also sets out the methodology for assessing clause 4.6 exceptions – drawn from Preston CJ's decision in *Randwick City Council v Micaul Holdings Pty Ltd* (2016) 25 LGERA 94; [2016] NSWLEC 7. That methodology has been subject to recent further review in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 per Basten JA at [21-24], *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 per Preston CJ and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 per Payne JA and Preston CJ of LEC in June 2019.

Crown DA subject to clause 5.12 of Sydney LEP 2012

As detailed in the SEE for this Concept DA, this DA is also a Crown DA subject to the provisions of section 4.33 of the EP&A Act. Specifically, under section 4.33(1), a consent authority (other than the Minister) must not refuse its consent to a Crown development application, except with the approval of the Minister, or impose a condition on its consent to a Crown development application, except with the approval of the applicant or the Minister.

Of relevance in relation to this, and of particular note, is also the application of clause 5.12(1) of the Sydney LEP 2012 which states ... *this Plan does not restrict or prohibit, or enable the restriction or prohibition of, the carrying out of any development, by or on behalf of a public authority, that is permitted to be carried out with or without development consent, or that is exempt development, under State Environmental Planning Policy (Infrastructure) 2007.*

Accordingly, with reference to clause 5.12 of Sydney LEP 2012, given the development is permitted with and without consent under the Infrastructure SEPP as an *emergency services facility* under clauses 47(2) and 48(1), respectively, Sydney LEP 2012 cannot restrict or prohibit, or enable the restriction or prohibition of, the carrying out of the development. This extends to any provisions of the LEP that would operate to restrict the development, including development standards such as building height and FSR controls. To that end such provisions are not enforceable.

Notwithstanding, this clause 4.6 exception to a development standard has been prepared in good faith to support the Concept DA and to demonstrate that strict adherence to the FSR development standard in this instance is both unreasonable and unnecessary in the circumstances and that an appropriate form of development (including a concept development envelope) will result. It seeks to support Council's assessment and the Panel's decision-making in this matter.

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Relevant FSR Exceedance

The proposed Concept DA seeks development consent for the construction and use of the proposed new Central Sydney Ambulance Station over part of the site at 42-50 Parramatta Road, Forest Lodge as well as a development envelope for a future mixed use development over the remainder of the site. The ambulance station will address Arundel Street, with the concept envelope addressing Parramatta Road within its own land parcel (as proposed via subdivision under this DA).

The base FSR control of 1.5:1 (plus additional GFA available for end of trip facilities within the future commercial development envelope) gives an allowable site FSR of **1.52:1**. This is exceeded by some 11.6% by the combined proposed gross floor area (GFA) of both the new ambulance station and the proposed future development envelope and its reference design. The proposed FSR of **1.7:1** largely arises from the concept envelope which is designed to secure additional development capacity and certainty over the surplus residual land at the site addressing Parramatta Road. The purpose of the development envelope is to secure concept approval for a future development, for which a future DA will be lodged by others to 'fill the approved envelope' and at that time will propose a permitted land use. Relevantly, the 15m building height control is not concurrently exceeded by either element of the Concept DA.

The proposed future development envelope provides for the following, noting no land use is nominated, but a commercial / mixed use scenario has been tested by the reference design.

- 3-storey envelope with rooftop plant zone to a maximum sloping height plane to 15m. This results in a height plane at the extremities of the site of RL 36.86 to RL 38.338 addressing Parramatta Road and RL 35.143 to RL 37.478 addressing the centre of the site where it abuts the proposed Ambulance station – see **Figure 1**. This provides for a 100% site coverage of the residual land (proposed future commercial lot);
- Basement level with 23 parking spaces (including 1 disabled space and turning bay), consolidated area for end of trip facilities (76.5 m²), and loading dock;
- Ground Floor level of 1,152 m²; and
- Level 1 and Level 2 of 1,250 m² each.

