

06 June 2019

Regional Assessment  
Department of Planning and Environment  
320 Pitt Street,  
SYDNEY NSW 2001



**Attention:** Lawren Drummond

## Clause 4.6 Variation to Development Standard Statement

**RE: SSD 8019 MOD 1 – 21 Honeysuckle Drive, Newcastle NSW 2300**

**Our Ref: 18307**

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### 1 Introduction

The development to which this submission relates is for the modification of consent for SSD8019 under the *Environmental Planning and Assessment Act 1979* (EP&A Act 1979) for amended to the approval floor plans for the mixed-use development approved at 21 Honeysuckle Drive, Newcastle NSW 2300.

This addendum supplements the original Clause 4.6 Variation Statements prepared by SJB for SSD8019 titled *Clause 4.6 – Exceptions to Development Standards – Height of Buildings (Cl. 4.3)* (dated 10.11.2017) and *Clause 4.6 – Exceptions to Development Standards – Maximum FSR (Cl. 4.4(2))* (dated 30.11.2017).

Specifically, this Section 4.55 Modification seeks approval for numerous minor internal and external alterations, predominately related to the below:

- Reconfiguration of apartments resulting in the amalgamation of 12 apartments into 6 apartments, and the reduction of the number of adaptable apartments from 16 to 15 apartments.
- Removal of 30 AC condenser rooms to increase 1-bedroom units' size for corner 1-bedroom apartments fronting Honeysuckle Drive.
- Additional storage included in 1-bedroom.
- Commercial tenancy on corner of Worth Place and Honeysuckle Drive balcony amended.
- Façade amendment to incorporate bay windows on Building A and changes to materiality.
- Removal of communal open space on the rooftop of Building C including the lift and stair access, the lobby, WD, pergola, landscaping and all associated elements.
- The location of the plant area on Building A, Building B and Building C have been updated and repositioned.
- Other minor modification as documented in the architectural plans provided by SJB and dated 15.05.19.

The development controls sought to be varied are contained in Clause 4.3 and Clause 4.4 of the *Newcastle Local Environmental Plan 2012* (NLEP 2012) which relate to height of buildings and floor space ratio.

An assessment of the variation is provided in the following pages, in accordance the requirements of Clause 4.6 of the LEP 2012. This variation has been prepared generally in accordance with the NSW Department of Planning and Infrastructure's publication "Varying Development Standards: A Guide" (August 2011), which identifies matters to be addressed in an application to vary a development standard.

The objectives of clause 4.6 are to provide an appropriate degree of flexibility in applying the development standards to achieve better outcomes for, and from, development.

The proposed variation is considered reasonable on the basis that:

- The proposal meets the underlying intent of the controls and is compatible form of development that does not result in unreasonable environmental amenity impact;
- The proposed development will further reinforce the long-term viability of the Honeysuckle Precinct of Newcastle providing high quality residential accommodation close to public transport;
- The proposed development has been architectural designed to present as three buildings through the articulation and indention which minimises the overall bulk of the development;
- The proposed built form will not result in an overbearing visual impact, with much of the excess height due to the plant decks and communal open spaces, which are setback from street view; and
- The additional building height resulting from the exceedance does not result in any significant impact on adjoining properties, particularly with respect to view impact to 10 Worth Place, loss of privacy and loss of views.

Accordingly, the proposal is considered to be consistent with the strategic objectives of LEP 2012, as well as the objectives of Clause 4.3 and Clause 4.4. Therefore, notwithstanding that the proposed development is not consistent with the numerical height and floor space ratio standards in LEP 2012, the non-compliance is considered to be acceptable.

## 2 Site Details

The site is located on the corner of Honeysuckle Drive and Worth Place, which forms part of the Honeysuckle Precinct with the Newcastle local government area (LGA). The subject site is legally identified as Lot 2 in DP 1236735. The Honeysuckle Precinct is located with the Newcastle City Centre and to the west of the Newcastle CBD. The site area is 7,292m<sup>2</sup>.

The character of the immediate locality is mixed, and included residential, commercial and public use buildings. To the south of the site on the opposite side of Honeysuckle Drive is a range of seven (7) storey commercial buildings.

**Figure 1 – Aerial View of the site (Source: SIX Maps)**



### 3 Exception to Development Standards

The Department of Planning and Environment's publication "*Varying Development Standards: A Guide*" (August 2011), states that:

*The NSW planning system currently has two mechanisms that provide the ability to vary development standards contained within environmental planning instruments:*

- *Clause 4.6 of the Standard Instrument Local Environment Plan (SI LEP); and*
- *State Environment Planning Policy No 1 – Development Standards (SEPP1).*

In this instance, SEPP 1 does not apply as the NLEP 2012 is a Standard Instrument LEP. It is noted that the Guidelines do not identify any other mechanisms (such as a Planning Proposal) to vary a development standard.

#### 3.1 Clause 4.6

Clause 4.6 of the NLEP 2012 aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better planning outcomes.

*(1) The objectives of this clause are as follows:*

*(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*

*(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

*(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

The proposal seeks to vary the building separation standard applicable to the site and does not introduce new controls across an area. The Clause 4.6 guidelines also express when this clause is not to be used, namely:

*"...in Rural or Environmental zones to allow subdivision of land that will result in 2 or more lots less than the minimum area specified for such lots by a development standard, or the subdivision of land that will result in any lot less than 90% of the minimum area specified for such lots by a development standard in the following SI zones: Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Rural Small Holdings, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living."*

Neither the site nor the proposal is included within these criteria and therefore, the use of Clause 4.6 is an appropriate mechanism to seek to vary the building separation standards in this instance.

#### 3.2 Legal Context to Varying Development Standards

This submission has been prepared having regard to the latest authority on Clause 4.6, contained in the following NSW Land and Environment Court (Court) judgements:

- Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46
- Wehbe v Pittwater Council [2007] NSWLEC 827
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 (Four2Five No 1)
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 (Four2Five No 2)

- Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 (Four2Five No 3)
- Moskovich v Waverley Council [2016] NSWLEC 1015
- Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7

In the decision of *Moskovich v Waverley Council* [2016] NSWLEC 1015 it was deemed consistent with the decision in Four2Five and the Court agreed that the public interest test (incl 4.6(4)(a)(ii)) is different to the "unreasonable or unnecessary in the circumstances of the case" test (incl 4.6(3)(a)). The Court said that "*the latter, being more onerous, would require additional considerations such as the matters outlined by Preston CJ in Wehbe at [70-76]*".

*Randwick City Council v Micaul Holding Pty Ltd* [2016] NSWLEC 7 documents a decision of the Chief Judge of the Court in an appeal against a decision of Commissioner Morris to uphold a request under clause 4.6 of the Randwick LEP 2012 to vary development standards relating to the height and FSR of a building.

The Chief Judge observed at paragraph 39 of his judgement that clause 4.6(4) of the Standard Instrument does not require the consent authority to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed those matters. This lessens the force of the Court's earlier judgement in Four2Five that a variation request must demonstrate consistency with the objectives of the standard in addition to consistency with the objectives of the standard and zone.

The objection principles identified in the decision of Justice Lloyd in *Winten v North Sydney Council* are outlined below:

- (1) *Is the planning control in question a development standard;*
- (2) *What is the underlying object or purpose of the standard;*
- (3) *Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act 1979;*
- (4) *Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;*
- (5) *Is a development which complies with the development standard unreasonable or unnecessary; and*
- (6) *Is the objection well founded.*

In the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827, Chief Justice Preston outlined the rationale for development standards, and the ways by which a standard might be considered unnecessary and/or unreasonable. At paragraph 43 of his judgement Preston CJ noted:

*"The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)."*

*Wehbe V Pittwater* [2007] NSW LEC 827 also established the 'five-part test' to determine whether compliance with a development standard is unreasonable or unnecessary based on the following:

- (1) *Would the proposal, despite numerical non-compliance, be consistent with the relevant environmental or planning objectives;*
- (2) *Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;*
- (3) *Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;*



(4) Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or

(5) Is the "zoning of particular land" unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently, compliance with that development standard is unnecessary and unreasonable.

Of particular relevance in this instance is Part 1, that "the proposal, despite numerical non-compliance, [would] be consistent with the relevant environment or planning objectives".

## 4 Development Standard to be Varied

This section pertains to the "Application form to vary a development standard" by the Department of Planning and Environment.

