

**CLAUSE 4.6 VARIATION
REQUEST
BOTANY BAY LEP 2013
CL 4.4 FLOOR SPACE RATIO**

**4 – 18 DONCASTER AVE,
KENSINGTON**

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1. INTRODUCTION

This Clause 4.6 variation request has been prepared by Urbis on behalf of Bluesky Commercial Asset Management Pty Ltd, the applicant for a development application for student accommodation at 4-18 Doncaster Ave, Kensington (**the site**).

The request seeks to vary the floor space ratio (**FSR**) development standard prescribed for the site under clause 4.4 of *Randwick Local Environmental Plan 2012 (RLEP)*.

The variation request is made pursuant to clause 4.6 of the RLEP. For a request to meet the requirements of clause 4.6(3) of RLEP, it must:

1. “adequately” demonstrate “that compliance with the FSR standard is unreasonable or unnecessary in the circumstances” of the project on the site; and
2. “adequately” demonstrate “that there are sufficient environmental planning grounds” to justify contravening the FSR standard.

This request contains justified reasoning supporting conclusions in respect of the above two matters, specifically that:

- Objectives of the development standard will be achieved, notwithstanding that the numerical limit of the FSR will be exceeded, and in doing so establishes that compliance with the standard is unreasonable or unnecessary (*Initial Action* at [17]) – **Refer to Section 6.3.1 of this Request**
- There are sufficient environmental planning grounds to support the proposed development, in that the bulk and scale of the development does not adversely impact the heritage values of the local heritage item on the site, notwithstanding the numerical limit of the FSR will be exceeded (*Initial Action* at [24]) – **Refer to Section 6.3.2 of this Request**

As stated in *Initial Action* at [25], clause 4.6(3) does not require the consent authority to form its own opinion of satisfaction regarding the matters identified in clause 4.6(3)(a) and (b), but only indirectly must be satisfied that the applicant’s written request has adequately addressed those matters. This request does that, and therefore the consent authority is open to be satisfied that subclause 4.6(3) has been met.

Following the receipt of concurrence from the Secretary, the remaining question for the consent authority is whether the proposed development will be in the public interest because:

1. It is consistent with the objectives of the development standard; and
2. It is consistent with the objectives for development within the zone.

While this request is not legally obligated to demonstrate satisfaction of clause 4.6(4) and (5), **Sections 6.3.3-6.3.6** of this request provides material to assist the consent authority to reach satisfaction that the development is consistent with the objectives for development within the R3 Medium Density Residential zone and usefully addresses the matters that the consent authority need to address when exercising the function of the Secretary.

2. ASSESSMENT FRAMEWORK

2.1. CLAUSE 4.6 OF RANDWICK LOCAL ENVIRONMENTAL PLAN 2012

Clause 4.6 of RLEP includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 are:

- *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a development application that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, clause 4.6 requires that the consent authority consider a written request from the applicant, which demonstrates:

- 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.*

Furthermore, 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 standard and the objectives for development within the zone, and the concurrence of the Secretary has been obtained.

In deciding whether to grant concurrence, subclause (5) requires that the Secretary 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 Secretary before granting concurrence.*

[Note: Concurrence is assumed pursuant to *Planning Circular No. PS 18-003 Variations to Development Standards* dated 21 February 2018].

This document forms a clause 4.6 written request to justify the contravention of the FSR development standard in clause 4.4 of the RLEP. The assessment of the proposed variation has been undertaken in accordance with the requirements of the RLEP, clause 4.6 Exceptions to development standards.

2.2. NSW LAND AND ENVIRONMENT COURT: CASE LAW

Several key New South Wales Land and Environment Court (**NSW LEC**) planning principles and judgements have refined the manner in which variations to development standards are required to be approached.

The correct approach to preparing and dealing with a request under clause 4.6 is neatly summarised by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118:

[13] The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.

*[14] The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see *Woolworths Ltd v Pallas**

Newco Pty Ltd (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135; [2000] HCA 5 at [28]; Winten Property Group Limited v North Sydney Council (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].

