

# Clause 4.6 Variation: FSR

RETENTION OF HERITAGE ITEM AND  
CONSTRUCTION OF HOTEL  
198-204 LEURA MALL,  
LEURA

16 AUGUST 2022



## CLAUSE 4.6 VARIATION TO FSR

### *The Variation*

This statement comprises a written request under clause 4.6 of the *Blue Mountains Local Environmental Plan 2015* (BMLEP), that accompanies a proposal that contravenes the FSR development standard contained in clause 4.4 of the BMLEP. The BMLEP prescribes a 0.4:1 floor space ratio development standard for the site.

When calculating the FSR for the proposal the development has a 0.436:1 FSR, which exceeds the control as set out in the table below- noting the table covers the 'as calculated' site area of the site (2454m<sup>2</sup>) and the area nominated in the SOFAC (2453m<sup>2</sup>).

Mapped FSR	Permitted GFA	Proposed GFA	Proposed FSR	Variation
0.4:1	0.4:1x 2454m <sup>2</sup> = 981.6m <sup>2</sup>  *if using 2453m <sup>2</sup> as site area = 981.2	1082m <sup>2</sup>	0.44:1	100.4m <sup>2</sup> or 10.2%  100.8m <sup>2</sup> or 10.2%

In relation to the GFA elements of the proposal:

- The heritage item (Culgoa) itself has a total GFA of 154m<sup>2</sup> which contributes 14.23% of the GFA of the development. The design response provides a series of buildings to respond to the heritage setting of Culgoa and Leura Precinct 3.
- The proposal provides for hotel accommodation within the Leura Precinct (R1-LE03) which is consistent with objective (a) of Clause 7.8(3) of BMLEP which is to promote the tourism role of Leura
- The proposal provides a carefully designed series of buildings of varying height and scale in a sensitive manner that is designed to ensure compatibility with the character of the locality and compatibility with the heritage item Culgoa.
- This is achieved through the provision of a basement carpark with the driveway on the northern side of the site that then opens up a view line to the rear of the site over the driveway ramp past Culgoa. The primary building volume at the rear of the site within this view line has been designed by adopting an 'attic style' room in roof arrangement containing four (4) of the hotel rooms at the first floor (Rooms 23-26). These rooms face west and sit in the backdrop of Culgoa, in addition to the 'stable-esque' gable element that serves as a key viewline past Culgoa over the driveway ramp on the northern end of that building. The rooms that flank this

element to the east at the upper level are designed to be contained in an attic form with dormer windows in an area that would otherwise be a long unbroken roof form running north to south. If this area was simply the attic roof area of the building (with no habitable rooms or floor space) this would reduce the FSR to be compliant (reduction by 105m<sup>2</sup>) because the definition of GFA explicitly excludes an attic from GFA.

- A long unbroken high pitched roof would result in undesirable bulk and scale in terms of a heritage response on the site and a response to the character of Leura Precinct R1- LE03. The provision of habitable space within this attic area and in particular the introduction of a stable-esque west facing gable and dormers windows articulates and breaks down the bulk and scale of the roof form and alignment and activates this space along the view line to Leura Mall. The stable-esque gable and attic windows are also reflective of the character of the locality that features a number of room in roof attic style forms at the upper levels of buildings which are observed within the locality. This design response, and the consequential breach of the FSR through its location in a roof form (articulated by the stable-esque gable and dormer windows) constitute sufficient environmental planning grounds to justify the contravention as it is consistent with objects (f) & (g) of the *Environmental Planning and Assessment Act 1979* which are:
  - (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),
  - (g) to promote good design and amenity of the built environment,

The quantum of the contravention is minor and the proposal continues to meet the stated objectives of the FSR development standard and is consistent with the relevant objectives of the R1 zone which are set out further in this request.

Despite the above owing to the non-compliance a Clause 4.6 variation request has been prepared, noting that the request addresses a number of recent Land and Environment Court cases including *Four 2 Five v Ashfield* and *Micaul Holdings Pty Ltd v Randwick City Council* and *Moskovich v Waverley Council*.

In addition a judgement in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard.

Therefore, this must be considered when evaluating the merit of the FSR departure as this is the context in which the consent authority must consider and evaluate and form a view on the content of the Clause 4.6 variation request and the relevant matters for consideration under Clause 4.6.