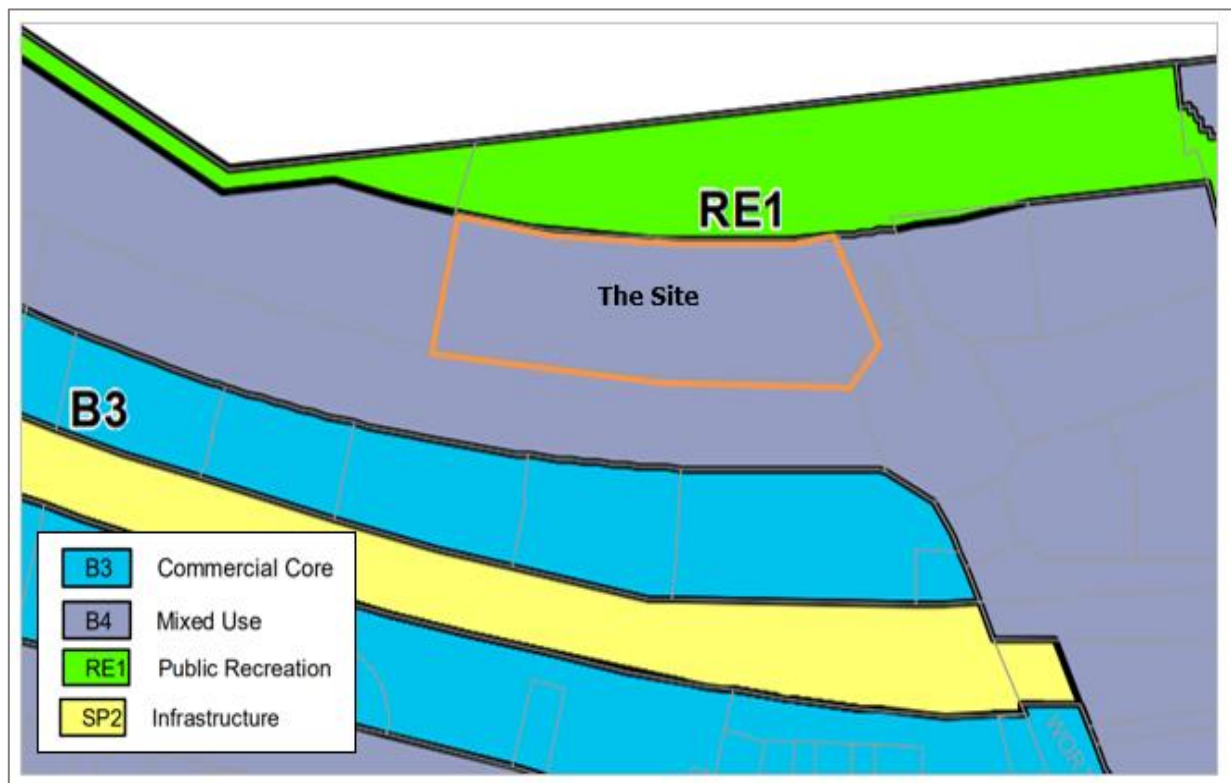
What is the name of the environmental planning instrument that applies to the land?

Newcastle Local Environmental Plan 2012 (LEP 2012).

What is the zoning of the land?

LEP 2012 indicates that the site is within the B4 Mixed Use, as illustrated in Figure 2.

**Figure 2 – Land Zoning Map Extract (Map LZN\_004G)**



What are the objectives of the zone?

- To provide a mixture of compatible land uses.
- 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.

- *To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.*

Comment: The proposal will provide a mix of compatible land uses including retail/commercial spaces and residential apartments in a highly accessible and desirable location. The subject site is within easy walking distance of established and emerging business and retail development within the Honeysuckle Precinct and the broader Newcastle City Centre. The overall development will result in a truly mixed-use precinct to live, work and play in close proximity to the many attractive features associated with Newcastle.

What are the development standards being varied?

The building height development standard contained in Clause 4.3 and floor space ratio standard contained in Clause 4.4 of the LEP 2012.

Are the standards to be varied a development standard?

Yes, the standards are each considered to be a development standard in accordance with the definition contained in Section 4(1) of the *Environmental Planning and Assessment Act 1979*; and not a prohibition. Clause 7.4 is also not listed under Clause 4.6(8) as a development standard that is not able to be varied.

What are the objectives of the development standard?

The objectives of Clause 4.3 – Height of Buildings are as follows:

*(a) to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,*

*(b) to allow reasonable daylight access to all developments and the public domain.*

The objectives of Clause 4.4 – Floor Space Ratio are as follows:

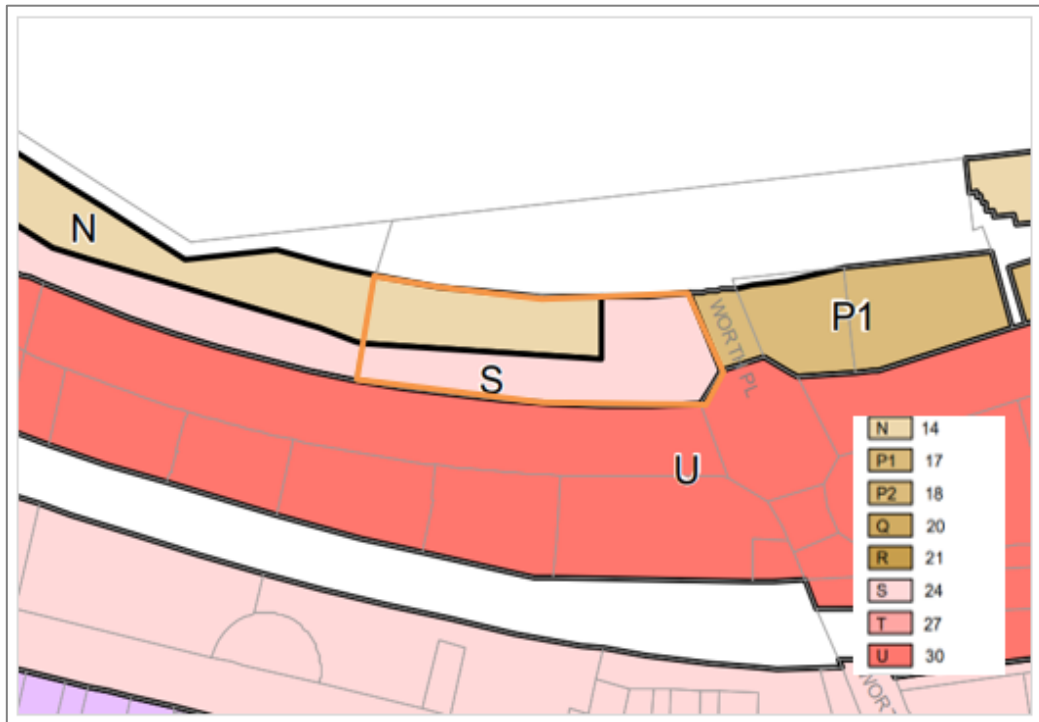
*(a) to provide an appropriate density of development consistent with the established centres hierarchy,*

*(b) to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.*

What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.3(2) establishes a maximum height of buildings for the site. The site has a maximum permissible height of buildings of 14.0m to 24.0m, in accordance with the Height of Buildings Map below in Figure 3.

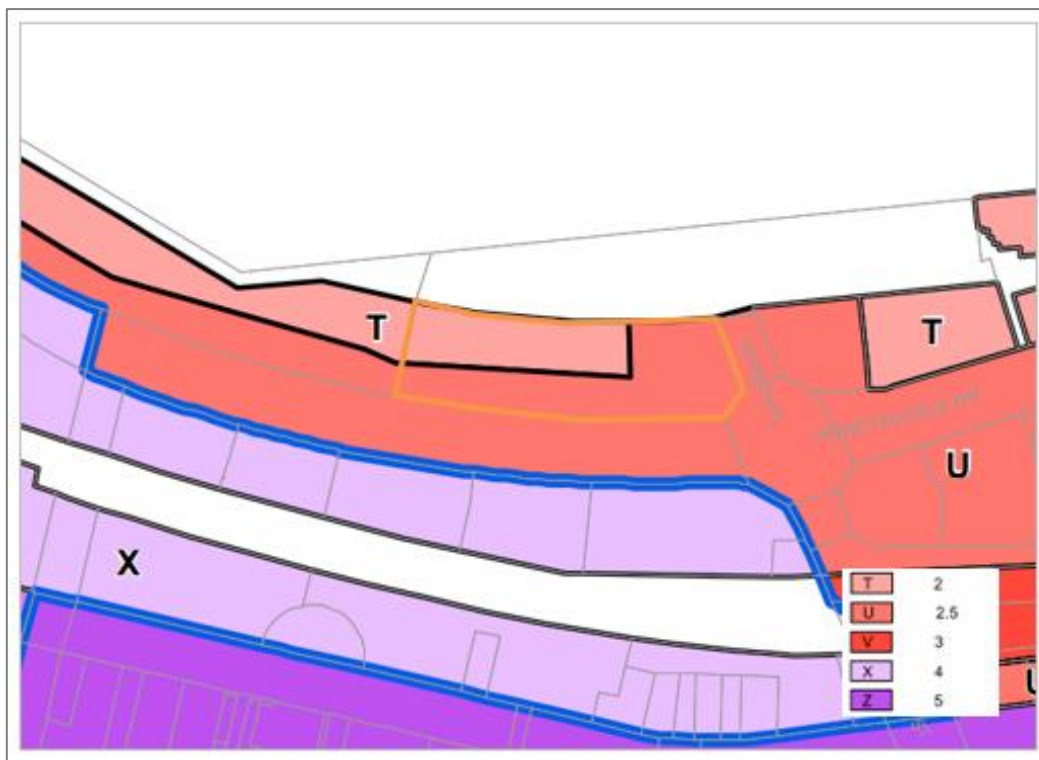
**Figure 3 – Height of Buildings Map Extract (Map HOB\_004G)**



Clause 4.4 establishes two (2) FSR controls for the site including:

- A maximum FSR of 2.1 running along the northern frontage of Worth Place Park West; and
- A maximum FSR of 2.5:1 running along the southern frontage and wrapping around the eastern side boundary to Worth Place (see Figure 4 below).