- [15] *The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.*
- [16] *As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in Wehbe v Pittwater Council at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.*
- [17] *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
- [18] *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
- [19] *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
- [20] *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
- [21] *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*
- [22] *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*
- [23] *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*

- [24] The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. 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. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].
- [25] The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant’s written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). As I observed in *Randwick City Council v Micaul Holdings Pty Ltd* at [39], the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), 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). The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant’s written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction: see *Wehbe v Pittwater Council* at [38].
- [26] The second opinion of satisfaction, in cl 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant’s written request has adequately addressed the matter in cl 4.6(4)(a)(ii).
- [27] The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development’s consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).
- [28] The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the *Planning Circular PS 18-003* issued on 21 February 2018, to each consent authority, that it may assume the Secretary’s concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.
- [29] On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the *Court Act*. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41].

3. SITE AND LOCALITY

3.1. THE SITE

The subject site is located at 4-18 Doncaster Ave, Kensington and comprises 10 individual lots. It is within the Randwick Local Government Area, in the Royal Randwick Racecourse State Significant Development (SSD) site. The site is approximately 4.5km south-east of the Sydney CBD.

The site is rectangular in shape with an area of 4,275sqm. It has frontage to Doncaster Ave to the west and adjoins the light rail holding yard to the east, as illustrated in **Figure 1**.

The site is currently vacant with the exception of two semi-detached, two-storey dwellings that are locally heritage listed (I122). The lot at 18 Doncaster Avenue while presently vacant has historically been used as informal access to the Randwick Racecourse precinct.

The site is relatively flat, from its existing ground level of RL 28.64m in the north-western corner of the site close to Doncaster Ave, through to the south-east corner of the site at RL 27.92m.

The subject site currently contains four vehicle crossings from Doncaster Ave, leading to driveways for the residential dwellings on the site.

Figure 1 – Subject Site



3.2. LOCAL CONTEXT

A locality image is provided at **Figure 2** demonstrating the location of the site in relation to Randwick Racecourse, Centennial Park, and the Sydney CBD. The site is situated in close proximity to the Carlton Street light rail stop and is a relatively short walking distance to Kensington Town Centre (within 500m) and the University of New South Wales Kensington Campus (within 1.2km). The site is highly accessible via public transport and is in close proximity to bicycle paths, which with the proximity to the University, makes the site well suited to student accommodation.

Figure 2 – Locality diagram



Development in the immediate locality is characterised by residential land uses comprising a mix of single dwellings, semi-detached dwellings and three to four storey residential flat buildings. Development on the western side of Doncaster Avenue comprises primarily residential flat buildings. Further to the west of the site is the Kensington Town Centre, which is affected by the draft Kensington to Kingsford Strategy, which received conditional gateway determination in December 2017.

The architectural package provided at **Appendix A** of the **Environmental Impact Statement (EIS)** includes a sheet illustrating the relationship between the proposed building scale and massing arrangement and the existing residential flat building development on the western side of Doncaster Avenue.

The site to the east, formerly part of the Randwick Racecourse site, is now occupied by the recently developed light rail holding yard. The holding yard is a low-rise structure with substantial floor plate. The structure extends the length of the subject site (and beyond) with a large masonry wall presenting to the eastern property boundary of the subject site.

To the south of the subject site are a series of single storey brick dwellings, the nearest of which is situated a nominal distance from the southern property boundary of the subject site. This interface is sensitive in the sense that it is situated on the southern side of the property and is inherently vulnerable to overshadowing.

A contextual analysis is provided at **Appendix A** of the **EIS** illustrating proximity to University facilities, the Kensington Town Centre and existing and developing public transport routes.

A detailed description of the subject site is provided in the **EIS** prepared by Urbis, accompanying the SSD Development Application.

3.3. PLANNING CONTEXT

The proposal is for student accommodation which is best characterised as a *boarding house* development under the RLEP. The site is zoned R3 Medium Density Residential. Boarding house development is permissible with consent. The proposal is permitted with consent. The proposed development complies with the 12m height limit for the site. The site contains a local heritage item (I122) known as “2 storey terraced pair” at 10-12 Doncaster Ave and is within the Racecourse heritage conservation area (C13).

