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# Appendix II

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Clause 4.6 variation request – clause  
7.24

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# **Clause 4.6 Variation Request**

Clause 7.24 - Commercial premises in Zone B4  
Mixed Use

Sydney Metro West

Parramatta Over and Adjacent Station  
Development

Concept State Significant Development Application

# Contents

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Glossary and abbreviations .....	3
1 Introduction .....	4
2 Development standard to be varied.....	6
3 Nature of the variation sought .....	7
4 Justification for contravention of the development standard .....	9
4.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case .....	9
4.1.1 The underlying objectives or purposes of the development standard .....	10
4.1.2 The objectives of the standard are achieved notwithstanding non-compliance with the standard .....	10
4.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard .....	11
4.2.1 Relevant environmental planning grounds .....	11
4.2.2 Consistency with the Objects of the EP&A Act.....	11
4.3 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard .....	13
4.3.1 Consistency with the objectives of the zone .....	13
4.3.2 Consistency with the objectives of the development standard...	14
5 Other matters for consideration.....	15
5.1 Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning	15
5.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard .....	15
5.3 Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.....	15
6 Conclusion .....	16

## Glossary and abbreviations

Term	Definition
Concept and Stage 1 CSSI Approval Stage 1 CSSI Approval	SSI-10038, approved 11 March 2021, including all major civil construction works between Westmead and The Bays, including station excavation and tunnelling, associated with the Sydney Metro West railway line
Concept SSDA	A concept development application as defined in Section 4.22 the EP&A Act, as a <i>development application that sets out concept proposals for the development of a site, and for which detailed proposals for the site or for separate parts of the site are to be the subject of a subsequent development application or applications</i>  Refers to the subject application for over station and adjacent station development at Parramatta metro station
Council	City of Parramatta Council
CSSI	Critical State Significant Infrastructure
Detailed SSDA	The SSD Application(s) to be made after the Concept SSDA, to seek consent for the design and to physically carry out the proposal
EIS	Environmental Impact Statement
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i>
EP&A Regulation	Environmental Planning and Assessment Regulation 2021
FSR	Floor Space Ratio
GFA	Gross Floor Area
ISD	Integrated station development. In the context of this EIS, refers to the integrated over station and adjacent station development, and Parramatta metro station
PLEP 2011	<i>Parramatta Local Environmental Plan 2011</i>
SSD	State Significant Development
SSDA	State Significant Development Application
SEARs	Secretary's Environmental Assessment Requirements
Stage 3 CSSI Application	Application (SSI-227-65520) seeking approval to carry out rail infrastructure, stations, precincts, and operation of the Sydney Metro West line
Sydney Metro West	Construction and operation of a metro rail line and associated stations between Westmead and the Sydney CBD

# 1 Introduction

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This clause 4.6 Variation Request seeks to vary the development standard at Clause 7.24 – ‘Commercial premises in Zone B4 Mixed Use’ of the *Parramatta Local Environmental Plan 2011* (PLEP 2011).

Clause 4.6 of the PLEP 2011 allows consent for development to be granted even though the development contravenes a development standard imposed by the PLEP 2011. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clauses 4.6 (3) and (4)(a)(ii) require that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard as detailed below:

- that the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- that the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

The NSW Land and Environment Court (LEC) has established a set of factors to guide assessment of whether a variation to development standards should be approved. The original approach was set out in the judgment of Justice Lloyd in *Winten Property Group Ltd v North Sydney Council [2001] 130 LGERA 79* at 89 in relation to variations lodged under *State Environmental Planning Policy 1 – Development Standards* (SEPP 1). This approach was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council [2007] NSWLEC 827* (Wehbe).

While these cases referred to the former SEPP 1, the analysis remains relevant to the application of clause 4.6(3)(a). Further guidance on clause 4.6 of the Standard Instrument has been provided by the NSW LEC in a number of decisions, including:

- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*;
- *Turland v Wingecarribee Shire Council [2018] NSWLEC 1511*;
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009*;
- *Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386*;
- and
- *Moskovich v Waverley Council [2016] NSWLEC 1015*.