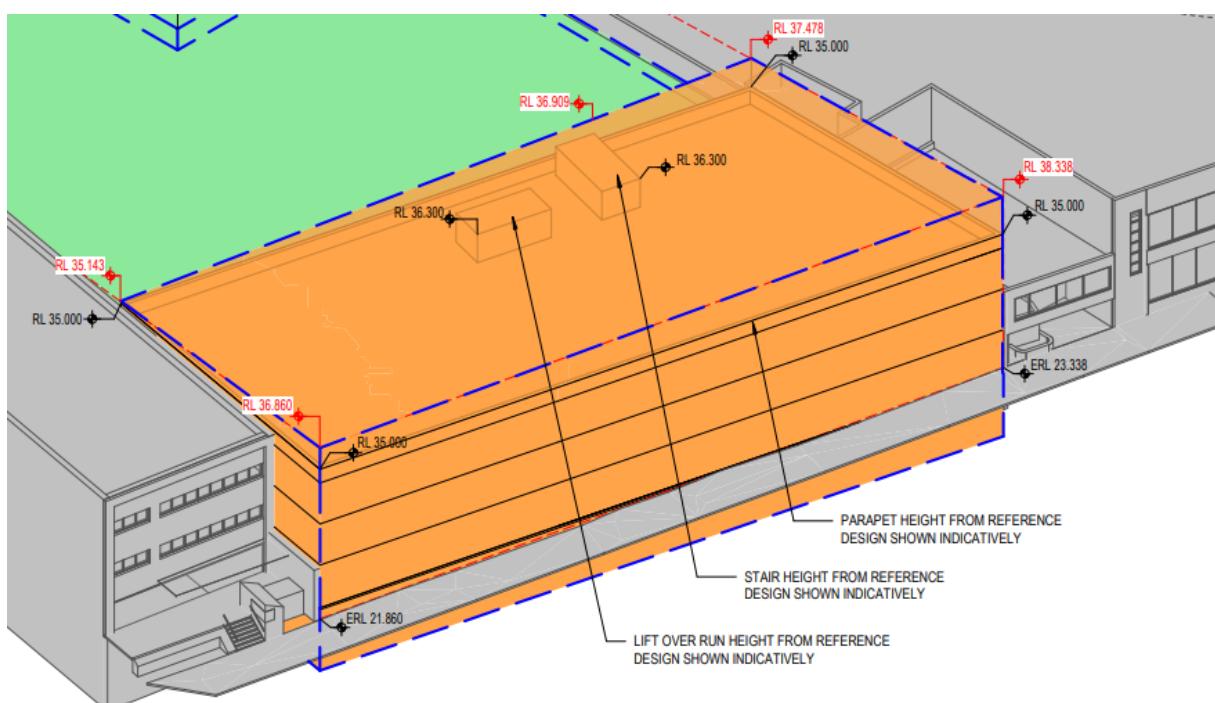


Figure 1 – The proposed 3-storey reference design envelope and maximum height plane

A summary table is set out below articulating the relevant GFA data in relation to the proposed development. It also sets out the calculations in relation to the end of trip facilities based on clause

6.13 of Sydney LEP 2012. The base FSR of 1.5:1 is increased to 1.52:1 through the inclusion of the compliant facilities within the proposed basement level of the concept design.

Element	Site Area	Proposed GFA	Resultant FSR
Ambulance Station	2,091 m2	2,224 m2	
Future Development Envelope	1,368 m2	3,652 m2	
TOTAL / OVERALL	3,459m2	5,876 m2	1.7:1
Base FSR 1.5:1		5,188.5 allowable base GFA	
Bonus GFA (clause 6.13 of LEP)	76.5 m2		
TOTAL ALLOWABLE GFA	5,265 m2		1.52:1

Availability and Operation of clause 4.6

Exclusions to the operation of clause 4.6 under Sydney LEP 2012 extend to certain forms of subdivision within a range of rural, residential, and environmental protection zones (see clause 4.6(6) of the LEP). As the site is in the B7 – Business Park zone, the proposed subdivision is not affected by this provision and these exclusions do not apply.

Additionally, under clause 4.6(8) development consent cannot be granted to a development contravening any of the following:

- a development standard for complying development,
- 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,
- clause 5.4 (Controls relating to miscellaneous permissible uses),
- clause 4.3 (Height of buildings), but only in relation to land shown as being in Area 1 or Area 2 on the Height of Buildings Map,
- clause 4.5A (Balconies on certain residential flat buildings),
- clause 5.3A (Development below ground level in Zone RE1),
- clause 6.10 (Heritage floor space),
- clause 6.11 (Utilisation of certain additional floor space requires allocation of heritage floor space),
- clause 6.11A (Temporary alternative heritage arrangements in relation to allocation of heritage floor space),
- clause 6.17 (Sun access planes),
- clause 6.18 (Exceptions to sun access planes),
- clause 6.19(1)(d)–(h) and (j), unless the additional overshadowing is caused by playground equipment, a shade structure, an awning, a sculpture or artwork, or a community notice or public information sign,
- clause 6.26 (AMP Circular Quay precinct),
- clause 6.29 (58–60 Martin Place, Sydney),
- clause 6.33 (230–238 Sussex Street, Sydney),
- clause 6.35 (45 Murray Street, Pyrmont), but only if the development is an alteration or addition to an existing building,
- clause 6.36 (12–20 Rosebery Avenue, 22–40 Rosebery Avenue and 108 Dalmeny Avenue, Rosebery),
- clause 6.37 (296–298 Botany Road and 284 Wyndham Street, Alexandria),
- clause 6.41 (7–15 Randle Street, Surry Hills),
- clause 6.42 (102–106 Dunning Avenue, Rosebery),
- clause 6.40 (2–32 Junction Street, Forest Lodge),
- clause 6.43 (Danks Street South Precinct),
- clause 6.52 (1–11 Oxford Street, Paddington),
- Division 1 of Part 7 (Car parking ancillary to other development).

As the development relates to none of the above, operation of clause 4.6 is available to the development and its minor FSR exceedance.

2 CLAUSE 4.6 EXCEPTION TO DEVELOPMENT STANDARD

Clause 4.6 is set out below (but without subsections (6)-(8) inclusive):

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 Planning Secretary has been obtained.*
- (5) *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.*

3 DEVELOPMENT STANDARD TO BE VARIED

Clause 4.4(2) of the LEP provides that 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. The maximum FSR shown on the relevant map is 1.5:1, noting however that bonus GFA / FSR is available through the provision of end of trip facilities. As a result, the allowable FSR is 1.52:1 in relation to this Concept DA. It is a development standard for the purposes of the *Environmental Planning & Assessment Act 1979* and the Sydney LEP 2012 because it fixes a standard in respect of an aspect of development (section 1.4(c) of the EP&A Act).

The proposed maximum FSR of the overall Concept DA is 1.7:1 as set out in the table over.

Element	Site Area	Proposed GFA	Resultant FSR
Ambulance Station	2,091 m2	2,224 m2	
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Base FSR 1.5:1	5,188.5 allowable base GFA		
Bonus GFA (clause 6.13 of LEP)	76.5 m2		
TOTAL ALLOWABLE GFA	5,265 m2		1.52:1

This is an exceedance of 11.6% or 611 m2 over an allowable GFA of 5,265m2. Broadly, the minor FSR non-compliance arises from the transfer of ‘unused’ GFA within the ambulance station portion of the site to the surplus land parcel addressing Parramatta Road. This is accepted by Council based on recent correspondence from the Director of City Planning, Development and Transport. Council advised that it would generally support a Concept DA for the collective site (including transferred floor space ‘unused’ from the ambulance station component to the residual southern portion component of the DA), subject to assessment.