State Environmental Planning Policy (State and Regional Development) 2011 (SRD SEPP) identifies development that is SSD. The proposal is declared to be SSD as it is proposed to be carried out on land identified as being within the Royal Randwick Racecourse Site and will have a capital investment value of more than \$10 million.

It is noted that part of the site falls outside the Royal Randwick Racecourse Site, being Lots 52A and 52B in DP 400051, however pursuant to clause 8(2) of the SRD SEPP, the whole development is declared to be SSD as development proposed across these allotments is inherently related to the SSD.

Figure 3 illustrates the site boundary in relation to the Royal Randwick Racecourse SSD area boundary.

Figure 3 – Royal Randwick Racecourse SSD site area



The *State Environmental Planning Policy (Affordable Rental Housing) 2009 (ARH SEPP)* aims to provide a consistent planning regime for the provision of affordable rental housing and to facilitate the effective delivery of new affordable rental housing by providing incentives by way of expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards.

The provisions of the ARH SEPP apply to boarding house developments. Part 2 Division 3 of the ARH SEPP sets out mandatory standards for boarding houses, and standards that cannot be used to refuse development consent if achieved.

The proposed development illustrated at **Appendix A** of the **Response to Submissions Report Addendum** has been designed to satisfy the mandatory standards for boarding houses established in clause 30 of the ARH SEPP. This includes provision of community living rooms, maximum floor space for boarding rooms (with the exception of the heritage building), provision for a boarding house manager, and minimum parking spaces for bicycles and motorcycles.

The proposed development has been designed to meet the standards that cannot be used to refuse consent under clause 29 of the ARH SEPP, with the exception of development density (clause 29(1)) and parking (clause 29(2)(e)).

Clause 29(1) provides for the site's base FSR of 0.9:1 to be increased up to an additional FSR of 0.5:1, but only if the site does not contain a heritage item. An FSR of 1.4:1 is proposed for the development, however as the site does contain a heritage item, this clause 4.6 variation request has been prepared to vary the FSR development control contained in the RLEP.

The proposed development would otherwise satisfy clause 29(1) for development density if the heritage listed item was excluded from the site area. In such an instance, the consent authority could not lawfully refuse the development with an FSR of up to 1.4:1 on the grounds of density or scale. Notwithstanding this provision and the location of the heritage listed item on the site, the additional 0.5:1 FSR can be accommodated on the site without adverse environmental impacts as demonstrated through this request and the EIS.

It is proposed that the car parking provision contained in clause 29(2)(e)(iia) is not met for this student accommodation development as evidence outlined within the EIS demonstrates that future occupants of the site would not require a car space for every second student. A more appropriate provision of on-site car parking is proposed that balances the community desire for the provision of on-site parking and the planning principle to minimise reliance on private car ownership where alternative transport is available.

Clause 29(4) functions to permit the consent authority to consent to development that does not accord with the development standards set out in clause 29(1) or (2). This request has been prepared pursuant to clause 4.6 of RLEP in relation to the FSR variation sought. A clause 4.6 variation is not required to be prepared for clause 29(2)(e)(iia) as there is no equivalent standard for car parking within RLEP.

4. THE PROPOSED DEVELOPMENT

4.1. DEVELOPMENT OVERVIEW

This clause 4.6 variation request relates to a proposed boarding house (student accommodation) development delivered under the provisions of RLEP and ARH SEPP.

The development is described as follows:

- Demolition of existing structures on site, with the exception of the locally heritage listed semi-detached pair of dwellings at 10 and 12 Doncaster Avenue which are proposed to be retained and repurposed.
- Construction of a three-storey student accommodation (defined as a boarding house) development comprising:
 - A gross floor area (GFA) of 5,860sqm which equates to a floor space ratio of 1.37:1.
 - A total of 259 beds, including a combination of rooms with private facilities and 'clusters' that rely on communal facilities.
 - Several communal rooms distributed over the three levels of the development with an aggregate area of 338sqm.
 - 434sqm of communal outdoor landscape areas.
- A single level of basement parking including waste and loading areas, 56 car parking spaces, 55 motorcycle spaces and 178 bicycle spaces.