**Figure 4 – Floor Space Ratio Map Extract (Map FSR\_004G)**



What is the proposed numeric value of the development standard in your development application?

The numeric value of the proposed development and percentage variation are detailed in the following table.

Clause	Control	Approved	Proposed	Change	Variation to LEP
Clause 4.3 Building Height	Part 14m	Building A – Terraces (Roof Parapet) – 7.4m/RL 9.50	Building A – Terraces (roof parapet) 7.7m/ RL9.80	+0.3m	Nil Variation
		Building A – Apartments (Pergola main roof) – 26.11m/RL 28.38	Building A – Apartments (Pergola main roof) – 26.23m/RL 28.50	+0.12m	<b>87.4%</b>
		Building B – Terraces (Roof Parapet) – 7.4m/RL 9.50	Building B – Terraces (roof parapet) 7.7m/ RL9.80	+0.3m	Nil Variation
		Building B – Apartments (Pergola main roof) – 26.11m/RL 28.38	Building B – Apartments (Pergola main roof) – 26.23m/RL 28.50	+0.12m	<b>87.4%</b>
	Part 24m	Building A – Apartments (main roof) – 22.5m/RL 25.30	Building A – Apartments (main roof) – 22.55m/RL 25.35	+0.05m	Nil Variation
		Building A – Lift Overrun – 26.98m/RL 29.60	Building A – Lift Overrun – 26.78m/RL 29.40	-0.2m	<b>11.6%</b>
		Building B – Apartments (main roof) – 22.5m/RL 25.30	Building B – Apartments (main roof) – 22.55m/RL 25.35	+0.05m	Nil Variation
		Building B – Lift Overrun – 25.98m/RL 28.60	Building B – Lift Overrun – 26.78m/RL 29.40	-0.2m	<b>11.6%</b>
		Building C – Terraces (Roof Parapet) – 7.4m/RL 9.50	Building C – Terraces (roof parapet) 7.7m/ RL9.80	+0.3m	Nil Variation
		Building C – Apartment (main roof) – 23m/ RL 25.70	Building C – Apartments (main roof) – 22.55m/RL 25.35	+0.05m	Nil Variation
		Building C – Lift Overrun – 27.28m/ RL 29.60	Nil Lift Overrun	N/A	N/A
			Building C – Plant – 25.13m/27.45 RL	N/A	<b>4.7%</b>



Clause	Control	Approved	Proposed	Change	Variation to LEP
Clause 4.4. – Floor Space Ratio	Part FSR 2.0:1	GFA: 4,707m <sup>2</sup> Portion Area: 2,820m <sup>2</sup> FSR: 1.6:1	GFA: 4,843m <sup>2</sup> Portion Area: 2,820m <sup>2</sup> FSR: 1.72:1	+ 136m <sup>2</sup> + 0.12:1	Nil Variation to LEP
	Part FSR 2.5:1	GFA: 12,156m <sup>2</sup> Portion Area: 4,472m <sup>2</sup> FSR: 2.7:1	GFA: 12,328m <sup>2</sup> Portion Area: 4,472m <sup>2</sup> FSR: 2.76:1	+172m <sup>2</sup> +0.6:1	<b>10.3%</b>
	Combine	GFA: 16,863m <sup>2</sup> Site Area: 7,292m <sup>2</sup> FSR: 2.3:1	GFA: 17,171m <sup>2</sup> Site Area: 7,292m <sup>2</sup> FSR: 2.35:1	+308m <sup>2</sup> +0.5:1	Overall site compliant. However, variation to part 2.5:1 section of the site

Please refer to Attachment A for previous calculations.

**Note:**

Newcastle LEP 2012 defines building height as the following:

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

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

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like

The numeric values used in the table above are the vertical distance from ground level (existing) to the highest point of the building, as opposed to the RL of the building.

## 5 Justification for the Contravention

This section addresses Section (3), (4) and (5) of Clause 4.6 and seeks to justify the contravention from development standard clause 7.4.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

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

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

*(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

*(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

*(b) the concurrence of the Secretary has been obtained.*

*(5) In deciding whether to grant concurrence, the Secretary must consider:*

*(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*

*(b) the public benefit of maintaining the development standard, and*

*(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*

## 5.1 Compliance is Unreasonable or Unnecessary

As mentioned above, compliance with a development standard might be shown as unreasonable or unnecessary if the objectives of the standard are achieved notwithstanding noncompliance with the standard.

### Height

The proposed development achieves the objectives of Clause 4.3:

*(a) to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,*

The proposed development has been designed by SJB and consists of a high quality, architecturally designed building that makes a positive contribution to the street frontage and built form of Honeysuckle Drive. The projection of the building above the height limit will not result in an overbearing visual impact, as the exceedance is largely a result of the plant deck and communal open space.

The proposed configuration responds to the environmental and planning objectives whilst considering the surrounding context, in particular the commercial and residential buildings to the south of the site fronting Honeysuckle Drive. The built form steps down from seven storeys to two storeys from the rear towards Worth Place Park to provide an appropriate transition to the streetscape.

The non-compliance with the 24m height control predominantly relates to the provision of communal open space and plant on the rooftop of all buildings. Numerous locations for the plant were explored including external to the building on the side, integrated into the building design and different location on the rooftop. It was concluded that the overall location of the plant minimises the view impact on neighbouring buildings as the plant has been strategically positioned to the southern inset parapet.

It is considered the proposed development which has been subject to numerous urban and view assessments, under this modification and original SSD application, would make a positive contribution to the existing built environment by providing a transition in building heights appropriate for the existing planning controls and existing buildings within the locality.

Further, it is evident that the proposed plant on Building C will have a negligible impact in terms of the impact of views from the properties at 10 Worth Place. The Department should consider permitting plant on Building C's roof top as the proposal will have a negligible impact in terms of view impacts as demonstrated by the above view loss test and view impact assessment from SJB. Numerous options have been considered in relation to the location of the AC condenser units and the proposed is considered the most appropriate from an overall serviceability, architectural design and amenity perspective.

It is noted that although there will be an increase in height for some sections of the building the maximum height of the building will not exceed the previously approved height of 26.98m/RL 29.60 (Building A and Building B lift overrun). In this regards the clause 4.6 is limited in nature only to the components of the building that are to be modified.

*(b) to allow reasonable daylight access to all developments and the public domain.*

The solar access analysis has demonstrated that the proposed building, including the portions of the building that are non-compliant with the height control, do not result in adverse solar access impacts on surrounding existing or potential future development.

The amenity of adjoining properties will not be diminished to any unreasonable extent as a result of the height exceedance. The proposed development does not compromise the ability of adjoining land to develop and achieve their intended built form. The proposed development achieves the objectives of this clause and therefore strict compliance with a height limit would be unreasonable, unnecessary and would not achieve a greater planning or urban design outcome.

#### FSR

The proposed density is consistent with the combined FSR standard over the entire site as demonstrated in the above table. Despite the variation for the 2.5:1 component of the site, the proposed development makes a positive contribution towards the streetscape of Newcastle. The cumulative proposed density of the development is 2.35:1. The proposal is a modern architecturally designed building providing a high level of amenity on the site.

The bulk and scale of the development is minimised through high quality design by SJB. The visual bulk of the building is broken by the horizontal architectural expression and articulation of the building into three elements through intention and materiality. Visually, the stepped building form provides for a more interesting façade and composition that reduces building height to Worth Place Park whilst providing articulation and through-site links.

## 5.2 Sufficient Environmental Planning Grounds to Justify Contravention

This submission demonstrates that the resultant environmental impacts of the proposal are considered to be satisfactory. If made to strictly comply with Clause 4.3 and Clause 4.4 there would be no additional benefit to the streetscape or public domain in the local area.

In respect to view impact, the Land and Environment Court (LEC) have established 'planning principles' for views (general principles) and impacts on public domain views. To ascertain whether the proposed view sharing impacts are reasonable, KDC has followed a four-step assessment in accordance with the principles established by Tenacity Consulting Vs Warringah [2004] NSWLEC 140. The steps/principles adopted in the decision are:

1. *assess what views are affected and the qualitative value of those views*
2. *consider from what part of the property the views are obtained*
3. *assess the extent of the impact (from 'negligible' to 'devastating')*
4. *assess the reasonableness of the proposal that is causing the impact.*

In this instance the view that needs to be assessed is that from 10 Worth Place. 10 Worth Place is a 10-storey residential building containing 71 apartments, of which 43 of these apartments have a northerly aspect with views norths, east and west of the Hunter River and districts views of the Hunter.