The reference design of a commercial / mixed use development in this portion of the site has tested the development opportunity, capacity, and viability of a development that provides for a positive urban design outcome for the Parramatta Road frontage; facilitates a development scale, density and height proportionate to adjacent development and the Parramatta Road context; and meets the desired future character of the locality.

The exceedance is minor in the context, particularly in light of the entirety of the Concept DA’s proposed development being under the site’s 15m building height control.

4 CLAUSE 4.6(3)(a) – IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

Traditionally, consideration of this requirement has been undertaken in accordance with the first test of the 5 part test set out in the judgement of Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827 by showing that the objectives of the standard are achieved notwithstanding the non-compliance with the standard. This test was established to meet the requirements of a SEPP 1 Development Standards objection. That judgement indicates that it is not the only way of establishing that compliance with the development standard is unreasonable or unnecessary, and presents another 4 methods of establishing unreasonableness or unnecessity. Assessment of clause 4.6(3)(a) using the *Wehbe v Pittwater Council* tests has been affirmed by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [16-22].

4.1 Wehbe v Pittwater Council

The first test identified under *Wehbe v Pittwater Council* is whether the objectives of the standard are achieved notwithstanding non-compliance with the standard. The other four tests set out in that case are:

- the underlying objective or purpose of the standard is not relevant to the development;
- the underlying objective or purpose would be defeated or thwarted if compliance was required;
- the standard has been virtually abandoned or destroyed by the Council’s own actions in granting consents departing from the standard and/or;
- the zoning of land was unreasonable or inappropriate, such that the standards for that zoning are also unreasonable or unnecessary.

Not all tests need to be applied or relied on and only test No.1 with respect to whether the objectives of the standard are achieved notwithstanding non-compliance with the standard is applied in this instance.

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The objectives of the development standard in clause 4.4 are:

- (a) *to provide sufficient floor space to meet anticipated development needs for the foreseeable future,*
- (b) *to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,*
- (c) *to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,*
- (d) *to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.*

Discussion on each of these is set out below.

(a) *to provide sufficient floor space to meet anticipated development needs for the foreseeable future,*

The former NSW Coroners Court site is vacant and underutilised. The existing site also has no direct or open presence to Parramatta Road. The opportunity arises to rectify this relationship with Parramatta Road and provide a new development with an appropriate address, scale and form and which maximises the development opportunity available within the existing built context and building height control of 15m. The existing site and its neighbouring development is shown in **Figures 2-4**.

Figures 5 and 6 demonstrate the existing built form character in the vicinity of the site to the west along Parramatta Road. Typical development heights are 3-6 storeys with the majority of buildings built directly to the road reservation and property line.



Figure 2 – The former NSW Coroners Court site – 42-50 Parramatta Road, Forest Lodge

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Figure 3 – The former NSW Coroners Court site and adjacent office and Sydney City Toyota development



Figure 4 – The former NSW Coroners Court site and adjacent Master Builders and Bedford College development

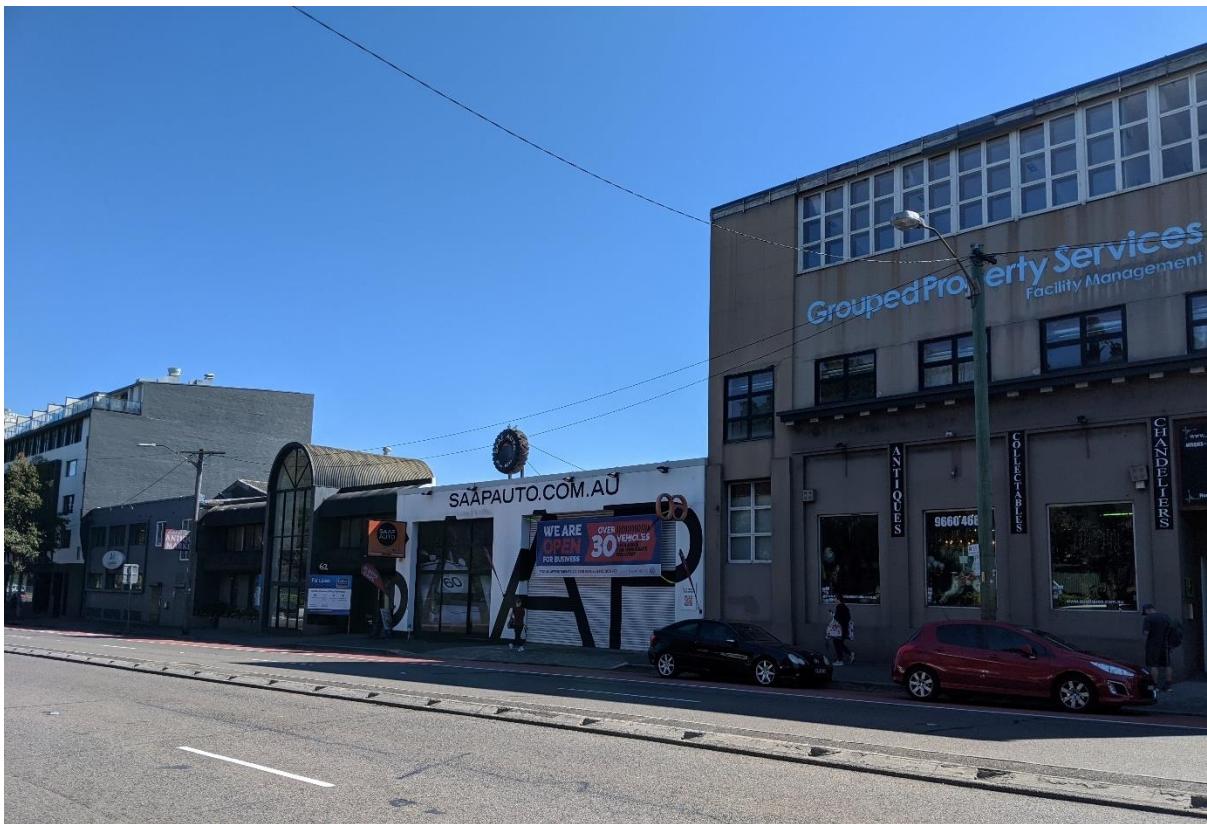


Figure 5 – Parramatta Road built form context to the west of the development



Figure 6 – Parramatta Road – 5-6 storey built form context to the west of the development

