

Attachment B

Clause 4.6 Variation Request – Floor Space Ratio

GYDE

Clause 4.6 Request – Floor Space Ratio

Sydney Local Environmental Plan 2012

25-27 Dunning Avenue, Rosebery

Submitted to City of Sydney

on behalf of Dunning Proprietor Pty Ltd

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1. INTRODUCTION

This is a written request prepared in accordance with Clause 4.6 of the Sydney Local Environmental Plan 2012 (SLEP 2012) to justify a variation to the floor space ratio (FSR) development standard in a Development Application (DA) submitted to City of Sydney Council for a commercial development at 25-27 Dunning Avenue, Rosebery (the site).

The proposed works involve the:

- Removal of the existing sawtooth roof, demolition of first floor offices and mezzanine.
- Insertion of a first floor contained within the existing building envelope.
- Retention and relocation of existing trusses.
- Construction of a three (3) storey addition with outdoor terraces, amenities and services.
- Retention of, conservation works and upgrades to the existing heritage façade including new window openings on the Cressy Street frontage.

Specifically, the proposal involves the adaptive re-use of the heritage item and will result in a 5 storey commercial building containing:

- Ground Floor – shared commercial lobby and retail space, amenities, car park containing ten (10) car parking spaces and one (1) service vehicle space. The ground floor also includes end of trip facilities (EOTF), plant and service rooms and waste room.
- Four storeys of commercial tenancies above including associated amenities, lift access, fire stairs and plant.

The site is subject to a maximum FSR of 1.5:1, however, the proposal benefits from additional floor space under the SLEP which is summarised as follows:

- **Clause 6.13 End of journey floor space** – As demonstrated on the GFA plans, the proposed end of trip facilities (EOTF) have a total area of 73sqm which equates to a FSR of 0.076:1. Pursuant to Clause 6.13 of the SLEP the end of journey floor space (up to maximum FSR of 0.3:1) can therefore be added as additional floor space above the maximum FSR that applies to the site.
- **6.14 Community infrastructure floor space at Green Square** - The site is eligible for a bonus 0.5:1 FSR under Clause 6.14 by delivering additional community infrastructure at Green Square. The applicant will enter into a Voluntary Planning Agreement in accordance with Council's Community Infrastructure Guidelines.

When considering the additional floor space above, the site benefits from a combined maximum FSR of 2.076:1. However, this Clause 4.6 Request seeks to vary Clause 4.4 of the SLEP and therefore all GFA, notwithstanding the additional floor space provisions discussed above, must be considered in relation to the base FSR of 1.5:1.

Therefore, for the purpose of this Clause 4.6 Variation Request to Clause 4.4 of the SLEP, the proposed building has a total gross floor area (GFA) of 2,966sqm which equates to a FSR of 3.1:1. This results in a 1.6:1 variation (107%) to the current numerical FSR standard of 1.5:1. As Commissioner Clay explained in his decision in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112, the application of clause 4.6 should not be constrained by a perceived maximum number by which a standard may be varied (this decision was upheld by the Chief Judge of the Land and Environment Court on appeal in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115).

The objectives of Clause 4.6 are to provide an appropriate level of flexibility in applying certain development standards to particular development, and to achieve better outcomes for and from development, by allowing flexibility in particular circumstances.

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

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130) and *Al Maha Pty Ltd v Huajun Investments Pty Ltd (2018) 233 LGERA 170*; [2018] NSWCA 245:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)]; and
3. 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 [clause 4.6(4)].

This request considers that compliance with the FSR development standard is unreasonable and unnecessary in the circumstances of the proposed development because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

There are sufficient environmental planning grounds to justify the variation as detailed in Section 5 of this 4.6 Request.

The development satisfies the objectives of the FSR standard, as well as the objectives of the B4 Mixed Use Zone and is therefore in the public interest.

This request also addresses the requirement for concurrence of the Secretary as required by Clause 4.6(4)(b).

It is therefore considered appropriate in these circumstances to grant the Clause 4.6 variation request.

2. STANDARD TO BE VARIED

The standard that is proposed to be varied is the FSR development standard which is set out in clause 4.4 of the SLEP 2012 as follows:

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



Figure 1: Extract of FSR Map, subject site outlined in red. (Source: NSW Legislation)

The numerical value of the development standard applicable in this instance is 1.5:1.