In accordance with the above requirements, this clause 4.6 variation request:

- identifies the development standard to be varied (Section 2);
- identifies the variation sought (Section 3);
- establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Section 4.1);
- demonstrates there are sufficient environmental planning grounds to justify the contravention (Section 4.2);

- demonstrates that the proposed variation is in the public interest (Section 4.3);  
and
- provides an assessment of the matters the Planning Secretary is required to consider before providing concurrence (Section 5).

Therefore, this Concept SSDA may be approved with the variations proposed in accordance with the flexibility allowed under clause 4.6 of the PLEP 2011.

## 2 Development standard to be varied

This clause 4.6 variation request seeks to justify contravention of the development standard set out in Clause 7.24 – ‘Commercial premises in Zone B4 Mixed Use’ of PLEP 2011 relating to the minimum floor space ratio required for the purposes of commercial premises.

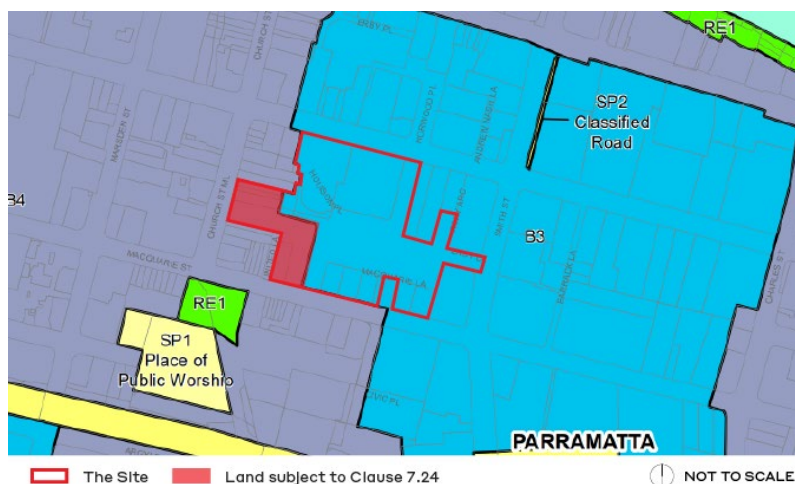
Clause 7.24 states as follows:

### 7.24 Commercial premises in Zone B4 Mixed Use

- (1) *The objective of this clause is to facilitate development for the purposes of commercial premises on land in Zone B4 Mixed Use.*
- (2) *This clause applies to land in Zone B4 Mixed Use identified on the Additional Local Provisions Area Map.*
- (3) *Development consent must not be granted to the erection of a building on land to which this clause applies unless the consent authority is satisfied—*
  - (a) *for land identified as “Area 20” on the Special Provisions Area Map a gross floor area equal to a floor space ratio of at least 3:1 will be used only for non-residential purposes, and*
  - (b) *otherwise—a gross floor area equal to a floor space ratio of at least 1:1 will be used only for the purposes of commercial premises.*

The western portion of the Concept SSDA site is zoned B4 Mixed Use and is subject to clause 7.24, as shown in **Figure 2-1** below. Specifically, the following allotments are subject to this Clause:

- 220 Church Street (Lot 1 in DP1041242)
- 222 Church Street (Lot 1 in DP702291)
- 232 Church Street (Lot 1 in DP651992)
- 236 Church Street (Lot 1 in DP128437)
- 238 Church Street (Lot 2 in DP591454)
- 48 Macquarie Street (Lot B in DP394050).