The proposed development will obstruct all views from residential level seven and below of 10 Worth Place, with some view retained from north-east located apartments. The uppermost two levels will retain views towards the water over the proposed development. The communal rooftop areas on Buildings A and B and revised plant only affect a small portion of the district land views to the west and do not affect views of high significance. The view impact to levels eight and nine is considered moderate and acceptable.

Figure 5 illustrates an impact comparison between SSD8019 (with Condition B2 changes) and the proposed modification, it is evident that the view impact as a result of the modification is minimal.

**Figure 5 – SSD 8019 (with Condition B2 Changes) Vs SSD 8019 MOD 1 Impact Assessment (as proposed)**



It is evident that the proposed plant on Building C will have a negligible impact in terms views from the properties at 10 Worth Place. The Department should consider permitting plant on Building C's roof top as the proposal will have a negligible impact in terms of view impacts as demonstrated by the above view loss test and view impact assessment from SJB. Numerous options have been considered in relation to the location of the AC condenser units and the proposed is considered the most appropriate from an overall serviceability, architectural design and amenity perspective.

### 5.3 Public Interest

As demonstrated above, the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives of the zone.

The proposed development's ability to meet the objectives of the development standards sought to be varied are discussed at length in Section 5.1 of this variation justification report. It is clear from this discussion that the public interest will be well served by the proposed development's attainment of the objectives of these two development standards which are sought to be varied.

The intent of the mixed-use zone is to provide a wide range of retail, business, residential, and other suitable and compatible land uses within a mixed-use development. The proposal is a mixed-use development which incorporates retail and residential components. These uses are compatible with the objectives of the zone and will complement surrounding land uses and strengthen the Honeysuckle Foreshore Precincts and broader Newcastle City Centre.

The proposed development will provide a number of significant public benefits including contributing to the mix of land uses in the locality, creating employment opportunities during construction and operational stages as well as providing retail space and residential dwellings close to public transport. The proposed development represents a high-quality urban design, which seeks to continue to redevelop and enhance the Honeysuckle Precinct. The non-compliances do not outweigh the merits of the proposal and its contribution to the social fabric and built form of Honeysuckle.

## 6 Conclusion

This Clause 4.6 Variation to Development Standard submission has been prepared in response to numerical non-compliance with the development standard for Clause 4.3 Height of Buildings and Clause 4.4 Floor Space Ratio in LEP 2012. The extent of non-compliance is considered acceptable in the context of the site given the type, location and scale of the development proposed.

The modified proposal will not result in unacceptable impacts with regards to the amenity of surrounding properties and view loss. As demonstrated within this submission, the overall massing, scale, bulk and height of the proposed development is consistent with the desired future character envisioned for the Honeysuckle Precinct.

The modified proposal is aligned with the objectives of the B4 Mixed Use zone and the objectives of both Clause 4.3 and Clause 4.4 of the LEP 2012. The additional building height for Building C is a result of further mechanical engineering design and will not have a significant impact on 10 Worth Place. Further, the additional floor space ratio is a

The variations allow for the orderly and economic use of the land in an appropriate manner, whilst allowing for a better outcome based on planning merits and public benefit. Further, the proposal will not result in any unreasonable impact on amenity or any significant adverse environmental impacts as a result of the variations, which have been arrived at after a design excellence process that involved testing and amending the design to achieve the most appropriate massing of development for the site.

The Department can be satisfied that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development and that there are sufficient environmental planning grounds to justify contravening the development standards.

It is therefore requested that the Department grant development consent for the proposed development.

Yours sincerely



Naomi Weber  
**Town Planner**  
**KDC Pty Ltd**



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Attachment A – Previous Clause 4.6 Variation Statements (SJB)

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## Clause 4.6 – Exceptions to Development Standards – Height of Buildings (Cl. 4.3)

**Address:** 50 Honeysuckle Drive, Newcastle

**Proposal:** Mixed use commercial/residential development.

### 1.0 Introduction

This is a written request to seek an exception to a development standard under Clause 4.6 – Exceptions to Development Standards of the Newcastle Local Environmental Plan (NLEP) 2012.

The development standard for which the variation is sought is Clause 4.3 Height of Buildings under the NLEP.

This application has been prepared in accordance with the NSW Department of Planning and Environment (DP&E) guideline, *Varying Development Standards: A Guide*, August 2011, and has incorporated as relevant the latest authority on Clause 4.6, contained in the following judgements:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009* ('Four2Five No 1');
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* ('Four2Five No 2');
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248* ('Four2Five No 3');
- *Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386;* and
- *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7.*

The following sections of this written request demonstrate that the proposed development addresses the principles identified in the above judgements.

### 2.0 Description of the Planning Instrument, Development Standard and Proposed Variation

#### 2.1 What is the name of the environmental planning instrument that applies to the land?

The Newcastle Local Environmental Plan (NLEP) 2012.

#### 2.2 What is the zoning of the land?

The land is zoned B4 Mixed Use.

### **2.3 What are the Objectives of the zone?**

The objectives of the B4 Mixed Use zone are as follows:

- To provide a mixture of compatible land uses;
- 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; and
- To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.

### **2.4 What is the development standard being varied?**

The development standard being varied is the height of buildings development standard.

### **2.5 Is the development standard a performance based control? Give details.**

No. The height of buildings development standard is a numerical control.

### **2.6 Under what clause is the development standard listed in the environmental planning instrument?**

The development standard is listed under Clause 4.3 of NLEP 2012.

### **2.7 What are the objectives of the development standard?**

The objectives of the development standard are contained in Subclause 4.3(1)(a) to (e), and are reproduced below:

- “(a) to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,*
- (b) to allow reasonable daylight access to all developments and the public domain.”*

### **2.8 What is the numeric value of the development standard in the environmental planning instrument?**

Clause 4.3(2) establishes a maximum height of buildings for the site. The site the subject of the variation request has a maximum permissible height of buildings of 14.0m to 24.0m for the site, in accordance with the Height of Buildings Map below in Figure 1.



**Maximum Building Height (m)**

L	8.5
K	10
J	11
M	12
N	14
P1	17
P2	18
Q	20
R	21
S	24
T	27
U	30
V	35
X	45
AA	60
AB	90

**Maximum Building Height (RL)**

Heights shown on map in RL (m)
49.1
54.5
58.9

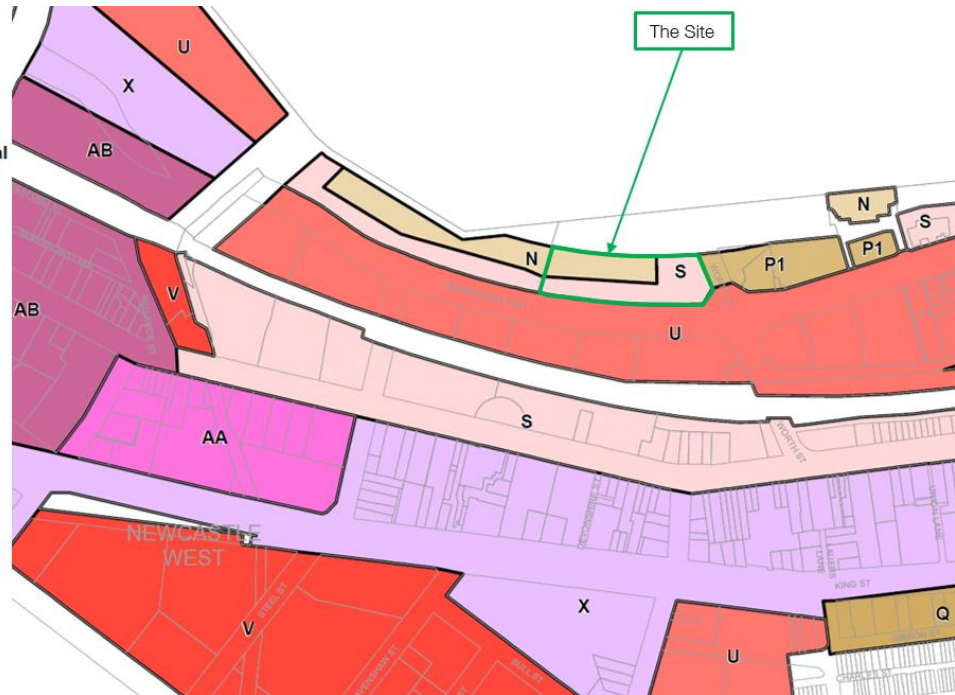


Figure1: Extract from Height of Buildings Map – NLEP 2012

## 2.9 What is the proposed numeric value of the development standard in the development application?

The amended development proposes the following heights:

Proposed Building	Control	Proposed Height	Compliance	Variation	% Varied
Building A (West)	14m	Terraces (Roof parapet – 7.4m / RL9.50)	Yes	N/A	N/A
		Apartments (Pergola main roof – 26.11m / RL28.38)	No	12.11m	86%
	24m	Apartments (Main roof – 22.5m/RL25.30)	Yes	N/A	N/A
		(Lift overrun – 26.98m / RL29.60)	No	2.98m	12%
Building B (Central)	14m	Terraces (Roof parapet – 7.4m/RL9.50)	Yes	N/A	N/A
		Apartments (Main roof – 22.5m/RL25.30)	No	8.5m	60%
	24m	Apartments (Main roof – 22.5m RL25.30)	Yes	N/A	N/A
		(Lift overrun – 25.91m / RL28.6)	Yes	1.91m	8%

Proposed Building	Control	Proposed Height	Compliance	Variation	% Varied
Building C (East)	24m	Terraces (Roof parapet – 7.4m / RL9.50)	Yes	N/A	N/A
		Apartments (Main roof – 23m RL25.70)	Yes	N/A	N/A
		(Lift overrun – 27.28m / RL29.60)	No	3.28m	14%

Table 1: Proposed heights for the development

Table 1 demonstrates the degree of non-compliance with the relevant height controls which, at the same time, identifies the degree that the proposal is below the height controls for other portions of the building. A visual representation of the above mentioned exceedance of the 14m and 24m maximum building height controls and wherer the building is below the height limit is demonstrated in Figure 2 below.