The key tests or requirements arising from the above judgements is that:

- The consent authority must be directly satisfied the proposed development will be in the public interest because it is “consistent with” the objectives of the development standard and zone. It is not a requirement to “achieve” those objectives. It is a requirement that the development be ‘compatible’ with them or ‘capable of existing together in harmony’. It means “something less onerous than ‘achievement’”.
- Establishing that ‘compliance with the standard is unreasonable or unnecessary in the circumstances of the case’ does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe “test” 1). Other methods are available, for example that the relevant objectives of the standard would not be achieved or would be thwarted by a complying development (Wehbe “test” 3).
- Despite earlier case law (Four 2 Five) when pursuing a clause 4.6 variation request it is not necessary to demonstrate how the proposal achieves a better outcome, or a neutral outcome, as compared to a complying scheme- per *Initial Action*; and
- The proposal is required to be in ‘the public interest’.

In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the FSR development standard;
- Demonstrating sufficient environmental planning grounds exist for the departure;
- Demonstrating consistency with the R1 zoning; and
- Satisfying the relevant provisions of Clause 4.6 of BM LEP 2015;

These matters are addressed below, noting that the proposal presents a site responsive development and that the development presents three (3) distinct building forms separated across the site and in the rear of the site to mitigate impacts to the heritage item that are designed in a specific way to result in a desirable planning outcome for development on the site.

## Clause 4.6

Clause 4.6 of the Blue Mountains LEP 2015 provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular subclause 3-5 which provide:



- (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 Director-General has been obtained.*
- (5) *In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

#### **Clause 4.6 (3) – Compliance Unreasonable and Unnecessary**

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control are achieved, notwithstanding the non-compliance to the control.

The objectives of the floor space ratio development standard are stated as:

- (1) *The objectives of this clause are as follows:*
  - (a) *to ensure that development is compatible with the bulk, scale and character of existing and future surrounding development,*
  - (b) *to provide for a built form that is compatible with the role of the town and major centres.*

The development seeks to depart from the floor space ratio control noting that the proposal remains consistent with the objectives of the clause and is an appropriate outcome on the site because of the following:

Objective (a)

- The development has been designed to follow the height and setback controls (other than a minor part of the upper level roof form) applying to the development and is designed to carefully place the building mass at the rear of the site through a series of varied building forms to limit the perceived bulk and scale of the development relative to surrounding development, and to ensure compatibility with the desired bulk and scale for the site itself owing to the heritage item, and also to adjoining development as the built form being carefully sited at the rear limits perceived bulk and scale from the public domain. Importantly the design of the built form, in terms of the detailing and architectural form to the largest building in the north-eastern corner of the site is carried out in a way that is responsive to the heritage item Culgoa on the site and to provide a suitable design response that is contributory to the desired future character within Leura Precinct B2-LE03.
- The character of the site is informed by the heritage context and setting as well as relationships to adjoining properties and the proposal has been designed to meet this desired character as set out in the HIS by Paul Davies;
- The bulk and scale is consistent with the desired future character noting consistency with the height (other than upper level roof form in the south-eastern corner of the site) and setback controls. This is particularly the case through the design of the built form. The proposal provides a carefully designed series of buildings of varying height and scale in a sensitive manner that is designed to ensure compatibility with character of the locality and in relation to compatibility with the heritage item of Culgoa. This is achieved through the primary building volume adopting an 'attic style' room in roof arrangement to four (4) of the hotel rooms at the first floor (Room 23-26). These face west and sit in the backdrop of Culgoa and are designed to be contained in an attic form with dormer windows in an area that would otherwise be a long unbroken roof form running north to south. If this area was simply the attic roof area of the building (with no habitable rooms or floor space) this would reduce the FSR to be compliant (reduction by 105m<sup>2</sup>) because the definition of GFA explicitly excludes an attic from GFA unless it is a habitable room within the attic area.
- This design with a long unbroken roof running north-south on the main building volume would be undesirable in terms of bulk and scale in terms of a heritage response on the site and a response to the character of Leura Precinct LE03 and the provision of habitable space within this attic area and the provision of dormers facilitates a more varied roof alignment, activation of this space, and also is reflective of the character of the locality that features a number of room in roof attic style forms at the upper levels of buildings observed within the locality. Therefore this response, and the breach of the FSR through this location, is a desirable planning outcome and remains consistent with the objective (a) of the FSR standard.