A photomontage of the proposed development is provided below at Figure 4 and west elevation along the Doncaster Ave frontage at **Figure 5**.

The Architectural Plans detailing the proposal as prepared by Hayball Architects are attached at **Appendix A of the Response to Submissions Addendum**.

Figure 4 – Proposed Development



4.2. MASSING AND BUILT FORM

The proposed building elevations are highly articulated to provide a contextually appropriate built form. The articulation has been designed to reflect the vertical façade elements of the Victorian houses further south on Doncaster Ave.

The RLEP and the RDCP outline the desired character of the locality and the detailed controls for the redevelopment of the site. The proposal is substantially consistent with the built form envisaged for the site and will support the achievement of the objectives of the R3 Medium Density Residential zone.

4.3. URBAN DESIGN AND AMENITY

- Significant areas of landscaping and communal spaces are to be provided both internally and externally within the site, including communal study spaces, meeting rooms, kitchen and dining areas, courtyards with seating, BBQ and outdoor lounge area;
- The proposal complies with the maximum height limit of the site and surrounding area. In addition to complying with the numeric height of building standard that applies to the site, the proposed building height and scale is consistent with the three and four storey residential flat buildings on Doncaster Avenue;
- The proposal is consistent with the FSR of surrounding sites that include residential flat buildings, and notwithstanding the proposed FSR achieves 43% of the site as landscape area, and 23% of the site as deep soil area;
- Notwithstanding the proposed FSR on the site, the amended development provides building breaks along Doncaster Avenue to prioritise an east-west orientation of the building as read from the public domain, which is consistent with the prevailing streetscape pattern of Doncaster Avenue for residential flat buildings;
- The site is located in an ideal location for a student accommodation development which is facilitated by provisions within the ARH SEPP to incentivise in housing diversity and affordability;
- The site is located at the end of a street block and therefore does not interrupt a consistent or contiguous streetscape;
- Given the orientation and topography of the site and the scale of development permitted, it is reasonable to expect that additional overshadowing will occur to the property immediately to the south. The south-east corner of the development has been restricted to a single storey only, to reduce overshadowing impacts on this adjoining property;

- A development with a compliant FSR could have the same degree or greater of overshadowing upon the property to the south. It is noted that the Council previously approved a development on the subject site that was assessed against the Apartment Design Guide and the RDCP with commensurate shadow impacts than currently proposed;
- The proposal has incorporated a local heritage item within the development, while providing appropriate landscape curtilage around the item and maximising views to the heritage item from the public domain;
- The proposal complies with the RDCP front and side setback controls for medium density residential premises.

5. EXTENT OF CONTRAVENTION

5.1. VARIATION TO FLOOR SPACE RATIO CONTROL

The proposed development has a total GFA of 5,860sqm which equates to an FSR of 1.37:1. This utilises the 0.9:1 FSR for the R3 Medium Density Residential zone, as well as the bonus floor space ratio of 0.5:1 provided for boarding houses within clause 29(1) of the ARH SEPP.

However, the bonus FSR does not technically apply to the subject site as the site contains a heritage item. Notwithstanding the heritage status of part of the site, the theoretical maximum potential FSR is 1.4:1 when the 'bonus' FSR is included.

In recognising the heritage item on the site, this request seeks to vary the 0.9:1 FSR development standard prescribed for the site under clause 4.4 of the RLEP.

6. CLAUSE 4.6 VARIATION REQUEST: FLOOR SPACE RATIO

The following sections of the report provide an assessment of the request to vary the development standard relating to the maximum FSR in accordance with clause 4.6 of RLEP.

6.1. CLAUSE 4.4 FLOOR SPACE RATIO

The maximum FSR under the RLEP is 0.9:1. The objectives of the FSR development standard as per subclause 4.4(1) of the RLEP are as follows:

- (a) to ensure that the size and scale of development is compatible with the desired future character of the locality,*
- (b) to ensure that buildings are well articulated and respond to environmental and energy needs,*
- (c) to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item,*
- (d) to ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views.*

6.2. KEY QUESTIONS

Is the Planning Control a Development Standard?