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

3. EXTENT OF VARIATION

Pursuant to Clause 4.4(2) of the SLEP 2012, the maximum FSR for development on the subject site is 1.5:1. As discussed in the Executive Summary, the site is also eligible for additional FSR under Clauses 6.13 and 6.14 of the SLEP. These include an additional 0.076:1 FSR for the provision of EOTF (under Clause 6.13) and additional 0.5:1 FSR by delivering additional community infrastructure at Green Square. When considering the additional floor space provisions, the site is subject to a combined FSR standard of 2.076:1. However, this Clause 4.6 Variation Request is made in relation to Clause 4.4 of the SLEP and therefore all GFA, notwithstanding the additional floor space provisions discussed above, must be considered in relation to the base FSR of 1.5:1.

The proposed building has a total gross floor area (GFA) of 2,966sqm which equates to a FSR of 3.1:1. This results in a 1.6:1 variation (107%) to the current numerical FSR standard of 1.5:1. Compared with the combined FSR (including of EOTF and community infrastructure bonus floor space) the variation is 1.024:1 or 49%.

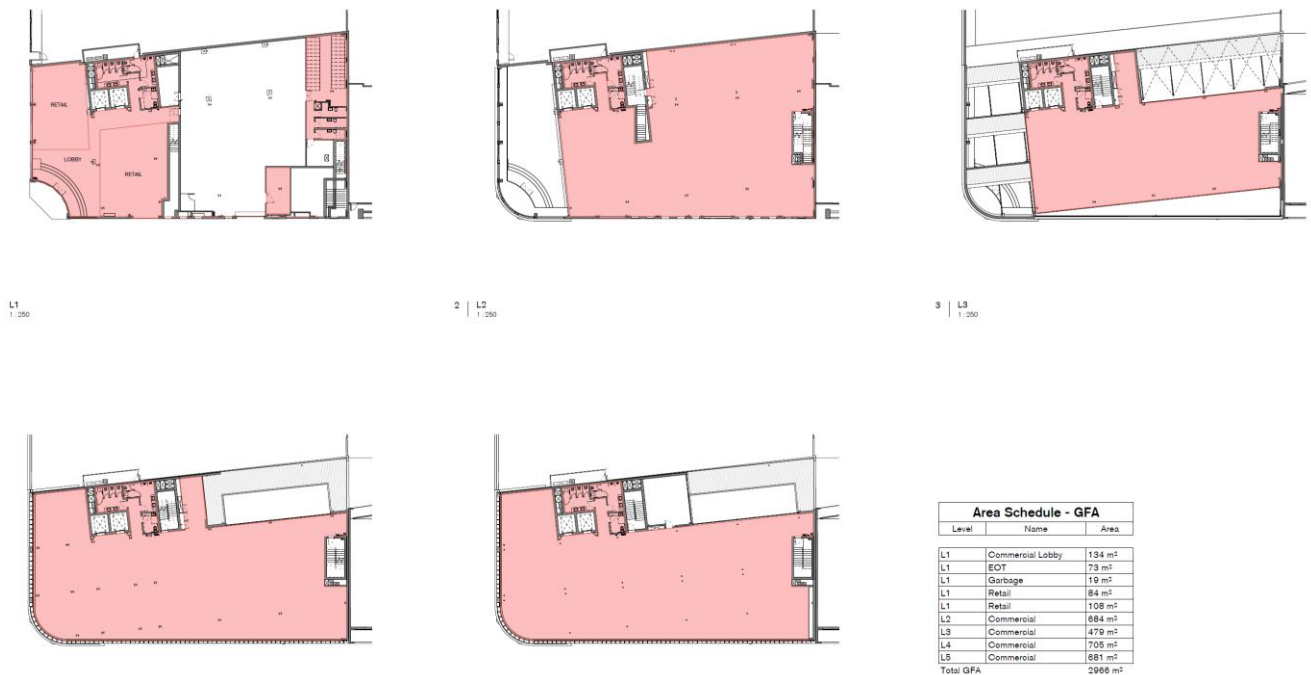


Figure 2: Gross Floor Area Diagrams (Source: Tzannes)

4. UNREASONABLE OR UNECESSARY

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

The Court has held that there are at least five different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. See *Wehbe v Pittwater Council* [2007] NSWLEC 827 (Wehbe).

The five ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; (First Test)
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary; (Second Test)
3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable; (Third Test)
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; (Fourth Test) and
5. The zoning of the land is unreasonable or inappropriate. (Fifth Test)

It is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

Nonetheless, we have considered each of the ways as follows.