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Given the 'landlocked' nature of the site and existing development generally built to property boundaries to the east and west, it is appropriate to develop with a 100% site coverage over the future residual land parcel. The resulting development envelope is modest in its context at 3 storeys plus rooftop overrun and plant zone and this is consistent with the built form and context of adjacent development as seen in the various figures above.

The GFA that results from this built form is a modest 5,876 m², only some 611m² over the FSR control. This provides a viable and flexible quantum of GFA for a range of commercial and mixed use land uses in a highly visible and accessible part of the inner west. Given its accessibility and address, the development site would be desirable for any number of commercial activities that seek proximity to, and potential for synergies with, the adjacent University of Sydney, the nearby Royal Prince Alfred hospital complex and its associated range of health services and research facilities, and other land uses and precincts within a short radius of the site.

The proposed GFA has a direct relationship to working towards (but not exceeding) the building height control of 15m. The reference design demonstrates that the combined FSR and building height controls are not completely harmonious and that even a fully compliant building height will result in a minor FSR exceedance and non-compliance whilst aiming to ensure the proposed development meets conventional urban design objectives of introducing or maintaining an appropriately scaled and designed active frontage to Parramatta Road's northern edge in this locality. Note that the balance of the massing is towards Parramatta Road, its wide road reserve, and the general open and built character of the University of Sydney. The lower scale of development addressing the 2-storey character of Arundel Street to the north is an appropriately scaled and transitioned massing response.

(b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,

The scale, form, and intensity of land use is entirely in keeping with the existing and desired character of the locality – essentially the northern edge of Parramatta Road between Ross Street and Larkin Street to the west. The 15m height control increases to 18m heading west along Parramatta Road. The site's 1.5:1 base FSR control extends to the west where it also increases to 2.5:1 coinciding with the 18m height control. Of relevance and note is the base FSR of 1.75:1 for the immediately adjacent office development and Sydney City Toyota to the east of the site, each also with a 15m height control. If the subject development were afforded the same combined height and FSR controls, it would be fully compliant.

Of further relevance, it is clear that both the adjacent Bedford College and Master Builders' Association of NSW developments have a near 100% site coverage. Each would respectively likely exceed the prevailing FSR control while otherwise generally meeting the prevailing height control and the desired (future) character of the area.

The mixed use nature of the locality and the strong built edge to Parramatta Road is reinforced by the concept design and the proposed future development envelope. Note the proposed 23 commercial parking spaces is within the maximum 29-30 spaces identified in the relevant parking controls for the site under clause 7.6 of the LEP, further emphasising the scale of development is commensurate with the density and intensity of development expected.

(c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,

The likely development within the proposed future development envelope will be of a scale and intensity unlikely to burden or significantly impact upon any corresponding existing or planned infrastructure capacity. Webb, the project's services consultant, has confirmed as part of the Concept DA that the development site (both ambulance station and future commercial envelope) is readily serviced via existing utilities and infrastructure. Similarly, the addition of the commercial floor space is of a scale unlikely to affect bus services in each peak period in either direction at this location.

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(d) to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.

As stated, the former NSW Coroners Court site is vacant and underutilised. The existing site also has no direct or open presence to Parramatta Road. The current development at the site impairs the ability to achieve the desired future character. Rather than leave the site unplanned for, this Concept DA seeks to provide Council with the opportunity to confirm the finer-grained development parameters at the residual portion of the site and ensure an appropriate built form arises through this DA, and an appropriate development outcome arises through the subsequent DA. The opportunity arises to rectify this relationship with Parramatta Road and provide a new development with an appropriate address, scale and form and which maximises the development opportunity available within the existing built context and building height control of 15m – see **Figures 7 and 8**.

The site sits within the Sydney DCP Ross Street Locality. The Locality Statement is silent on any specific desired future character for development fronting Parramatta Road. However, the principles for development within the Locality include consolidating the pattern of large street edging buildings to provide a new visual focus and corner anchor to strengthen views towards Sydney University and aligning buildings to the street and introducing uses that interact with the street at the ground and first floor levels. Unification of the streetscape also forms part of the principles.

To that end, the proposed envelope and demonstrated by the reference design is able to meet these principles in satisfying the desired future character of the locality.