The FSR control prescribed under clause 4.4 of the RLEP is a development standard capable of being varied under clause 4.6 of RLEP.

Is the Development Standard Excluded from the Operation of Clause 4.6?

The development standard is not excluded from the operation of clause 4.6 as it is not listed within clause 4.6(6) or clause 4.6(8) of RLEP.

What is the Underlying Object or Purpose of the Standard?

The objectives of the standard are clearly established in the relevant LEP as set out in Section 6.1 of this report.

6.3. CONSIDERATION

6.3.1. Clause 4.6(3)(a) – Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are listed within the 'five-part test' outlined in *Wehbe v Pittwater [2007] NSWLEC 827*. These tests are outlined in **Section 2.2** of this request (paragraphs [17]-[21]).

An applicant does not need to establish all of the tests or 'ways'. **It may be sufficient to establish only one way**, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way

The development is justified against one of the Wehbe tests as set out below.

Test 1: The objectives of the development standard are achieved notwithstanding non-compliance with the standard

The proposed development achieves the objectives of the development standard as outlined within **Table 1**.

Table 1 – Assessment of Achievement of Objectives of Floor Space Ratio standard

Objective	Compliance
<p><i>(a) To ensure that the size and scale of development is compatible with the desired future character of the locality</i></p>	<p>The building complies with the maximum height of building control. Development of the size and scale of the proposal, for the purposes of a multi-dwelling development or residential flat building is permitted within the R3 Medium Density Residential zone and is envisaged through the planning controls with a 12m height control.</p> <p>The proposed FSR complies with the base FSR under the RLEP plus the bonus FSR provided for in the ARH SEPP which incentivises boarding house development, notwithstanding there is a heritage item on the site. Lawfully the landowner could subdivide the heritage item so that it was no longer part of the site, and by doing so comply with the bonus maximum FSR with no requirement to change to the building form as proposed. However, it is considered a better outcome for the site to adaptively reuse the heritage building within the student accommodation development, rather than to be left isolated.</p> <p>The site is located close to the busy Alison Road, and provides an appropriate built form transition from Alison Road through to the lower density dwellings further south on Doncaster Ave. Being located at the end of a street and boundary of a residential neighbourhood, the proposed development does not interrupt a consistent or contiguous streetscape.</p> <p>Directly opposite the site the urban form is characterised by 3-4 storey residential flat buildings. The proposed development at 12m is comparable to this scale and thus would be viewed as in-keeping with the local character.</p> <p>Architecturally, the proposal includes articulation of the façade to reflect the articulation of the Victorian single storey dwellings south of the site on Doncaster Ave. The proposal also has compliant front and side setbacks, retains existing street trees and provides additional site landscaping, notably significant areas of landscaping fronting Doncaster Avenue within the communal open space area. The proposal will thus result in a contextually sympathetic and architecturally appropriate response to the character of the area.</p> <p>The spatial separation from the retained heritage items or the neighbouring properties are greater than previously approved by the Council and is supported by technical heritage advisors and Randwick Council in their submission on the DA. The proposed front building line is subservient to the heritage items on Doncaster Avenue, and the heritage items remain visible from the street and the public domain.</p> <p>The size and scale of the development is therefore compatible with the character of the locality.</p>
<p><i>(b) to ensure that buildings are well articulated and respond to environmental and energy needs</i></p>	<p>The design incorporates a range of elements that contribute to creating a well-articulated building form. These include:</p>