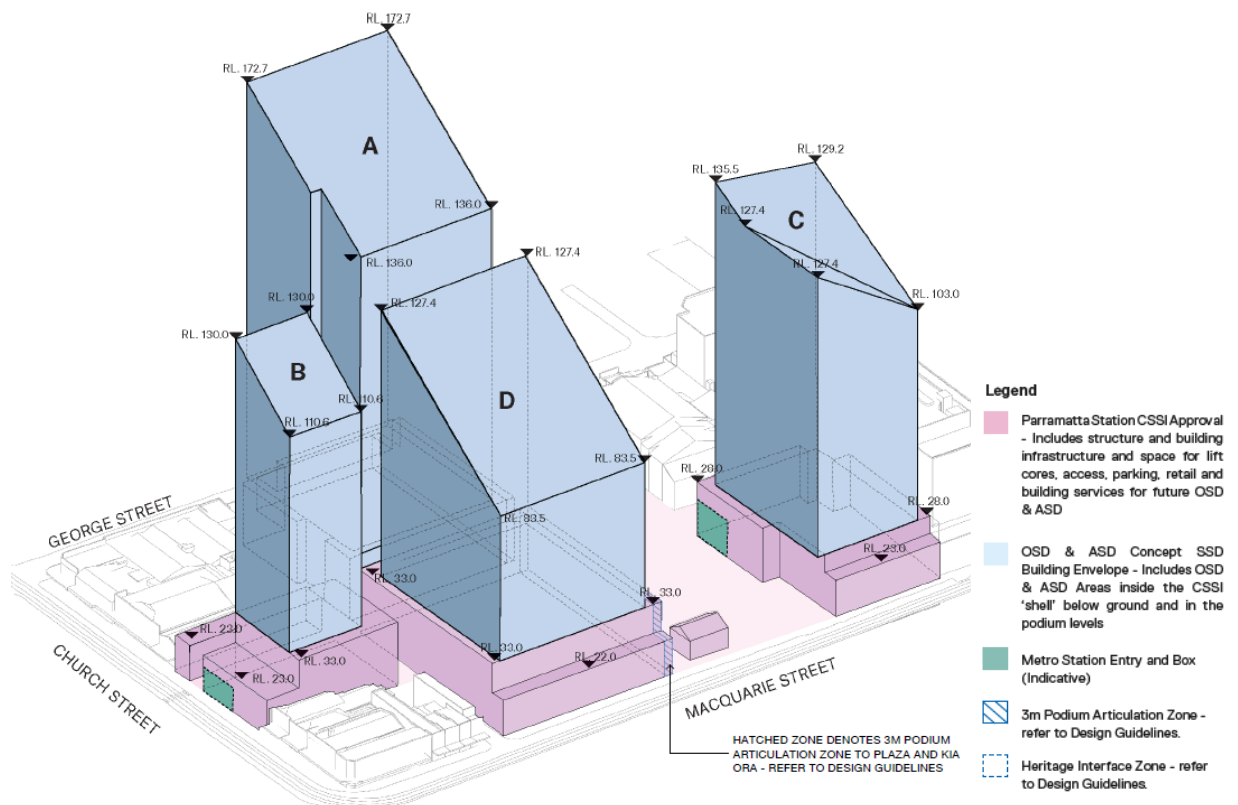


**Figure 2-1** The Parramatta Concept SSDA site. Portion highlighted in red is subject to clause 7.24

No part of the site is identified as “Area 20”.

### 3 Nature of the variation sought

The Concept SSDA seeks consent for maximum building envelopes, land uses, and maximum GFA limits for four buildings above and adjacent to the Parramatta metro station. The proposed development will comprise three (3) new commercial office buildings (Buildings A, C, D), and one (1) residential accommodation building (Building B) as shown in **Figure 3-1**.