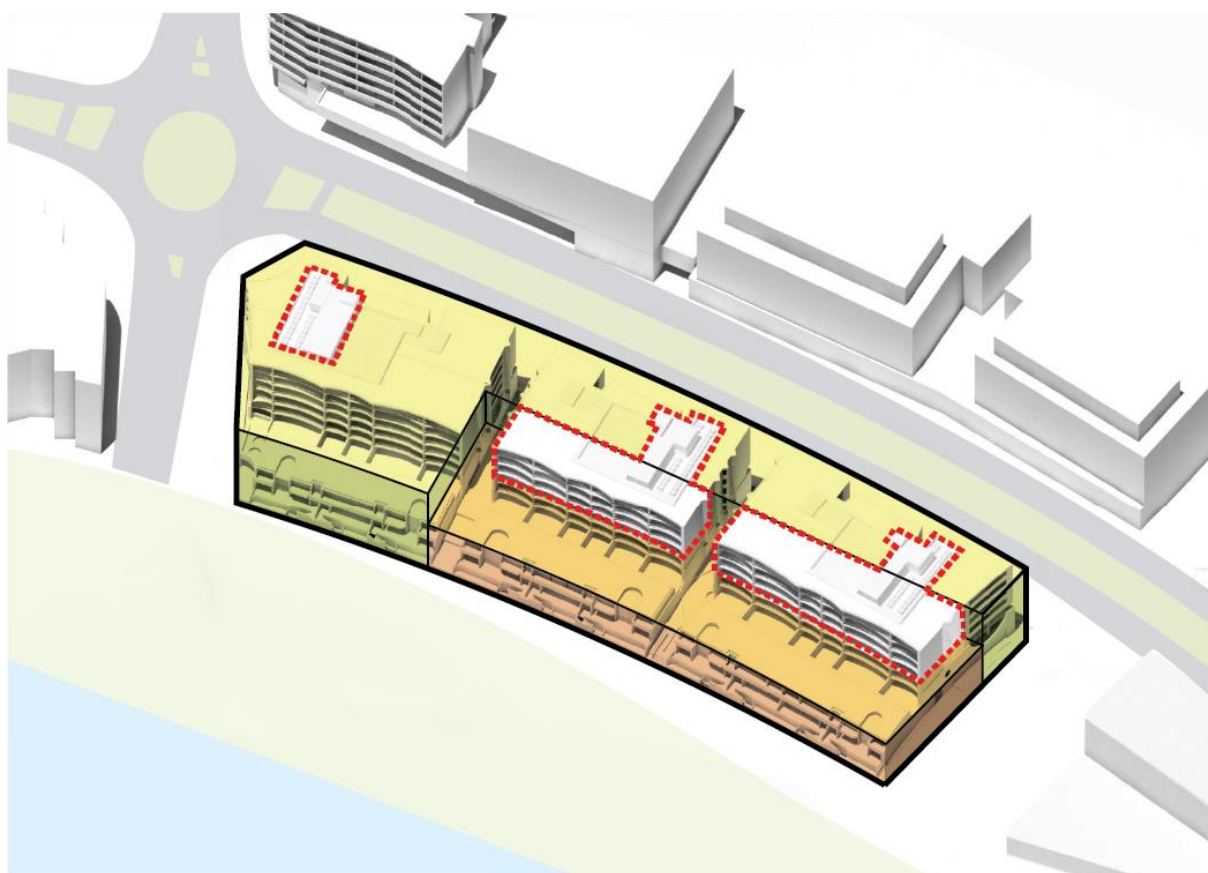


Figure 2: Diagram of height of building non-compliance to the 14m and 24m height controls outlined in red.

## 2.10 What is the percentage variation (between your proposal and the environmental planning instrument)?

The amended proposal in part exceeds the maximum height of building development standard of 14m by 86% to the central and western portions of the site resultant from the inclusion of communal roof terraces and associated pergola structures. In addition, the amended proposal in part exceeds the maximum height of building development standard of 24m by 60% to the central portion of Building B.

It is noted that the building has been designed to accommodate the flood planning level of RL3.40 for the site. Given the proposed stepping of the building from seven (7) to two (2) storeys from Honeysuckle Drive to Worth Place Park, the non-compliance with the 14m maximum building height control is predominantly restricted to the central and west portion of the site i.e. away from Honeysuckle Drive. Furthermore, the exceedance of the 24m height control through the central portion of the site is directly attributable to the provision of communal open space at main roof level.

### 3.0 Assessment of the Proposed Variation

#### 3.1 Overview

Clause 4.6 Exceptions to development standards, establishes the framework for varying development standards applying under a local environmental plan.

Objectives to clause 4.6 at 4.6(1) are as follows:

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

Clause 4.6(3)(a) and 4.6(3)(b) require that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

- “(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.”*

Clause 4.6(4)(a)(i) and (ii) require that development consent must not be granted to a development that contravenes a development standard unless the:

- “(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”*

Clause 4.6(4)(b) requires that the concurrence of the Secretary be obtained and clause 4.6(5) requires the Secretary in deciding whether to grant concurrence 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 Secretary before granting concurrence.”*

This application has been prepared in accordance with the NSW Department of Planning and Environment (DP&E) guideline *Varying Development Standards: A Guide*, August 2011, and has incorporated as relevant principles identified in the following judgements:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009* ('Four2Five No 1');
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* ('Four2Five No 2');
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248* ('Four2Five No 3');
- *Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386;* and
- *Randwick City Council v Micaul Holdings Pty Ltd v [2016] NSWLEC 7.*

### **3.2 Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?**

#### **3.2.1 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?**

A development that strictly complies with the height of building development standard of 14m is unreasonable or unnecessary in this circumstance for the following reasons:

- The non-conforming element of the amended proposal is located within the central portion of the site and facilitates the built form transition encouraged by the height of buildings development standard;
- The non-compliance to the building height development standard does not result in additional development potential rather facilitates the accommodation of the FSR on the site in a manner that achieves superior urban outcomes as well as superior amenity outcomes by facilitating the inclusion of communal open space at main roof level;
- The form and scale responds to the broader context of the site and the high density form that has emerged as the locality has transitioned from an industrial precinct to a mixed use residential commercial precinct;
- A strictly compliant development would fail to maximise the housing contribution of the site in a locality that has been specifically planned to accommodate housing to the density proposed and which is well served by public transport services in an easy walkable distance; and
- The numerical non-compliance is a result of the overriding imperative to seek consistency with the apartment amenity considerations required by the provisions of SEPP 65 Design Quality of Apartment Development which is a higher level Environmental Planning Instrument than the LEP which contains the height of buildings development standard.

A development that strictly complied would result in an impeded built form and a less articulated response to the site constraints. Specifically, a compliant design would not respond to as well to the foreshore setting of the site, and importantly would fail to achieve the level of residential amenity achieved by the amended proposal, which features communal open space at main roof level.

#### **3.2.2 Would the underlying objectives or purpose be defeated or thwarted if compliance was required?**

Compliance with the objectives of the 14m and 24m height of building standards would be thwarted if strict compliance with the standard was required, as this would then prevent the condition of the site being improved through the construction of a mixed use development comprising a communal open space via roof top terraces and associated lift access within the Honeysuckle Precinct.

A development that strictly complied with the standard would likely result in an inferior urban design response to the site. The amended proposal is considered superior to a compliant development design through the design response that seeks to vary the development standard to facilitate the inclusion of communal open space at main roof level. Visually, the stepped building form provides for a more interesting façade and composition that reduces building height to Worth Place Park whilst providing articulation and through site links. Furthermore, exceedance of the height control would not be visible from Honeysuckle Drive frontage to the south.

As such, strict compliance with the 14m and 24m height controls would thwart the intention to ensure that the scale of development proposed makes a positive contribution towards the desired built form of the Honeysuckle Precinct and wider city centre.