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

The following table considers whether the objectives of the development standard are achieved notwithstanding the proposed variation (First test under *Wehbe*).

Table 1 Consistency with Objectives of Clause 4.4 of SLEP.

OBJECTIVE	DISCUSSION
4.4 Floor space ratio (1) The objectives of this clause are as follows—	
(a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,	<p>The proposed development provides employment floorspace exclusively and in this regard is atypical of development taking place in the locality which has a strong (and often exclusive) residential focus.</p> <p>The need for employment floorspace in the locality was highlighted in the City of Sydney Employment Lands Strategy and Employment Lands Study (2014). The focus of this study was on securing Sydney's economic future by retaining essential employment lands and making space for more businesses and new jobs. Although the subject site is located just outside of the employment lands study area, the findings of the study and directions of the strategy are still relevant to this commercial proposal. The background report accompanying</p>

OBJECTIVE	DISCUSSION
	<p>the study identifies that by 2030 Green Square is expected to attract about 22,000 workers. The proposal would provide employment floorspace for approximately 200 workers.</p> <p>This demonstrates the anticipated development needs in the locality which this proposal will help to satisfy. The additional floor space in excess of the maximum FSR facilitates the provision of commercially attractive and flexible floorplates (approximately 620sqm in area) that are suited to a wider range of businesses and which make the development itself economically feasible when compared with other permissible land uses such as residential apartments.</p>
<p>(b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,</p>	<p>Although the proposal exceeds the maximum FSR that applies to the site, the proposed building complies with the maximum 22m building height under the SLEP and also complies with the setback and storey controls under the SDCP. The proposal seeks to retain the existing heritage façade which has a zero setback from Cressy Street and Dunning Avenue. The proposed zero setback of the addition is compliant with the DCP setback controls which only require an upper level setback where adjacent building adopt them which is not the case for this site. The proposed zero setbacks to the street frontages are therefore consistent with the DCP and adjoining properties. From a heritage perspective, GBA considers that setting back the addition would break down the cohesion of the building as one element and divide the development into significant shopfronts and warehouses with addition. The current proposal visually maintains the integrity of the building as a whole and is considered to celebrate the existing facade and enhance the existing streetscape presence of the heritage building. In summary, the proposal is consistent with the density, built form and land use intensity that would be expected of a commercial building, noting that commercial buildings are permissible within the B4 Mixed Use zone that applies to the site.</p> <p>The proposed commercial land use is not a high intensity use as the site will mostly be occupied Monday to Friday during working hours. The dispersion of employment floorspace within an area increasingly dominated by residential land uses maximises the opportunity for people to live close to work and promotes walking and cycling. The proposal encourages these active transport options for future staff and visitors through the provision of end of trip facilities including lockers, showers/change rooms and bicycle storage. The development includes 11 car parking spaces on site well below the maximum 21 parking spaces permitted under the SLEP. This will minimise traffic movements to and from the site and further encourage future users of the site to utilise active transport options.</p>
<p>(c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,</p>	<p>The proposal is for a purely commercial development which is not anticipated to impact the capacity of existing and planning infrastructure within the locality. Compared to a residential development, the proposed commercial development would have less reliance on certain local infrastructure such as outdoor recreation facilities and community facilities.</p> <p>Notwithstanding, the proposal will result in additional foot traffic and bike movements surrounding the site. However, these movements can be accommodated on the existing pedestrian and cycle pathways.</p>
<p>(d) to ensure that new development reflects the desired character of the</p>	<p>The objective of the B4 Mixed Use is to integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling. This is indicative of the desired future character of the</p>