- The proposal provides for the retention of the heritage cottage which is of local significance in terms of the setting and location of the site, and the heritage report notes that the proposal will contribute to the future viability of Leura Mall and the design of the complex retains streetscape and site heritage values;
- The satisfaction of FSR objective (a) in terms of desired future character is informed by Clause 7.8(3) that sets out that as key character considerations:

*(c) to maintain and enhance the historically distinctive pattern of detached cottages that are surrounded by gardens and freestanding garages by conserving existing trees that provide visually significant streetscape features and ensuring that landscaping complements and extends the established pattern of tall canopy trees that are located primarily alongside property boundaries,*

*(e) to promote new buildings that are consistent or compatible with the scale, bulk and architectural character of existing houses and cottages,*

*(f) to encourage restoration of traditional architectural forms and details for existing early 20th century cottages and houses,*

- In relation to these provisions:
  - o The development provides for the maintenance and enhancement of historically distinctive patterns of detached cottages surrounded by gardens. This is achieved through retention of Culgoa and the provision of a series of buildings carefully sited at the rear of the site such that the detached cottage character of Culgoa is maintained and there are significant trees retained in the south-western corner of the site with further embellishment of landscaping across the site to ensure that landscaping complements and extends the established pattern of tall canopy trees in proximity to property boundaries.
  - o The development as designed provides new buildings that are compatible with the scale, bulk and architectural character of existing houses and cottages in the precinct. This is achieved through the careful design and siting of the building with the single storey reception building, the provision of an attic style arrangement (other than the 'stable-esque' gable end in the north western corner desired in terms of a high quality architectural element) to the largest building mass that sits in the primary backdrop of Culgoa. In addition the south-eastern building is staggered with a 2 storey component at the interface with the property to the south that is in a visually recessive location.
  - o The architectural detailing provided features face brick, cladding elements, and pitched roof elements including an attic form that is reflective of the character of built form elements in the Precinct.
  - o Accordingly consistency with these Precinct objectives, that could be seen to inform the desired future character, clearly assists in demonstrating satisfaction of objective (a) of the FSR development standard.

Objective b)

- The built form, including the departure to FSR, is compatible with the desired role of Leura Village noting the proposal expands availability of hotel and motel accommodation. The FSR achieved includes all development on site and if excluding the heritage building GFA then the proposal would be compliant with the standard.
- The proposal provides for the retention of the heritage cottage which is of local significance in terms of the setting and location of the site, and the heritage report notes that the proposal will contribute to the future viability of Leura Mall and the design of the complex retains streetscape and site heritage values;
- In relation to stated objective (b) satisfaction of this objective is also derived from Clause 7.8(3) noting a stated objective is to promote the tourism role of Leura Village, to maintain and enhance the historically distinctive pattern of detached cottages, and to maintain an integrated pre-1946 housing stock, and to ensure that appropriate landscaping elements are incorporated into development to screen and minimise bulk. The proposal satisfies these elements and is a built form that is compatible with the role of the Leura Village.

**Clause 4.6 (3) – Environmental Planning Grounds**

The departure to the FSR demonstrates sufficient environmental planning grounds as follows:

- In order to preserve the heritage significance and setting of Culgoa the front portion of the site remains relatively undeveloped other than the driveway and ramp to the basement car parking and a footpath link to the proposed reception building to the side and rear of Culgoa. As a result the buildings are located to the rear and sides of Culgoa.
- Another fundamental part of ensuring a suitable planning outcome in terms of a heritage and landscape character arrangement through retention of significant trees is achieved through the provision of a basement carpark with the driveway on the northern side of the site that enables tree retention to the south-eastern portion of the site and then opens up a key view line to the rear of the site over the driveway ramp.
- The planning controls seek to retain existing cottages and to have any new buildings be consistent or compatible with the built form of those retain cottages. The proposed development is for hotel accommodation which as a result of its function requires a different form to Culgoa but consistent with the planning controls has been designed to be broken into a number of buildings which complement Culgoa by incorporating the architectural features of the cottage



and other buildings in the precinct. This includes high pitched roof forms. The most visible of the new buildings is the longer building which runs along the eastern boundary. Its visibility is a consequence of providing the driveway and basement ramp along the northern boundary.