Figure 7 – Photomontage (Architectus)

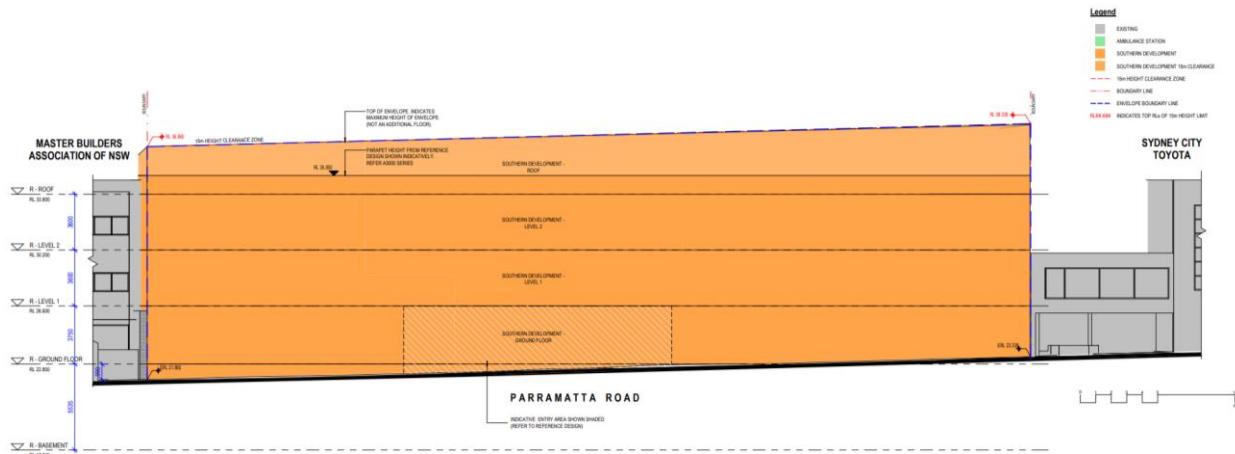


Figure 8 – Southern Elevation of Reference Design and Envelope to Parramatta Road (Architectus)

The amenity of adjoining land uses are unlikely to be affected by overlooking or overshadowing as a result of the proposed envelope / reference design. To some extent, the compliant building height will partially screen traffic noise from Parramatta Road to residences to the north in Arundel Street. Any visual impacts of the envelope are generally mitigated by distance and the lack of any significant views and vistas of note. The envelope is also unlikely to result in any significant or adverse overshadowing impacts to adjacent sensitive uses (including heritage buildings and landscapes) as demonstrated by the shadows diagram for mid-winter 9:00am, 12 noon, and 3:00pm in **Figure 9** over. As noted, no residential properties are affected and the compliant height will result in mid-winter overshadowing of Parramatta Road predominantly, as well as vegetated and canopy tree areas of the University of Sydney addressing the southern edge of Parramatta Road. By mid-summer, barely any overshadowing of Parramatta Road results and no areas of the University of Sydney will be affected for long periods of the year.

Summary

In summary, the proposed development generally meets and satisfies the objectives of the floor space ratio development standard in clause 4.4 of Sydney LEP 2012. These are achieved notwithstanding the partial non-compliance with the FSR standard. As demonstrated, the minor non-compliance does not generate adverse amenity impacts nor a development that is out of character with its existing built context or the desired future character for Parramatta Road. In fact, to strictly adhere to the FSR control would result in a built form that would be more in keeping with the existing scale of development of the former NSW Coroners Court building and which would be less consistent with the character with other nearby development. To strictly adhere to the FSR control would unreasonably and unnecessarily limit the development of the site preventing a coherent and functional built form, and which would not significantly enhance or otherwise improve compliance with the objectives of the FSR standard.

As noted, in response to the objectives of FSR standard, the proposed development and the minor non-compliance itself will not adversely, detrimentally, or significantly impact upon or disrupt consistency with the prevailing built form, building heights and desired future streetscape character in the locality and the bulk and scale of buildings. The concentration of increased massing (under the building height control) towards Parramatta Road, its wide road reserve, and the general open and built character of the University of Sydney with a lower scale of development addressing the 2-storey character of Arundel Street to the north is an appropriately scaled and transitioned massing response.

It would be unreasonable, unnecessary and inappropriate in the circumstances to rigidly apply the 1.52:1 FSR control, based on the preceding information and justification. Again, it is reiterated that clause 5.12 of the Sydney LEP applies, and the provisions of the LEP are not strictly enforceable in this instance, including the requirement for a clause 4.6 request for exception to a development standard.