Objective	Compliance
	<ul style="list-style-type: none"> • Creating a distinct series of building forms with an approximate width of 12-15m to break up the street façade; • Utilising lighter colours on the ground/lower levels to emphasise the lower two storeys window placement; • The contrasting darker top level colours to create a varied visual colour and the visual effect of a stepped down of dominant forms of the building adjacent to the heritage item; • Use of primary and secondary vertical articulation expressed through either hoods on windows or protruding vertical elements out from the facade wall; and • As demonstrated within the revised Architectural Package generous solar access is provided to the communal open spaces and living rooms of the development. <p>These design techniques have the effect of reducing the appearance of bulk and breaking up the visual appearance of the proposed development when viewed from street frontages. The location of the heritage building along the Doncaster Ave frontage also provides significant visual interest and variation along this street frontage.</p> <p>Ecologically Sustainable Development measures have been incorporated into the proposal including passive design features such as high performance building fabric and glazing, external shading overhangs to facades with high solar exposure, access to natural ventilation and daylight, as well as high efficacy lighting, automated lighting controls, low water-dependent landscaping, and bicycle parking spaces.</p>
<p><i>(c) To ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item</i></p>	<p>The site is located to the extreme north of the racecourse heritage conservation area. To the north, east, and west of the site the surrounding development does not have any heritage value that would contribute to the scale and character of the conservation area. The site is therefore at the edge of the conservation area, and arguably should not be contained within it, given the extent of demolition approved on the site.</p> <p>Impacts on the conservation area to the east to the racecourse are considered particularly negligible, particularly as the light rail holding yard has been developed immediately east of the site within the conservation area.</p> <p>Impacts on the conservation area to the south is limited, and has been designed to be compatible with the rhythm, scale, and character of the conservation area through:</p> <ul style="list-style-type: none"> • The building massing south of the heritage item has been stepped back compared to the previously approved development to align with the front façade (not balcony) of the heritage listed terraces.

Objective	Compliance
	<ul style="list-style-type: none"> • View corridors are provided to the heritage item from the southern approach through the stepping back and proposed building separation of the new buildings and the heritage item. • As discussed above, vertical elements are included in the façade articulation to be in accordance with the Victorian dwellings to the south of the site along Doncaster Ave. The building massing is also broken down along Doncaster Ave to 12m-15m wide 'pavilions'. • The scale of the development has been reduced on the southern portion of the site to a part one to part three storey building. The building massing steps down to the property to the south. • The upper level of the building has been recessed to ensure a two-storey streetscape presentation is provided. <p>The proposal is for a contemporary student accommodation development which demonstrates high quality design and visual amenity. The development will be designed to integrate the heritage item on site within the student accommodation development, with the heritage building being used for student rooms with little amendment to the internal fabric of the buildings.</p>
<p><i>(d) To ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views</i></p>	<p>The proposed development complies with the 12m height limit for the site. Measures have been incorporated into the design of the façade including articulation, choice of materials and colours, as well as breaks in the façade, to reduce the visual bulk when viewed from street frontages.</p> <p>The neighbouring property to the south will be affected by overshadowing, notably in the afternoon, however this is to be expected and is reasonable due to the orientation of the site, the R3 Medium Density Residential zoning of the land and related development controls including the 12m height limit. The proposed development reduces potential overshadowing impacts on the building to the south by including only a single storey of development in the south-east corner.</p> <p>Similarly, the visual impact of the proposal is addressed by ensuring a one-storey building form is proposed east of the rear building line of 30 Doncaster Avenue for a depth of at least 13m from the site boundary. Further site boundary screen planting is proposed to mitigate the visual impact of a new development north of the site.</p> <p>Due to the relatively flat topography of the land and the existing outlook from adjoining or neighbouring properties, it is considered that there will be no loss of views to these properties as a result of the proposed development.</p> <p>Privacy screens have been provided to rooms at the southern end of the student accommodation so that the adjoining building to the south is not adversely impacted by overlooking.</p>

In summary, the objectives of the development standard are achieved (as required under clause 4.6(3)(a)) and the development is consistent with the objectives of the development standard (as required under clause 4.6(4)(a)(ii)) notwithstanding non-compliance with the standard.

Test 2: The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary

Not relied upon.

Test 3: The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable

Not relied upon.

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 compliance with the standard is unnecessary and unreasonable

Not relied upon.

Test 5: The zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary

Not relied upon.