OBJECTIVE	DISCUSSION
<p>locality in which it is located and minimises adverse impacts on the amenity of that locality.</p>	<p>locality even though new development tends to be towards residential land uses. The commercial focus of the proposal is consistent with the desired future character of the locality and will help to balance the range of land uses.</p> <p>The proposal is compatible with its context and responds to the character of the locality. Specifically, the proposal seeks to retain the heritage significance of the building and adapt it to retain an economic and physical presence in a changing context. The proposed addition has been carefully designed to delineate new from old in a scale that is consistent with the adjacent site at 14 Cressy Street and new development in the locality generally. The proposal is compliant with the maximum building height that applies to the site.</p> <p>The proposal has been designed to minimise any adverse impacts on the amenity of the locality including:</p> <ul style="list-style-type: none"> • Privacy – The proposed three storey addition has been designed to minimise privacy impacts on the adjacent residential flat buildings including at No. 4 Cressy Street and across Cressy Street at 29-31 Dunning Avenue. The proposal includes two terraces in the north east corner of the site at Level 4 and 5. The terraces are setback 2.5m to 4.3m from the eastern site boundary to minimise potential overlooking of the communal open space at 4 Cressy Street. Further, the 3m setback of the terraces to the northern boundary considers the privacy of a future residential development of the adjoining site to the north. The façade of the new addition includes vertical aluminum blades with glazing located behind which will reduce privacy impacts by reducing sightlines between the site and the residential flat building at 29-31 Dunning Avenue. • Overshadowing – The proposal will result in some additional overshadowing of the north elevation of 29-31 Dunning Avenue as a result of the proposed addition. However, these additional shadows fall on the bedroom windows/deck of ground floor apartments which benefit from a separate living area and primary private open space on the first floor. The proposal therefore will not result in any unreasonable overshadowing impacts as the residential flat building 29-31 Dunning Avenue will continue to maintain compliance with the ADG solar access requirements. • Views – The upper-level apartments and roof terraces within the residential flat building to the south of the site at 29-31 Dunning Avenue benefit from distant regional views which include part of the Sydney CBD skyline. Whilst the proposed development exceeds the maximum floor space ratio, the proposed building complies with the maximum building height under the SLEP and the building setbacks prescribed under the DCP. The view impacts as a result of the proposal are considered reasonable in the context of: <ul style="list-style-type: none"> ○ the type of view being impacted which is a distant regional view rather than a water view. ○ the location in which the views are gained from, being a standing position on the balconies/terrace. Noting that these views would be reduced/lost from within the apartments. ○ the proposal results in similar view impacts compared to a compliant

OBJECTIVE	DISCUSSION
	<p style="text-align: center;">residential built form on the subject site and on the adjoining site to the north.</p> <p>Overall the proposal, notwithstanding the proposed FSR variation, reflects the desired character of the locality and minimises adverse impacts on the amenity of that locality.</p>

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

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], therefore, compliance with the FSR development standard is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met on this way alone.

For the sake of completeness, the other recognised ways are considered as follows.

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

The underlying objective or purpose is relevant to the development and therefore is not relied upon.

4.3. The objective would be defeated or thwarted (undermined) if compliance was required with the consequence that compliance is unreasonable;

The consequence of not exercising flexibility in the application of the FSR standard in this instance is that it would reduce the economic viability of the proposal when compared with alternate land uses and residential development in particular. If this was to occur the first and fourth objectives would be undermined for the reasons explained in Table 1.

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

The standard has not been abandoned by Council actions in this case and so this reason is not relied upon.

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

The zoning of the land is reasonable and appropriate and this reason is therefore not relied upon.

5. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

The environmental planning grounds to justify the departure of the FSR standard are as follows:

- *The built form is consistent with the desired future character of the locality.*

The proposed building complies with the maximum 22m building height that applies to the site as well as the setbacks prescribed under the DCP. The DCP stipulates a maximum of 6 storeys for the site and the proposal is for a 5 storey building compliant with this control. The DCP also establishes a nil setback at the street frontages which is evident in recent development in the locality including the immediately adjoining residential flat building at 4 Cressy Street, which is 6 storeys high and has zero setbacks to both street frontages. The built form is therefore consistent with that anticipated under the current planning controls notwithstanding the proposed FSR variation.
- *The floor space ratio standard is not calibrated to commercial office buildings.*

Commercial office buildings have different physical characteristics compared with residential flat buildings and shop top housing. Because of the requirement to provide communal open space equal to 25% of the site area, and minimum separation distances to provide adequate privacy between habitable rooms and balconies, residential flat buildings and shop top housing require more land to provide adequate residential amenity. This is evident when examining aerial photographs of residential development in the locality as illustrated in Figure 3 below.
- *The existing heritage listed building occupies the whole site.*

The site coverage of the proposal is determined by the existing heritage listed building, which occupies the whole site. The 'new floors' (levels 4 and 5) are setback from the rear and the eastern boundaries to ensure an appropriate relationship with the adjoining development and provide amenity for the commercial office floors.
- *The variation facilitates employment development which will help satisfy identified needs in the region.*

As discussed in Section 4.1, the background report accompanying the Employment Lands Study identified that by 2030 the Green Square locality is expected to attract about 22,000 workers. The variation of the floor space ratio standard facilitates an economically feasible development of the land and adaptive reuse of the heritage fabric that will provide employment floor space in an appropriate location nearby to public transport, services and housing. An entirely commercial development of the site is desirable as it will provide local employment opportunities reduce travel demand and support local economic activity.