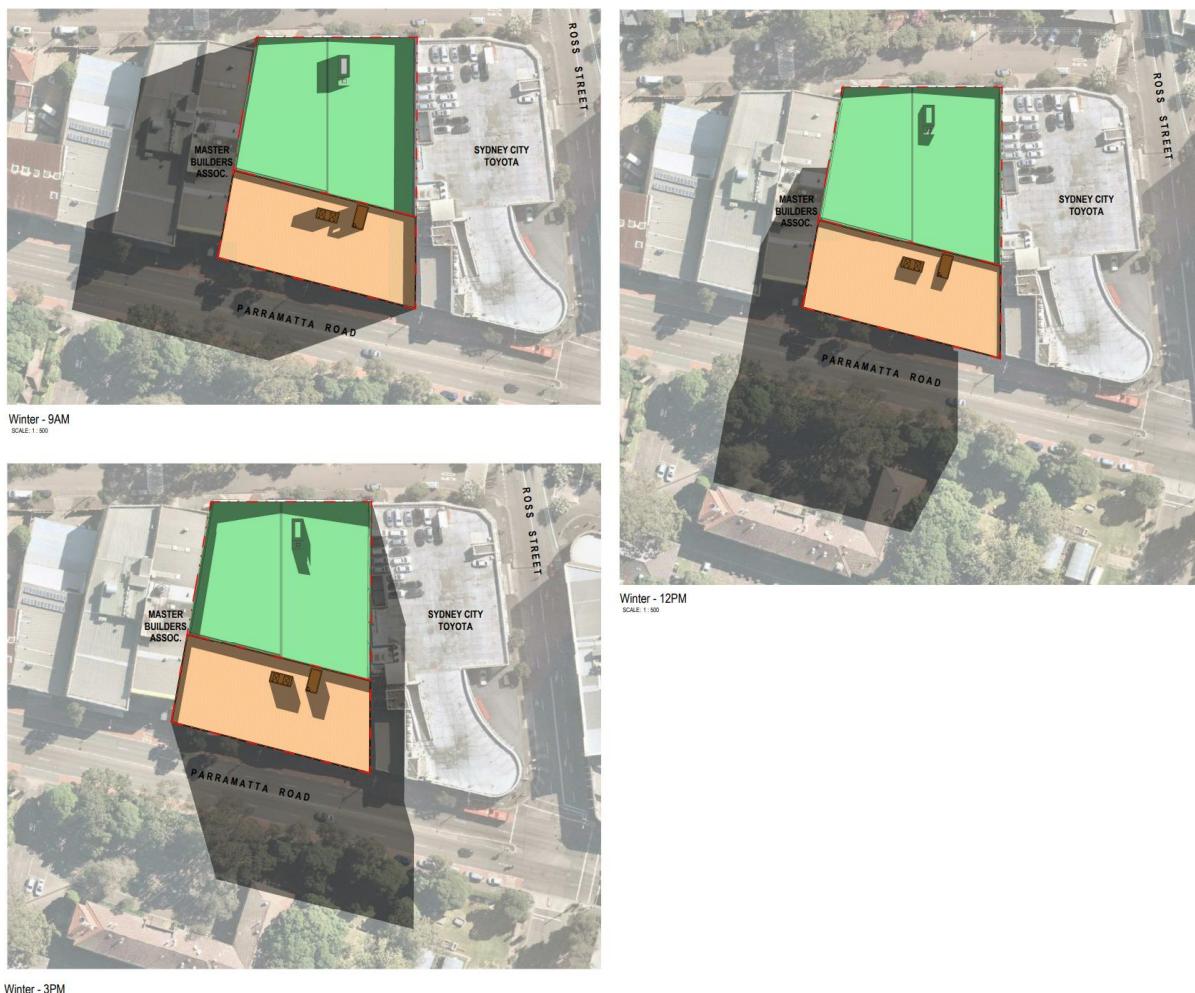


Figure 9 – Shadow diagrams – Reference Design (Architectus)

4.2 Four2Five Pty Ltd v Ashfield Council

Requests for a clause 4.6 exception received further judicial consideration in the Land & Environment Court appeal judgment by Justice Pain in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and in the subsequent Court of Appeal decision *Four2Five v Ashfield Council* [2015] NSWCA 248 set out in the judgment of Leeming JA. These judgements specifically drew a distinction between the test under SEPP 1 (from *Wehbe v Pittwater Council*) and the test under clause 4.6, most particularly with reference to the words in clause 4.6(3)(a) "in the circumstances of the case". Leeming JA in the Court of Appeal noted that there are additional ways of establishing that compliance is unreasonable or unnecessary in the circumstances of the case, at [16].

Early interpretation of this provision suggested that the consent authority had the discretion to require that an applicant identify circumstances particular to the site to satisfy clause 4.6(3)(a), that were in addition to simply identifying compliance with the objectives of the standard by generic planning benefits.

In this regard, the particular circumstances of the case to support a minor increase in the FSR are:

- ensuring a development envelope that complies with the building height control and adjacent scales and form of development can be realised to safeguard the achievement of a superior urban design outcome for this part of Parramatta Road and the locality;

- the lack of harmony between the 15m building height control and the FSR control in the context of this site, particularly when considered in the context of existing adjoining development and the height and density controls applicable to adjacent development, such as the 1.75:1 base FSR control for the smaller office and Sydney City Toyota development to the east, which is also within a 15m height control;
- the relevant objectives of the B7 – Business Park zone are satisfied (as set out further below);
- the objectives of the development standard are still achieved notwithstanding the partial non-compliance;
- the objectives of clause 4.6 – which are to provide flexibility and to achieve better outcomes from development are relevant in ensuring an appropriate and low-impact development is able to result; and
- strict compliance is unnecessary as an inferior urban design outcome is likely to result offering no greater achievement of the zone and FSR standard objectives.

Strict compliance with the development standard of the maximum FSR development standard is considered unreasonable and unnecessary because the objectives of the development standard are still achieved by the proposed development and there are specific circumstances peculiar to this building envelope and site which support the proposed minor increase in FSR when considered against the objectives of the standard. Again, due to the application of clause 5.12 of the LEP, the provisions are also strictly not enforceable.

5 CLAUSE 4.6(3)(b) ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

The conclusions arising from the two *Four2Five v Ashfield* cases and *Initial Action v Woollahra* per Preston CJ regarding satisfaction of whether there are sufficient environmental planning grounds to justify contravening the development standard include:

- Merely promoting the benefits arising from the development will not necessarily be sufficient to constitute environmental planning grounds to justify contravening the development standard in any particular case, *Four2Five v Ashfield Council* at [15] per Leeming JA, *Initial Action v Woollahra* at [24];
- The correct question is “whether the benefits advanced in the applicant’s written request justified the contravention of the development standard” per Preston CJ *Baron Corporation v Council of the City of Sydney* at [115];
- The grounds found by the Commissioner that the environmental planning grounds relied upon were not particular to the circumstances of the proposed development on that site, is one of fact, *Four2Five v Ashfield Council* at [29] per Pain J;
- “sufficient” in this context is not a low bar, *Four2Five v Ashfield Council* at [31] per Pain J. It must be sufficient “to justify contravening the development standard” (*Initial Action v Woollahra* at [24]);
- “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” per Preston CJ *Initial Action v Woollahra* at [24].

The environmental planning grounds justifying the contravention of the development standard for height in this case and which are specific to the FSR element which is contravening the development standard are:

- The non-compliance is minimal (611m²). To reduce the GFA to gain full compliance would result in upper level setbacks that are not warranted for a 3-storey development envelope, particularly where no adjacent built form exists to replicate upper level setbacks off the

Parramatta Road frontage at such a low height. Where any upper level setbacks do occur, these are at or above 5 storeys in height.