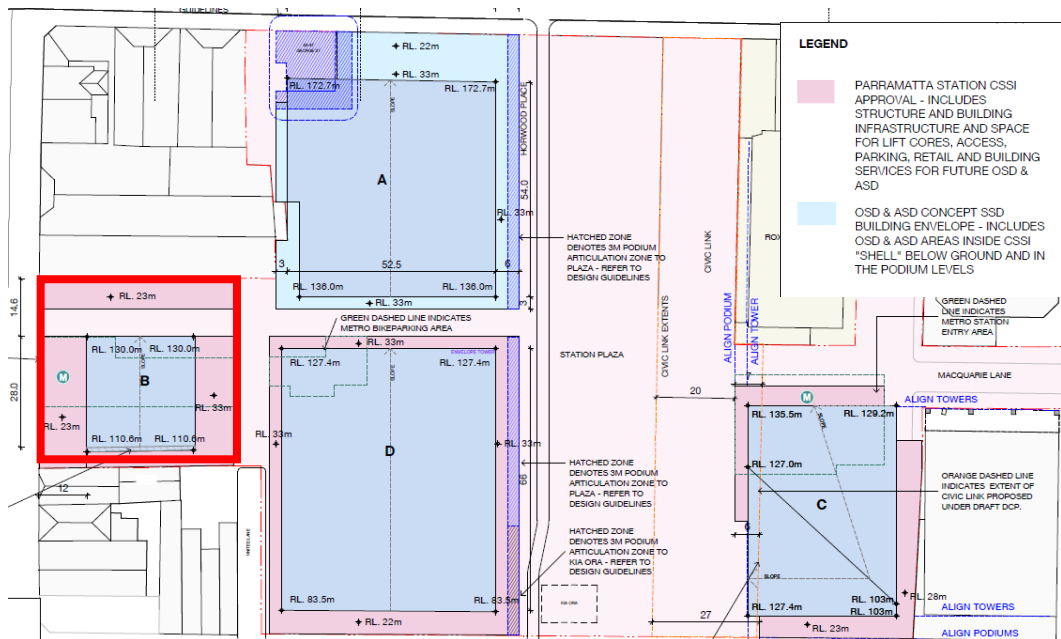
**Figure 3-1 Proposed building envelopes – isometric view (looking northeast)**

Buildings A, C and D are located on land zoned B3 Commercial Core and not subject to the proposed clause 4.6 variation. Only Building B is located on B4 Mixed Use land and is subject to the variation.

The total project site area is 24,899m<sup>2</sup>. The nominal site area for Building B is 2,470m<sup>2</sup> (**Figure 3-2**). Clause 7.24(3)(b) requires a a gross floor area equal to a floor space ratio of at least 1:1 to be provided for commercial premises at Building B, equating to a minimum commercial GFA requirement of 2,470m<sup>2</sup>.

The Concept SSDA seeks approval for 1,114m<sup>2</sup> of commercial (retail) GFA within Building B, which is less than the 2,470m<sup>2</sup> (i.e. FSR 1:1) required, necessitating this clause 4.6 variation.





## 4 Justification for contravention of the development standard

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Clause 4.6(3) of the PLEP 2011 provides that:

- “(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.”*

Further, clause 4.6(4)(a) of the PLEP 2011 provides that:

- “(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.”*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW LEC in:

- *Wehbe v Pittwater Council* [2007] NSWLEC 827; and
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.

The relevant matters contained in clause 4.6 of the PLEP 2011, with respect to the Clause 7.24 development standard to be varied, are each addressed below.

### 4.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the PLEP 2011 is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request.

The five methods outlined in *Wehbe* include:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Method).
- 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 (Fourth Method).
- 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 (Fifth Method).

Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary is the **First Method**.

#### **4.1.1 The underlying objectives or purposes of the development standard**

The objectives of the development standard to be varied is outlined in clause 7.24(1) of the PLEP 2011, as follows:

The objective of this clause is to facilitate development for the purposes of commercial premises on land in Zone B4 Mixed Use.

The development standards' objectives are further outlined within the Parramatta CBD Planning Proposal Report which states;

*The intent of the control to exempt commercial development from overall maximum FSR controls is to activate land on the edge of B3 Commercial Core zone and ... to incentivise more employment generating development in the B4 Mixed Use zone.*

#### **4.1.2 The objectives of the standard are achieved notwithstanding non-compliance with the standard**

The Concept SSDA achieves the underlying objective of the development standard. It will facilitate approximately 1,114m<sup>2</sup> of commercial gross floor area in Building B. Development for the purposes of commercial premises will be accommodated on the land zoned B4.

While the proposed commercial floor area in Building B represents a numerical variation of 1,356m<sup>2</sup>, the Concept SSDA as a whole will facilitate the delivery of 168,579m<sup>2</sup> of commercial gross floor area (both commercial office and retail) which equates to a project wide commercial FSR of 6.77:1 which is significantly above the minimum 1:1 required by clause 7.24.

Furthermore, Building B is located on land on the edge of the B3 Commercial Core zone. The station GFA within Building B will provide high level activation with commuters and residents entering and exiting Church Street frontage.