### **3.2.3 *Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?***

The development standard cannot be said to be abandoned. Rather, it is noted that the site is located immediately northward of 18 Honeysuckle Street (nine (9) storeys) and 22 Honeysuckle Street which have maximum building heights of nine (9) storeys and seven (7) storeys. As such, the proposed height of two (2) storeys to Worth Place Park West and seven (7) storeys to the rear of the site is a direct response to the higher buildings to the south and the foreshore setting to the north; whilst maintaining a desire to provide high levels of amenity for future occupants of the site by way of roof top open spaces including lift overruns and associated safety measures.

### **3.2.4 *Is the zoning of the land unreasonable or inappropriate?***

The zoning of the land is reasonable and appropriate given the sites location in the Honeysuckle Precinct, which is undergoing transition from an industrial area to a high density mixed use area.

### **3.3 *Are there sufficient environmental planning grounds to justify contravening the development standard?***

It is considered that there are sufficient planning grounds to justify contravening the development standard being:

- The proposal satisfies the objectives of the B4 Mixed Use zone and the objectives of the standard as described in Section 3.2 above;
- Non-compliance with the standard does not contribute to adverse environmental, social or economic impacts;
- As outlined in Section 3.2, a variation to the standard is required to support a viable development on the site. The proposal provides a high density apartment building that is appropriate for the sites location and current/future setting within a mixed use zone in the Honeysuckle Precinct;
- The proposal does not give rise to unacceptable impacts associated with an increased maximum building height, including greater intensity of development, traffic generation or bulk and scale; and
- The proposed development is generally compliant with the controls, or the intent of the controls, contained in the Newcastle Development Control Plan (NDCP) 2012.

### **3.4 *Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone?***



### 3.4.1 Objectives of the Height of Building standard

The proposal remains consistent with the objectives of the Height of Building Development standard outlined in Subclause 4.3(1) despite the non-compliance. This is demonstrated in the assessment of the objectives relating to the Height of Buildings:

*“(a) to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,”*

The proposed configuration responds to the environmental and planning objectives whilst considering and adapting to the context; specifically, the seven (7) to nine (9) storey buildings to the southern side of Honeysuckle Drive; the 24m maximum height control to the rear of the site and the foreshore setting to the north. The proposed development's built form steps down from seven (7) storeys to two (2) storeys from the rear towards Worth Place Park West to provide an appropriate transition to the streetscape.

The configuration of the proposed development has allowed for the provision of three (3) buildings with narrower floor plates. This facilitates the delivery of two (2) through-site links whilst providing for greater amenity for future residents under SEPP 65 and maintaining key view corridors to the Hunter River foreshore. The non-compliance to the 24m height control predominantly relates to the provision of roof terraces and associated lift / stair access and safety requirements and the recessed siting of the roof additions ensures an appropriate level of view sharing is maintained. As such, it is considered the proposed development which has been subject to exhaustive urban analysis would make a positive contribution to the existing built environment by providing a transition in building heights appropriate for the existing planning controls and existing buildings within the locality.

*“(b) to allow reasonable daylight access to all developments and the public domain.”*

The solar access analysis has demonstrated that the proposed building, including the portions of the building that are non-compliant with the height control, do not result in adverse solar access impacts on surrounding existing or potential future development. The building orientation and layout ensures that the Worth Place Park West and future potential development to the west will have excellent access to daylight and sunshine. Development to the west of the site will be separated by a future new access link to the Foreshore.

The proposed building and resulting building height does not result in adverse impacts upon the amenity, sky exposure or daylight access to key public domain areas or public open space areas.

### 3.4.2 Objectives of the zone

The proposal remains consistent with the objectives of the B4 Mixed Use Zone despite the non-compliance with the 14m and 24m height of buildings development standard. This is demonstrated in the assessment of the zone objectives below:

*“To provide a mixture of compatible land uses.”*

- The proposed development will feature commercial/retail units at ground floor level accessed directly from Honeysuckle Drive and Worth Place. In addition, the proposal increases the supply of residential accommodation in an area of mixed uses that affords the diverse range of opportunities for business, entertainment and community uses within the Honeysuckle Precinct.

*“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 proposed development proposed for commercial/retail and residential development in a highly accessible location noting the sites proximity to existing pedestrian and cycle links, bus stops and the future light rail infrastructure within Newcastle City Centre.

*“To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.”*

- The development site is located within easy walking distance of established and emerging business development within the Honeysuckle Precinct and the wider Newcastle City Centre. The proposed mixed use development is considered to support the viability of the commercial centre given the inclusion of a significant residential component.

### **3.5 Whether contravention of the development standard raises any matter of significance for the State or regional Environmental Planning?**

The contravention of the development standard in this case does not raise any issue of State or regional planning significance as it relates to local and contextual conditions. The variation sought is responding to the broad brush nature of a control applied across an area that supports a variety of built forms that are reflective of different zones, and are a function of their use.

### **3.6 How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act?**

The objectives set down in Section 5(a)(i) and (ii) are as follows:

*“to encourage*

- (i) The proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.*
- (ii) The promotion and coordination of the orderly and economic use and development of land...”*

A strictly complying development would result in a poorer urban design response to the overall site and the area generally, and in that sense, it may be said that compliance with the standard would hinder the attainment of the objects of section 5(a)(i) and (ii) of the Act.

Strict compliance with the development standard would not result in discernible benefits to the amenity of adjoining sites or the public. Further, the proposal satisfies the zone and development standard objectives, and principally, maintains the scale and density of recently approved buildings.

The development as proposed is consistent with the provisions of orderly and economic development, and strict compliance with the standard is not required in order to achieve compliance with the objectives.

### **3.7 Is there public benefit in maintaining the development standard?**

In the circumstances, there is public benefit in maintaining standards; however, there is also a public interest in maintaining a degree of flexibility in specific circumstances. In the current case, strict compliance with the height of buildings development standard applying to the site would preclude the delivery of high amenity apartments as required by SEPP 65. The design proposed achieves a public benefit for the future residents in providing high quality residential amenity and to the broader public through the efficient use of quality urban land that is well served by public transport and the resulting positive contribution to the public domain.

A strictly numerically complying development would result in a less interesting urban response to the locality and a less articulated building. Importantly, a numerically compliant building would achieve a poorer residential amenity outcome and would forgo the opportunity to maximise the housing opportunity for the site taking advantage of the superior urban attributes of the site and locality.

### **3.8 Is the objection well founded?**

For the reasons outlined in previous sections, it is considered that the objection is well founded in this instance, and that granting an exception to the development can be supported in the circumstances of the case.

The development does not contravene the objects specified within 5(a)(i) and (ii) of the Act and the development will satisfy the B4 Mixed Use Zone objectives and the objectives of the Clause 4.3 Height of Buildings development standard.

A development that strictly complies with the standard is unnecessary in this circumstance as no appreciable benefits would result for the locality by restricting building height to 14m and 24m within the central and western portion of the site. It has been demonstrated that the proposal will promote the social and economic welfare of the community and will have positive outcomes for the environment.

### **4.0 Conclusion**

The proposed variation is based on the reasons contained within this formal request for an exception to the standard.

The amended proposal will not result in unacceptable impacts with regard to the amenity of surrounding properties. The overall aesthetic appearance and scale of the development is that of a mixed use form that is compatible with the typologies in the surrounding area.

The amended proposal accords with the stated objectives for the B4 Mixed Use zone and the Clause 4.3 Height of Buildings development standard. The additional height does not contribute to significant adverse amenity impacts by way of overshadowing or privacy impacts and does not result in a building that is out of proportion or scale with surrounding existing and anticipated development.

A development strictly complying with the numerical standard would not significantly improve the amenity of surrounding land uses but would detrimentally impact upon the amenity of the proposed development. In the context of the locality it would be unreasonable for strict compliance to be enforced.

The non-compliance is not considered to result in any precedents for future development within the locality or broader City of Newcastle local government area given the site considerations and surrounding pattern of development including flood levels for habitable floors.

It is concluded that the objection is well founded as compliance with the standard is both unnecessary and unreasonable.



## Clause 4.6 – Exceptions to Development Standards – Maximum FSR (Cl. 4.4(2))

**Address:** 50 Honeysuckle Drive, Newcastle

**Proposal:** Mixed use commercial/residential development.

### 1.0 Introduction

This is a written request on behalf of the applicant to seek an exception to a development standard under Clause 4.6 – Exceptions to Development Standards of the Newcastle Local Environmental Plan (NLEP) 2012.

The development standard for which the variation is sought is Clause 4.4 Floor Space Ratio under NLEP 2012.

This application has been prepared in accordance with the NSW Department of Planning and Environment (DP&E) guideline *Varying Development Standards: A Guide*, August 2011, and has incorporated as relevant the latest authority on Clause 4.6, contained in the following judgements:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009* ('Four2Five No 1');
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* ('Four2Five No 2');
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248* ('Four2Five No 3');
- *Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386;* and
- *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7.*

The following sections of this written request demonstrate that the proposed development addresses the principles identified in the above judgements.