- The transfer of ‘unused’ GFA from the ambulance station component of the site to this development envelope allows for (and secures under the Concept DA) an appropriate transition in massing from the low-rise residential edge of Arundel Street to the wider and more ‘hostile’ environment of Parramatta Road, where the massing is suitably placed and compatible with the character of that street edge.
- The additional FSR promotes the achievement of better and enhanced opportunity to secure an appropriate and consistent built form along the Parramatta Road frontage of the site. Concurrently, it generates the capacity and certainty for the State in an enhanced value for redevelopment of this surplus land. Similarly, it also provides Council with enhanced certainty to the future development outcomes for this presently vacant and underutilised land via the subsequent development application.
- The impacts arising from the non-compliance does not affect any public or private views of any significance in the context.
- The impacts upon nearby heritage items or conservation areas is negligible and would be indiscernible in the context of this built edge of Parramatta Road.
- The amenity impacts (where they arise or are discernible) in terms of overshadowing of neighbouring public or private open space and habitable windows is not relevant as the proposed FSR does not generate additional development height and the building height control of the LEP remains satisfied.
- A superior development and design outcome is able to be realised without the implied impacts arising from a non-compliance. The proposed envelope is not what would be considered to be offensive, jarring or unsympathetic to its existing built context.

The matters above set out a number of environmental planning grounds which justify the contravention of the FSR standard. These grounds illustrate that the impacts arising from the increased FSR are either non-existent, negligible or minor, and that there are benefits which arise from the contravention which could not be obtained without the minor increase in FSR.

6 CLAUSE 4.6(4)(a)(i) THE CONSENT AUTHORITY MUST BE SATISFIED THAT THE APPLICANT’S WRITTEN REQUEST HAS ADEQUATELY ADDRESSED THE MATTERS REQUIRED TO BE DEMONSTRATED BY SUBCLAUSE (3)

Clause 4.6(4)(a)(i) requires the consent authority to be satisfied that the applicant’s written request has “adequately addressed” the matters required to be demonstrated by clause 4.6(3). In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 Preston CJ at [25] confirmed his statement in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [39], stating that the consent authority “does not have to directly form the opinion of satisfaction ...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)”.

This matter has been the subject of considerable recent judicial review, most recently in *Rebel/MH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 where Preston CJ of the Land and Environment Court sat on the bench of the Court of Appeal and affirmed the interpretation provided by Basten JA in *AI Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 at [21]-[24] and himself in *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [74]-[81]. The conclusion reached is that only if the request does demonstrate the achievement of these outcomes will the request have adequately addressed the matters required to be demonstrated by clause 4.6(3)(a) and (b). “The consent authority needs to be satisfied that those matters have in fact been demonstrated” (per Preston CJ of LEC in *Rebel/MH Neutral Bay Pty Limited v North Sydney Council* at [51]).

This request has considered in detail the objectives of the development standard in section 4.1 above, and found that the objectives are achieved. The development’s partial increase in FSR is

compatible with the existing built form and fabric and other prevailing characteristics of the locality. As noted, environmental and amenity impacts are minimal, where they arise.

The request has detailed many factors which are specific to this site and the circumstances of the case which lead to the conclusion that it is unreasonable and unnecessary in the circumstances of the case for rigid compliance with the development standard to be required.

The request has detailed a number of environmental planning grounds to justify contravening the development standard and the consent authority should be satisfied that the request has adequately addressed the matters set out in clause 4.6(3).

7 CLAUSE 4.6(4)(ii) THE CONSENT AUTHORITY MUST BE SATISFIED THAT THE PROPOSED DEVELOPMENT WILL BE IN THE PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES OF THE PARTICULAR DEVELOPMENT STANDARD AND THE OBJECTIVES FOR DEVELOPMENT WITHIN THE ZONE IN WHICH THE DEVELOPMENT IS PROPOSED TO BE CARRIED OUT

7.1 Objectives of the Development Standard

The objectives of the development standard are set out in section 4.1 of this request which carefully considers the proposal's consistency with the objectives of the development standard and finds that the proposal is consistent with the standard's objectives.

7.2 Objectives of the B7 zone

The objectives of the B7 zone are:

- *To provide a range of office and light industrial uses.*
- *To encourage employment opportunities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.*
- *To ensure uses support the viability of nearby centres.*

The proposal is consistent with the objectives of the B7 zone because:

- The proposed concept design and development envelope realises the opportunity to provide for new commercial accommodation. It does so with a coherent and achievable reference design that meets all development controls but for an excess of GFA by some 611m². The minor non-compliance enhances the opportunity for the future development envelope to secure a wider range of interested parties due to the consistent and standard sized commercial floor plates.
- In providing new commercial development it will encourage employment opportunities on what is presently a vacant and underutilised site.
- It has the capacity to provide for the day to day needs to the local community and workers in the area via ground floor level mixed use land uses.
- The future development envelope provides a significant opportunity to accommodate land uses tied to either of both the adjacent University of Sydney and the Royal Prince Alfred Hospital Health and Education Precinct and the broader Eastern City Innovation Corridor under the Greater Sydney Commission's Eastern City District Plan – see **Figure 10** below with the site circled in red.

As the proposed development is consistent with both the objectives of the standard and the objectives of the zone, clause 4.6(4)(a)(ii) indicates that the proposal is therefore in the public interest.