6.3.2. Clause 4.6(3)(b) – Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard?

There are sufficient environmental planning grounds to justify the proposed variation to the development standard, including the following:

- The development is consistent with the Objects of the *Environmental Planning and Assessment Act 1979* by promoting the orderly and economic use and development of the land by maximising opportunities to provide housing diversity and affordable dwelling types for students within proximity of public transport, active transport infrastructure, and tertiary education.
- By allowing the inclusion of an FSR bonus for boarding houses, development on the site can compete with the private residential market and can therefore provide a diversity of housing choices, affordable housing, and options suitable to the demographics of the locality. This aligns with the aims of the ARH SEPP to facilitate the effective delivery of new affordable rental housing.
- The building complies with the maximum height control for the site and is consistent with the desired future character of the area, as demonstrated by compliance with the objectives of the R3 Medium Density Residential zone.
- Significant amounts of landscaped and communal outdoor spaces are provided to enhance the amenity for residents of the site. Notwithstanding the proposed FSR, the development achieves a significant portion of the site as landscaped area (site coverage only 57%) and 23% of the site as deep soil area. Notably the deep soil area proposed on the site is greater than what would be required under the NSW Apartment Design Guide.
- It is considered a better outcome for the site to repurpose the heritage building by incorporating it into the student accommodation development rather than it being subdivided out of the site area in order to 'safeguard' the additional FSR bonus, where heritage conservation may not be independently delivered.
- The buildings have been designed to be well articulated through window placement, choice of materials and colours and breaks in the street façades, all of which reduce the appearance of bulk and break up the façade of the proposed development when viewed from street frontages.
- The opposite side of Doncaster Ave is characterised by 3-4 storey residential flat buildings, with the proposed development being of a similar scale to those buildings. The development therefore forms a consistent character with the existing residential flat buildings at the northern end of Doncaster Ave.

- The proposed development is suitable in the context of the heritage conservation area within which it is located.
- Potential impacts upon the amenity of the surrounding area will be minor or can be mitigated to an acceptable level.

In conclusion, there are sufficient environmental planning grounds to justify contravening the development standard.

6.3.3. Clause 4.6(4)(a)(ii) – Will the Proposed Development be in the Public Interest Because it is Consistent with the Objectives of the Particular Standard and Objectives for Development within the Zone in Which the Development is Proposed to be Carried Out?

The proposed development is consistent with the objectives of the development standard as outlined within **Table 1** in **Section 6.3.1** of this Request.

The proposal is also consistent with the land use objective that applies to the site under RLEP as demonstrated within **Table 2** below. The site is located within the R3 Medium Density Residential zone.

Table 2 – Assessment of Compliance with Land Use Zone Objectives

Objective	Compliance
<i>To provide for the housing needs of the community within a medium density residential environment</i>	<p>The proposal will provide for student accommodation within a medium density residential environment, specifically, the proposal includes a three-storey development that is consistent with the height and scale of a number of residential flat buildings within close proximity of the site, and that are characteristic of new development within the locality.</p> <p>The proposal provides for the needs of the community, specifically by delivering purpose-built student accommodation within an area of high demand for affordable accommodation for students and young people.</p> <p>The site is particularly suitable for student accommodation as it is situated in close proximity to the Carlton Street light rail stops and is a relatively short walking distance to Kensington Town Centre (within 500m) and the University of New South Wales Kensington Campus (within 1.2km). The site is highly accessible via public transport and is in close proximity to bicycle paths, which with the proximity to the University, makes the site well suited to student accommodation.</p>
<i>To provide a variety of housing types within a medium density residential environment</i>	<p>The proposed development provides three storey student accommodation within an area characterised by private dwellings of a mixture of sizes and scales, from single storey detached dwellings to four storey residential flat buildings.</p> <p>Student accommodation is considered to provide variety to the housing types within the locality in that the purpose-built student accommodation will deliver communal living for students rather than relying on traditional market rental accommodation. Variety of housing types is also delivered within the development, including studio accommodation, twin rooms, and 'cluster style' accommodation that will suit different student needs and price points.</p> <p>If the development standard is maintained, the highest and best use for the site would otherwise be private residential flat buildings (also with a</p>