Although Buildings A, C and D are on land zoned B3 Commercial Core, the Concept SSDA has been designed as a holistic, integrated precinct located above Parramatta metro station.

## 4.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the PLEP 2011 requires the consent authority to be satisfied that the applicant's written request has adequately addressed clause 4.6(3)(b), by demonstrating:

*That there are sufficient environmental planning grounds to justify contravening the development standard.*

The environmental planning grounds relied on in the written request under clause 4.6 must be sufficient to justify contravening the development standard. The environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action v Woollahra Municipal Council* [24] and *Turland v Wingecarribee Shire Council* [42]).

### 4.2.1 Relevant environmental planning grounds

The following points demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard:

- The proposal will facilitate the provision of a minimum of 1,000m<sup>2</sup> commercial gross floor area on land zoned B4 Mixed Use which is consistent with the objective of clause 7.24 to 'facilitate development for the purposes of commercial premises on land in Zone B4 Mixed Use'.
- The Stage 3 CSSI Application proposes a metro station entrance within the Building B podium which constrains the ground floor and limits the amount of commercial floorspace that can feasibly be delivered within Building B at the lower levels.
- The Concept SSDA building envelopes have been designed as a holistic, integrated precinct located above Parramatta metro station and adjacent to the Civic Link. Building B forms part of a development facilitating the delivery of a total of 168,579m<sup>2</sup> commercial GFA across the entire 24,899m<sup>2</sup> site, making commercial the predominant land use at approximately 90% of the development's gross floor area.

### 4.2.2 Consistency with the Objects of the EP&A Act

In *Initial Action*, the Court stated that the phrase "environmental planning grounds" is not defined but would refer to grounds that relate to the subject matter, scope, and purpose of the EP&A Act, including the objects in section 1.3 of the Act. While this does not necessarily require that the proposed development should be consistent with the objects of the Act, nevertheless, Table 1 considers how the proposed development is consistent with each object, notwithstanding the proposed variation to clause 7.24.

**Table 1 – Consistency with objects of the EP&A Act**

Object	Consistency
(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,	The Concept SSDA will facilitate the future delivery of commercial and residential floor space immediately adjacent to high frequency public transport. The development will maximise public transport usage which will reduce private car usage and promote a better environment.
(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,	<p>The Concept SSDA commits to a high standard of ESD, and has addressed the relevant economic, environmental, and social considerations.</p> <p>Furthermore, the proposal will facilitate future development that has the capability to achieve the sustainability targets outlined in clause 7.23 of the PLEP 2011.</p> <p>Ecological sustainability is further discussed at Section 6.15 of the EIS and the ESD Report at Appendix S of the EIS.</p>
(c) to promote the orderly and economic use and development of land,	The Concept SSDA is in accordance with the statutory requirements of the EP&A Act, the EP&A Regulation and the PLEP 2011. It represents the orderly and economic use and development of the land.
(d) to promote the delivery and maintenance of affordable housing,	The Concept SSDA will facilitate the delivery of approximately 16,340m <sup>2</sup> of residential gross floor (indicatively 146 dwellings) which will increase housing options in Parramatta.
(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,	The Concept SSDA relates to land within the Parramatta CBD. The Concept SSDA will not create additional impacts on threatened species, native animals and plants, ecological communities and their habitats. A BDAR Waiver has been submitted at Appendix L of the EIS.
(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),	The Concept SSDA is supported by an Aboriginal Cultural Heritage Assessment Report (Appendix K of EIS) and Historical Heritage Impact Assessment (Appendix V of EIS). The reports conclude that the Concept SSDA will not generate any unacceptable impacts on the built and cultural heritage in the area. Refer to Appendices K and V and Sections 6.15 and 6.16 of the EIS.
(g) to promote good design and amenity of the built environment,	Design Quality Guidelines (Appendix Q of the EIS) and a Design Excellence Strategy (Appendix P) have been prepared to ensure future development contributes to a well-designed built environment.