### 2.0 Description of the Planning Instrument, Development Standard and Proposed Variation

#### 2.1 What is the name of the environmental planning instrument that applies to the land?

The Newcastle Local Environmental Plan (NLEP) 2012.

#### 2.2 What is the zoning of the land?

The land is zoned B4 Mixed Use.

## 2.3 What are the objectives of the zone?

The objectives of the zone are:

- To provide a mixture of compatible land uses;
- 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; and
- To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.

## 2.4 What is the development standard being varied?

The development standard that is being varied is the maximum floor space ratio (FSR) development standard.

## 2.5 Is the development standard a performance based control? Give details.

No. The maximum FSR development standard is a numerical control.

## 2.6 Under what clause is the development standard listed in the environmental planning instrument?

The development standard is listed under Clause 4.4 of NLEP 2012.

## 2.7 What are the objectives of the development standard?

The objectives of the development standard are contained in Subclause 4.4(1)(a) to (c), and are reproduced below:

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

## 2.8 What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.4 establishes two (2) FSR controls for the site including:

- A maximum FSR of 2.1 running along the northern frontage of Worth Place Park West; and
- A maximum FSR of 2.5:1 running along the southern frontage and wrapping around the eastern side boundary to Worth Place (see Figure 1 below).



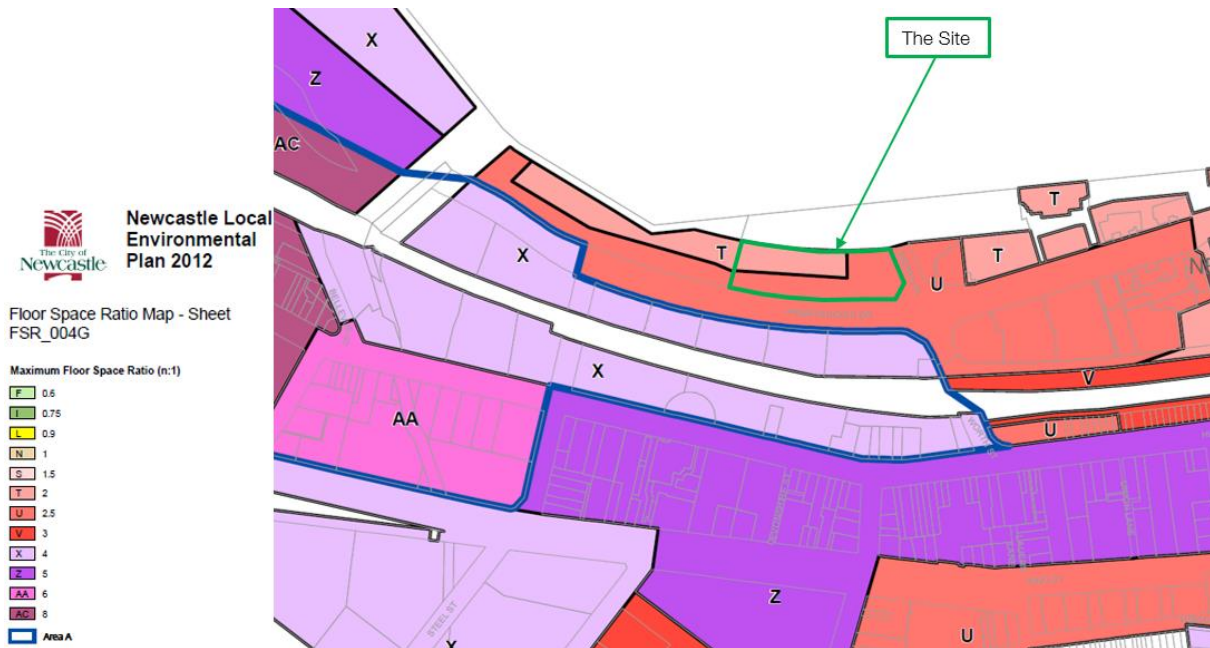


Figure1: Floor Space Ratio Map – NLEP 2012

## 2.9 What is the proposed numeric value of the development standard in the development application?

The development proposes a maximum gross floor area (GFA) of 16,863m<sup>2</sup> and therefore results in a minor exceedance of the maximum GFA of 16,820m<sup>2</sup> permitted across the entire site. The exceedance is directly attributable to the provision of communal open space and associated structures at main roof level and alterations to the glazing lines of centrally located apartments incorporated into the amended proposal. However, it is noted that the distribution of FSR results in the numerical non-compliance being restricted to the southern and eastern portion of the site by 975m<sup>2</sup> where the 2.5:1 FSR standard applies (see Figures 2 and 3).



**Total Allowable GFA = 16820sqm**

Figure 2: Maximum GFA as specified by FSR Development Standard

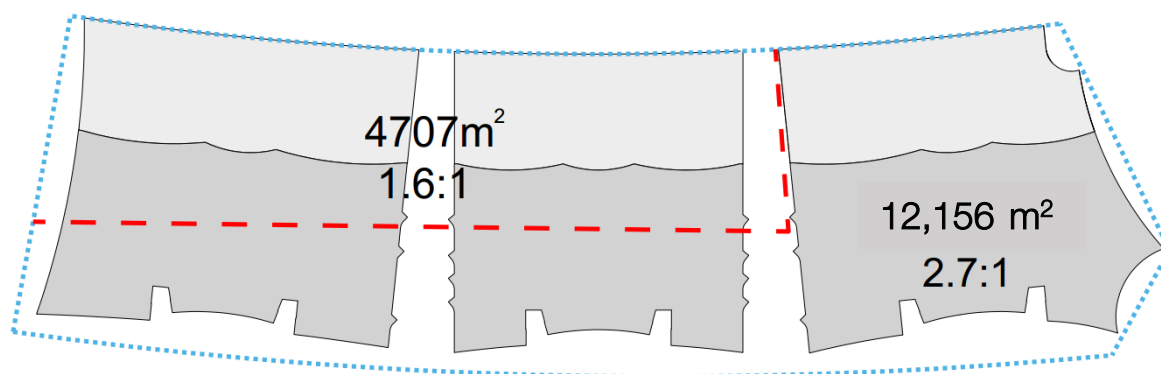


Figure 3: Proposed GFA/FSR

## 2.10 What is the percentage variation (between the proposal and the environmental planning instrument)?

In accordance with our assessment, the development does exceed the aggregate FSR development standard of 2.3:1 applicable over the entire site by 2% (43m<sup>2</sup>). However, the proposed development exceeds the maximum FSR of 2.5:1 applicable to the southern and eastern portion of site by 8.7%.

## 3.0 Assessment of the Proposed Variation

### 3.1 Overview

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan.

Objectives to Clause 4.6 at 4.6(1) are as follows:

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

Clause 4.6(3)(a) and 4.6(3)(b) require that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the 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.”*

Clause 4.6(4)(a)(i) and (ii) require that development consent must not be granted to a 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”*

Clause 4.6(4)(b) requires that the concurrence of the Secretary be obtained and Clause 4.6(5) requires the Secretary in deciding whether to grant concurrence 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 Secretary before granting concurrence.”*

This application has been prepared in accordance with the DP&I guideline, Varying Development Standards: A Guide, August 2011, and has incorporated as relevant principles identified in the following judgements:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009* (‘Four2Five No 1’);
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* (‘Four2Five No 2’);
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248* (‘Four2Five No 3’);
- *Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386;* and
- *Randwick City Council v Micaul Holdings Pty Ltd v [2016] NSWLEC 7.*

### **3.2 Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?**

#### **3.2.1 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?**

A development that strictly complies with the 2.5:1 FSR standard to the southern and eastern portion of the site is unreasonable or unnecessary in this circumstance for the following reasons:

- As identified within the Built Form Analysis and the architectural drawing package prepared by SJB Architects the amended proposal underutilises the maximum FSR applicable to the northern portion of the site and has subsequently redistributed that FSR to the southern and eastern portion of the site. The proposed redistribution of FSR within the site is considered to result in a better built form transition from Honeysuckle Drive to the foreshore relative to a compliant scheme;
- Strict compliance with the control would be unreasonable and unnecessary as the amended proposal delivers a better planning and urban design outcome through superior distribution of the FSR, and the inclusion of communal open space at main roof level;
- The form and scale of the development responds to and is consistent with the broader context of the site and the high density built form that has emerged as the locality has transitioned from an industrial precinct to a residential precinct and the bulk and scale of the proposal is consistent with this transition;
- A strictly compliant development would fail to maximise the housing contribution of the site. This is particularly important given the location of the site within an area in a locality that has been specifically planned to accommodate high density housing in a mixed use zone and is also well served by public transport services including future light rail infrastructure in an easy walkable distance of the site;
- A strictly compliant development would result in a loss of apartments in the proposed development, and would undermine the objectives of the zone to provide for a variety of compatible uses within a mixed use development;

- The variation to the residential FSR control does not increase the intensity of the development in such a way that will give rise to adverse environmental impacts such as increased traffic, bulk and scale, overshadowing or loss of views;
- The site is in a well served locality that has been specifically zoned to accommodate the scale of developed proposed by this application; and
- Overall, it is unreasonable to deny a variation that would promote a more efficient use of transport infrastructure whilst also promoting housing choice, particularly in circumstances where the variation to the 2.5:1 FSR control applying to the site can be approved without resulting in significant adverse impacts.