Objective	Compliance
	height of 12m) as was previously approved on the site. The proposal provides for a diversity of housing types in the locality that would otherwise not be delivered by a compliant scheme.
<i>To enable other land uses that provide facilities or services to meet the day to day needs of residents</i>	N/A
<i>To recognise the desirable elements of the existing streetscape and built form or, in precincts undergoing transition, that contribute to the desired future character of the area</i>	<p>While the existing built form on the site consists of a heritage item and previously low scale housing, recent population growth and increases in planning controls in the locality (Kensington to Kingsford corridor especially) in response to the additional investment in public transport in proximity to the area, is transforming Kensington for additional residential populations.</p> <p>The proposal recognises the desirable elements of the eastern side of Doncaster Avenue and the heritage conservation area, including the scale of the retained heritage item and the natural materiality of the conservation area, however, the development provides a scale that is consistent with opposite residential flat buildings and is consistent with the future character of the area. The proposed buildings have been articulated in building massing and scale, to provide building breaks along the streetscape to reduce the perception of scale of the development. The proposed buildings have also been articulated using material and colours to reflect a two-storey form with metal cladding upper levels.</p> <p>Articulation and variety in material and colours are incorporated into the façade of the proposed development to contribute to the desired future character of the area, while taking inspiration for building elements from the past. Significant new landscaping is proposed along the Doncaster Avenue streetscape, including within the communal open space, which will reduce the perception of the scale of the development from the public domain.</p> <p>The façade of the proposed development is designed with vertical elements to reflect the existing streetscape/built form elements provided by the single storey Victorian dwellings south of the site.</p>
<i>To protect the amenity of residents</i>	<p>The site is well positioned with only one direct residential neighbouring property. The development is therefore positioned away from a conglomerate of sensitive land uses.</p> <p>The amenity of residents will be protected through mitigation of overshadowing impacts on the adjoining building to the south by including only a single storey of development in the south-east corner.</p> <p>Privacy screens have been provided to rooms at the southern end of the student accommodation so that the adjoining building to the south is not impacted by overlooking. Visual impact of the proposal from the neighbouring property has been addressed through the reduction in scale at the south-east corner, increasing the amount of sun access</p>

Objective	Compliance
	<p>compared to a compliant residential flat building scheme, and through significant boundary screen planting as illustrated within the Landscape Plans included at Attachment F of the Response to Submissions Report</p> <p>The proposed development will provide a high level of amenity for future residents of the development and will not adversely impact upon other aspects of amenity for neighbouring residents.</p>
<i>To encourage housing affordability</i>	The proposal addresses housing affordability through the provision of a variety of student accommodation room types that suit various price points and by alleviating rental pressures on the private housing market from student demand.

The proposal is considered to be in the public interest as the development is consistent with the objectives of the development standard, and the land use objectives of the zone.

6.3.4. Clause 4.6(5)(a) – Would Non-Compliance Raise any Matter of Significance for State or Regional Planning?

The proposed non-compliance with the FSR development standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case given the location of a heritage item on the site, and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

6.3.5. Clause 4.6(5)(b) – Is There a Public Benefit of Maintaining the Planning Control Standard?

The proposed development achieves the objectives of the FSR development standard and the land use zoning objectives despite the non-compliance, and the contravention has been demonstrated to be appropriate and supportable in the circumstances of the case. There would be no public benefit in maintaining the development standard in this case, as:

- Heritage values of the retained heritage items have been maintained;
- Adequate setbacks are provided to the retained heritage items, and to the site boundaries; and
- Maintaining the standard would not deliver affordable and varied purpose-built student accommodation, and as such there would continue to be additional strain on the private rental housing market in the locality.

6.3.6. Clause 4.6(5)(c) – Are there any other matters required to be taken into consideration by the Secretary before granting concurrence?

The Planning Circular PS 18-003, issued on 21 February 2018 (**Planning Circular**), outlines that consent authorities for SSD may assume the Secretary's concurrence where development standards will be contravened.

Nevertheless, there are no known additional matters that need to be considered within the assessment of the clause 4.6 request and prior to granting concurrence, should it be required.

DISCLAIMER

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This report has been prepared with due care and diligence by Urbis and the statements and opinions given by Urbis in this report are given in good faith and in the reasonable belief that they are correct and not misleading, subject to the limitations above.

APPENDIX A ARCHITECTURAL DRAWING PACKAGE



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