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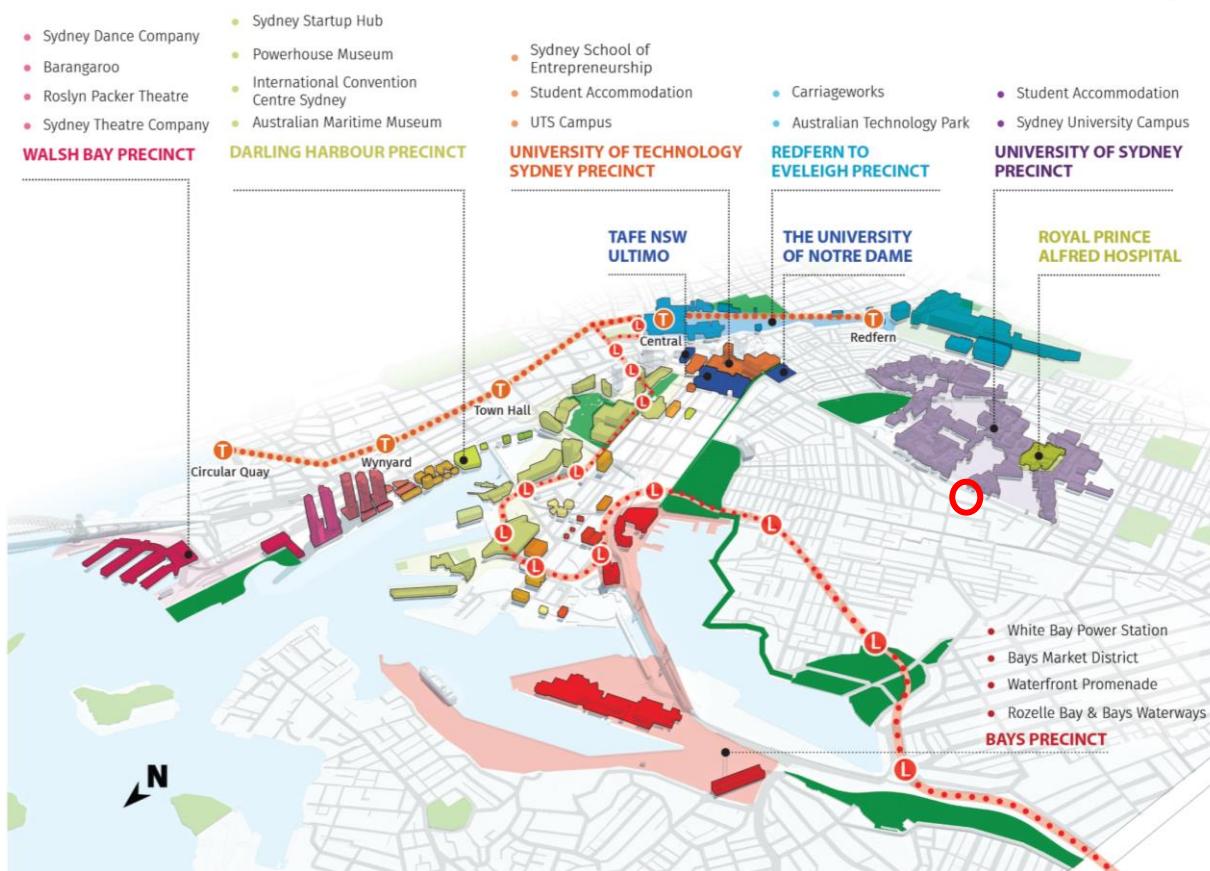


Figure 10 – Eastern City Innovation Corridor (GSC)

8 CLAUSE 4.6(4)(b) THE CONCURRENCE OF THE SECRETARY HAS BEEN OBTAINED

It is considered that the consent authority can assume concurrence (see *Moskovich v Waverley Council* [2016] NSWLEC 1015 Tuor C at [70].) Under clause 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018 under Planning Circular PS 18-003 (also dated 21 February 2018) to each consent authority that it may assume the Secretary's conditional concurrence with respect to the operation of clause 4.6. The notice allows the Council / Local Planning Panel to assume concurrence in this situation.

9 CLAUSE 4.6(5) IN DECIDING WHETHER TO GRANT CONCURRENCE, THE SECRETARY MUST CONSIDER:

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and**
- (b) the public benefit of maintaining the development standard, and...**

It is not considered that contravention of the development standard would raise any matter for State or regional environmental planning significance. The minimal environmental impacts are very localised and will not adversely impact upon adjacent land, its land uses, or impinge upon the achievement of strategic planning objectives.

There are sufficient circumstances particular to this site and this development as detailed above that satisfy the matters set out in clause 4.6(4) such that the public benefit of not maintaining the development standard should not preclude the granting of concurrence. There is a public benefit in maintaining the development standard, however given the objectives of clause 4.6 to provide flexibility and achieve better outcomes, the standard should not be dogmatically followed when there are no significant adverse environmental planning grounds arising from the exceedance. In this case

there are public benefits which result from the proposal's minor exceedance of the FSR development standard because the development is consistent with the objectives of the particular development standard and the zone. The impacts upon neighbouring land and uses, as well as the environment, are negligible or minimal where impacts arise. Strict compliance will not equate to a superior planning outcome in this instance and still achieves an orderly and economic development of land.

10 THE OBJECTIVES OF CLAUSE 4.6

The specific objectives of Clause 4.6 are:

- (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.*

As demonstrated above, the proposal is consistent with the objectives of the development standard and the zone notwithstanding the variation sought to the maximum FSR. This request seeks flexibility in applying the standard because of the limited environmental impacts, and because the development as a whole will improve the development outcomes for, and built form of, Parramatta Road in this locality with sufficient environmental planning grounds to justify the contravention of the standard.

Approval of this clause 4.6 Request will allow for flexibility to relax the development standard in this circumstance, given the public benefit of achieving the improved environmental, development and design outcome.

The flexibility envisaged by clause 4.6 in relation to exceedance of the FSR development standard allows for the inclusion of a minor non-compliance within the development which allows the achievement of the development with minimal environmental impact and which will achieve a better planning outcome than if strict compliance with the development standard was required.