Object	Consistency
(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,	The proposal is a concept only and proposes no physical works. A Construction and Environmental Management Plan has been prepared (Appendix M of the EIS) to outline the methods for ensuring future construction impacts are managed and mitigated.
(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State	The Concept SSDA, will be assessed by the DPE in accordance with the provisions of the EP&A Act.  All relevant government agencies and Parramatta Council will be consulted during the assessment process.
(j) to provide increased opportunity for community participation in environmental planning and assessment.	Sydney Metro is committed to a broad and inclusive public consultation process as outlined in the EP&A Act. For details, refer to Section 5 of the EIS.

### 4.3 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

In *Initial Action* it is established that it is a proposed development's consistency with the objectives of the development standard and the objectives of the zone that make a proposed development in the public interest. These matters are addressed below.

#### 4.3.1 Consistency with the objectives of the zone

The proposed development is consistent with the objectives of the B4 Mixed Use zone, as demonstrated in Table 2 below.

**Table 2 – Consistency with objects of B4 Mixed Use zoning**

Objective	Consistency
To provide a mixture of compatible land uses.	The Concept SSDA provides a mixture of retail, commercial office, and residential land uses. The proposed land uses are permissible with consent, and the EIS demonstrate that they are compatible with one another.
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.	The Concept SSDA is located directly above and adjacent to Parramatta metro station which will maximise public transport patronage and encourage walking and cycling.
To encourage development that contributes to an active, vibrant and sustainable neighbourhood.	The Concept SSDA delivers land uses, including retail tenancies, that will support an active, vibrant, and sustainable neighbourhood during both day and night.
To create opportunities to improve the public domain and pedestrian links.	The Concept SSDA has been designed to integrate with the public domain and pedestrian links being delivered under the

Objective	Consistency
	Stage 3 CSSI Application, including the Civic Link.
To support the higher order Zone B3 Commercial Core while providing for the daily commercial needs of the locality.	The Concept SSDA is located on land zoned B3 Commercial Core and B4 Mixed Use and has been designed as a holistic, integrated precinct. The proposal to facilitate a minimum of 1,000m <sup>2</sup> of commercial floor space in Building B on the B4 land is consistent with this objective.
To protect and enhance the unique qualities and character of special areas within the Parramatta City Centre.	The Concept SSDA is consistent with the desired future character of the Parramatta City Centre.

#### 4.3.2 Consistency with the objectives of the development standard

The proposed development is consistent with the objectives of the development standard to be varied, as addressed in Section 4.1.

## 5 Other matters for consideration

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Under clause 4.6(5), in deciding whether to grant concurrence, the Planning Secretary must consider the following matters:

*(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.*

These matters are addressed below.

### 5.1 **Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning**

The proposed variation to clause 7.24 does not raise any matters of significance for State or regional planning. The variation to the development standard will not contravene any overarching State or regional objectives or standards or have any effect outside of the site's immediate area.

### 5.2 **Clause 4.6(5)(b): The public benefit of maintaining the development standard**

Building B will accommodate approximately 1,114m<sup>2</sup> commercial floor area which is consistent with the objective of clause 7.24.

There is no public benefit in maintaining the development standard in terms of State and regional planning objectives. The Concept SSDA seeks approval for a total of 170,000m<sup>2</sup> of commercial GFA across the entire site, making commercial the predominant land use within the proposed development. Furthermore, the Concept SSDA provides station entrances which will create activation on Church Street as well as the Civic Link. There is no public benefit relocating commercial floor space from Building A, C or D to Building B for the sole purpose of compliance with clause 7.24.

### 5.3 **Clause 4.6(5)(c): Any other matters required to be taken into consideration by the Planning Secretary before granting concurrence**

Sydney Metro is not aware of any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.



## 6 Conclusion

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The assessment above demonstrates that compliance with clause 7.24 – ‘Commercial premises in Zone B4 Mixed Use’ under the PLEP 2011 is unreasonable and unnecessary in the circumstances of the case and that the justification for contravening the development standard is well founded.

This clause 4.6 variation demonstrates that, notwithstanding the noncompliance with clause 7.24, the proposal:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case
- There are sufficient environmental planning grounds to justify contravening the development standard
- Is in the public interest because it is consistent with the objectives of the zone and development standard.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the PLEP 2011.