### **3.2.2 *Would the underlying objective or purpose be defeated or thwarted if compliance was required?***

Compliance with the underlying objectives of the 2.5:1 FSR standard to the southern and eastern portion of the site would be thwarted if strict compliance with the standard was required. Strict compliance would result in a building that would not be in harmony with the bulk and scale of surrounding buildings and public open space within the Honeysuckle Precinct.

As demonstrated in the EIS, there is sufficient infrastructure, including that for vehicular and pedestrian traffic, to accommodate the development as proposed. In this respect, the objective at 1(b) of Clause 4.4 Floor Space Ratio, namely to regulate density of development relative to the generation of vehicle and pedestrian traffic.

Strict compliance with the 2.5:1 FSR standard would not thwart the intention to regulate the density of development and land use intensity and to control the corresponding generation of vehicle and pedestrian traffic has been satisfied. However, strict compliance would lead to circumstance where the development capacity planned for the area would not be achieved.

### **3.2.3 *Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?***

The development standard cannot be said to be abandoned. Rather, it is noted that the site is located to the north of 18, 22, and 24 Honeysuckle Drive which have a maximum FSR of 4:1 under Clause 4.4 of NLEP 2012, and a maximum building height of 30m under Clause 4.3 of NLEP 2012. As such, the proposed density for the site is a direct response to the higher density to the south, whilst maintaining a desire to provide high levels of amenity for future occupants of the site. Visually, the stepped building form provides for a more interesting façade and composition that reduces building height to Worth Place Park whilst providing articulation and site through links.

### **3.2.4 *Is the zoning of the land unreasonable or inappropriate?***

The zoning of the land is reasonable and appropriate given the sites location in the Honeysuckle Precinct which is undergoing transition from an industrial area to a high density mixed use area.

### **3.3 *Are there sufficient environmental planning grounds to justify contravening the development standard?***

It is considered that there are sufficient planning grounds to justify contravening the development standard being:

- The amended proposal satisfies the objectives of the B4 Mixed Use Development zone and the objectives of the standard as described in Section 3.2 above;
- Non-compliance with the standard does not contribute to adverse environmental, social or economic impacts or additional intensity of development on the site;

- As outlined in Section 3.2 and 3.3, a numerical variation to the standard is required to support a viable development on the site. The proposal provides a high density mixed use development that is appropriate for the sites location in both the current and future setting within a high density zone in the Honeysuckle Precinct;
- The proposed variation enables a more appropriate transition from the scale of the neighbouring development site to the south (18, 22, and 24 Honeysuckle Drive) that is particular to this site because of its context;
- The amended proposal does not give rise to unacceptable impacts associated with an increased maximum FSR, including greater intensity of development, traffic generation, bulk and scale or adverse view loss as the total yield across the site is consistent with the underlying planned density; and
- The proposed development is generally compliant with the controls, or the intent of the controls, contained in the Newcastle Development Control Plan (NDCP) 2012.

### **3.4 Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone?**

#### **3.4.1 Objectives of the Floor Space Ratio standard**

The proposal remains consistent with the objectives of the B4 Mixed Use zone, despite the non-compliance with the FSR control, as demonstrated in the assessment of the objectives below:

*“to provide an appropriate density of development consistent with the established centres hierarchy,”*

- The proposed density is consistent with the combined FSR standard over the entire site and will provide an appropriate visual relationship between the seven (7) to nine (9) storey buildings at 18, 22-24 Honeysuckle Drive to the south, the existing character of Worth Place Park West, and the wider city centre.

*“to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.”*

- The proposed building density across the site including the provision of communal open space at main roof level, public spaces and through-site links is consistent with the scale and massing permitted in the city centre. Visually, the stepped building form provides for a more interesting façade and composition that reduces building height to Worth Place Park whilst providing articulation and through-site links.

#### **3.4.2 Objectives of the zone**

The proposal remains consistent with the relevant objectives of the FSR standard, despite a numerical non-compliance with the 2.5:1 FSR standard applying to the southern and eastern portion of the site as demonstrated below:

*“To provide a mixture of compatible land uses.”*

- The proposed development will feature commercial / retail units at ground floor level accessed directly from Honeysuckle Drive and Worth Place. In addition, the proposal increases the supply of residential accommodation in an area of mixed uses that affords the diverse range of opportunities for business, entertainment and community uses within the Honeysuckle Precinct.

*“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 development proposed is for commercial/retail units and residential development in a highly accessible location noting the site's proximity to existing pedestrian and cycle links, bus stops and the future light rail infrastructure within Newcastle City Centre.

*"To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres."*

- The development site is located within easy walking distance of established and emerging business development within the Honeysuckle Precinct and the wider Newcastle City Centre. The proposed mixed use development is considered to support the viability of the commercial centre given the inclusion of a significant residential component.

Given the circumstances of the case, the provision of a strict numerical compliance to the FSR control applying to the southern and eastern portion of the site would be unreasonable on the basis that the proposed development achieves compliance with the objectives of the standard whilst delivering a better planning and urban design outcome through superior distribution of the permitted FSR. Furthermore, the proposal complies with the maximum FSR applicable to the entire site.

### **3.5 Whether contravention of the development stand raises any matter of significance for the State or regional Environmental Planning?**

The contravention of the development standard in this case does not raise an issue of State or regional planning significance as it relates to local and contextual conditions. The variation sought is responding to the broad brush nature of a control applied across an area that supports a variety of built forms that are reflective of different zones, and are a function of their use.

### **3.6 How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act?**

The objectives set down in Section 5(a)(i) and (ii) are as follows:

*"to encourage:*

- (i) The proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.*
- (ii) The promotion and coordination of the orderly and economic use and development of land..."*

A development strictly complying the 2.5:1 FSR control on that part of the site would result in a poorer urban design response to the overall site and the area generally. It has been demonstrated that the alternate distribution of the permitted FSR achieves a superior outcome assessed against the provisions of SEPP65 and associated Apartment Design Guide (ADG). In that sense, it may be said that compliance with the standard would hinder the attainment of the objects of Section 5(a)(i) and (ii) of the Act.

The development as proposed is consistent with the provisions of orderly and economic development and would not hinder the objects of the Act in Section 5(a)(i) and (ii).

### **3.7 Is there public benefit in maintaining the development standard?**

Generally speaking, there is public benefit in maintaining development standards. However, there is also public interest in maintaining a degree of flexibility in specific circumstances. In the current case, strict compliance with the FSR control to the southern and eastern portion of the site would preclude the delivery of high amenity accommodation including communal open space at main roof level in a well served location, and maximising the public investment in transport services.

Such a rigid and inflexible approach to the development standards forgoes the opportunity to provide superior residential amenity to the future residents in a manner that has no substantial adverse environmental impacts.

On balance the numerical variation to provide improved residential outcomes in an urban context is considered to be an appropriate use of the provisions of Clause 4.6.

Accordingly in the specific circumstances of this case, there is no public benefit in strictly maintaining the development standard, noting that the proposal complies the maximum GFA permitted over the entire site.

### **3.8 Is the objection well founded?**

For the reasons outlined in previous sections, it is considered that the objection to the FSR Development Standard is well founded in this instance and that granting of an exception to the development can be supported in the circumstances of the case.

### **4.0 Conclusion**

The proposed variation is based on the reasons contained within this formal request for an exception to the standard.

The amended proposal will not result in unacceptable impacts with regard to the amenity of adjoining properties. The overall aesthetic appearance and scale of the development is that of a mixed use form that is compatible with the typologies in the surrounding area.

A development strictly complying with the numerical standard of 2.5:1 to the southern and eastern portion of the site would not significantly improve the amenity of surrounding land uses and would not result in a superior urban design response to the site compared to that proposed. In the context of the locality within the mixed use setting of the Honeysuckle Precinct it would be unreasonable for strict compliance to be enforced noting that the proposal does not seek a greater yield than what is currently permitted on the site, rather it delivers a better planning and urban design outcome through the superior distribution of the proposed FSR over the site.

Additionally, strict enforcement of the standard would result in the development not satisfying the objectives of the control, specifically to provide an appropriate density of development consistent with the established area and ensuring the built form makes a positive contribution to the city centre. The strict application of the control would result in a building that provides poorer amenity for future residents whilst failing to respond the surrounding physical context including the Hunter River foreshore to the north, the Honeysuckle Precinct and wider Newcastle City Centre.

The non-compliance will not result in any precedents for future development within the local government area given the particular site circumstances and surrounding pattern of development near the site.

It is concluded that the objection is well founded as compliance with the standard is both unnecessary and unreasonable.