Figure 3 - Mixed use development in the vicinity of the site (orange arrow) with unbuilt upon building separation and communal open space areas highlighted. (Source: Nearmap and Gyde)

- The variation facilitates the provision of flexible commercial floorplates suited to a wider range of enterprises.*
 The proposal includes commercial floorplates ranging in size from 443sqm to 659sqm. Larger commercial floorplates suit a wider range of enterprises. As a result of Covid 19, enterprises are also seeking greater space allocations per employee. An arbitrary reduction in the size of floorplates for the sake of numerical compliance only would reduce the commercial attractiveness of the building, whereas the variation promotes the orderly and economic use and development of the land.
- The variation facilitates the conservation of the heritage significance of the building.*
 The adaptive reuse of the building for commercial purposes promotes the conservation of the building. It is both a highly suitable use because the large open floorplates and central services minimise disturbance of the heritage fabric, and provided it is economically feasible, it ensures the long term conservation of the fabric. From a heritage perspective, there are significant costs associated with conserving the heritage item and funding the upgrades required to the building. Development options which involve reduced floor space, such as only one additional level within the existing facade, are not financially viable. As observed by GBA, low scale alterations and additions to the building would be temporary and likely to only be viable in the short term, with the low property returns eventually leading to building decay. The proposed development, on the other hand, exhibits a very high degree of design excellence and longevity of materials and design.

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- *The proposed variation will not cause adverse environmental impacts.*
The proposal has been carefully designed to avoid adverse impacts on neighbouring properties by reason of visual privacy and noise impacts and the building form, which is consistent with the building form that would be expected from a complying residential flat building development, will not cause unreasonable overshadowing of neighbouring properties.

6. PUBLIC INTEREST

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. This is required by clause 4.6(4)(a)(ii) of the LEP.

In section 4 it was demonstrated that the proposed development overall achieves the objectives of the development standard notwithstanding the variation of the development standard (see comments under "public interest" in Table 1).

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

Table 2: Consistency with B4 Mixed Use Zone

OBJECTIVES OF B4 ZONE	DISCUSSION
<ul style="list-style-type: none"> To provide a mixture of compatible land uses. 	<p>The proposal seeks to provide commercial premises on the site which are compatible with the surrounding mix of land uses including residential flat buildings, other commercial uses and warehouses. The proposal includes a retail premises on the ground floor which can not only be utilised by workers on the subject site but also nearby residents and workers.</p>
<ul style="list-style-type: none"> To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling. 	<p>The proposal will result in an office development on the site which is located in close proximity to multiple bus services from Botany Road, Epsom Road and Rothschild Avenue. The site is also a 10 minute walk from Green Square train station and is highly accessible by public and active forms of transport. The proposal includes 28 bicycle parking spaces and EOTF to further encourage walking and cycling to and from the site.</p>
<ul style="list-style-type: none"> To ensure uses support the viability of centres. 	<p>The proposed commercial and retail uses on the site will support the viability of nearby centres by providing increased employment opportunities and a small scale retail premises which will not detract from nearby centres.</p>

As demonstrated in Table 2, the proposal is consistent with the objectives of the zone and in Section 4 it was demonstrated that the proposal is consistent with the objectives of the development standard. According to clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

7. STATE OR REGIONAL ENVIRONMENTAL PLANNING

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

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

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

Finally, we are not aware of any other matters required to be taken into consideration by the Secretary before granting concurrence.

8. CONCLUSION

This submission requests a variation, under clause 4.6 of the *Sydney Local Environmental Plan 2012*, to the FSR development standard and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development.
- The development achieves the objectives of the development standard and is consistent with the objectives of the B4 zone.
- There are sufficient environmental planning grounds to justify the contravention of the development standard.

The consent authority can be satisfied to the above and that the development achieves the objectives of the development standard and is consistent with the objectives of B4 Mixed Use Zone notwithstanding non-compliance with the FSR standard and is therefore in the public interest.

The concurrence of the Secretary can be assumed in accordance with Planning Circular PS 18-003.

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