- To ensure compatibility with Culgoa and the locality the building has been designed with a high pitched roof which presents in the view line down the driveway as a one and a half storey building with rooms in the roof. There are 4 hotel rooms contained within this roof area which equate to 105sqm of gross floor area. Those 4 hotel rooms could be removed and the development would comply with the FSR standard of 0.4:1- with an FSR of 0.4:1.
- An FSR compliant building with a long unbroken high pitched roof would result in undesirable bulk and scale in terms of a heritage response on the site and a response to the character of Leura Precinct R1- LE03. The provision of habitable space within this attic area and in particular the introduction of a stable-esque west facing gable and dormers windows articulates and breaks down the bulk and scale of the roof form and alignment and activates this space along the view line to Leura Mall. The stable-esque gable and attic windows are also reflective of the character of the locality that features a number of room in roof attic style forms at the upper levels of buildings which are observed within the locality. This design response, and the consequential breach of the FSR through its location in a roof form (articulated by the stable-esque gable and dormer windows) constitute sufficient environmental planning grounds to justify the contravention as it is consistent with objects (f) & (g) of the *Environmental Planning and Assessment Act 1979* which are:
  - (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),
  - (g) to promote good design and amenity of the built environment,
- The bulk and scale is consistent with the desired future character noting consistency with the height (other than upper level roof form in the south-eastern corner of the site) and setback controls. This is particularly the case through the design of the built form. The proposal provides a carefully designed series of buildings of varying height and scale in a sensitive manner that is designed to ensure compatibility with character of the locality and in relation to compatibility with the heritage item of Culgoa. This is achieved through the careful design and siting of the development. In particular the primary building volume adopting an 'attic style' room in roof arrangement to four (4) of the hotel rooms at the first floor (Room 23-26) that sit adjacent the 'stable-esque' gable feature design element. These room in roof style forms face west and sit in the backdrop of Culgoa and are designed to be contained in an attic form with dormer windows

in an area that would otherwise be a long unbroken roof form running north to south. If this area was simply the attic roof area of the building (with no habitable rooms or floor space) this would reduce the FSR to be compliant (reduction by 105m<sup>2</sup>) because the definition of GFA explicitly excludes an attic from GFA unless it is a habitable room within the attic area.

- The design response provides a series of buildings to respond to the heritage setting of Culgoa and Leura Precinct 3.
- The adoption of a building design that presents a series of buildings on the site, and designed in a sensitive and careful manner to break down the bulk and scale of the building having regard to the existing heritage item. This has directly influenced the design response through the provision of the 'stable-esque' gable in the prominent viewline along the northern portion of the site from the public domain and then the room in roof style rooms to the east with dormers to break up the roof plane to provide a suitable backdrop to Culgoa and to ensure its significance is maintained that also furthers Object (f) that states *(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)*,

Therefore the departure to the FSR control is a function of achieving a suitable design outcome on the site that demonstrates sufficient environmental planning grounds to support the variation as it aligns with the Objects of the Act.

#### **Clause 4.6(4)**

In accordance with the provisions of Clause 4.6(4) the consent authority can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3). As addressed the proposed development is in the public interest as it remains consistent with the objectives of the R1 zone objectives that are stipulated as:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that building form and design does not unreasonably detract from the amenity of adjacent residents or the existing quality of the environment due to its scale, height, bulk or operation.*
- *To enhance the traditional streetscape character and gardens that contribute to the attraction of the area for residents and visitors.*
- *To provide opportunities for the development of a variety of tourist-oriented land uses within a predominantly residential area.*

This is because:

- The first and second objective is not relevant however the proposal provides for tourist accommodation- which is desired within the Leura Tourist Precinct within which the site resides and hence the tourist use is appropriate;
- The proposal provides for other land uses (hotel accommodation) with a built form and design that ensures amenity to adjacent residents is maintained given the extent of setbacks proposed and the suitable design response provided;
- The streetscape character is enhanced through the restoration works with regard to the landscape treatment of the front setback area and the proposal provides for an improved landscape garden setting to Culgoa;
- The proposal provides for a tourist-oriented land use within Leura Village and in a context that is not strictly residential- noting the commercial uses to the north, south and the Church to the East of the subject site.
- The proposal complements and enhances the local streetscape by virtue of the careful siting of the development.

#### **Clause 4.6(5)**

As addressed it is understood the concurrence of the Secretary may be assumed in this circumstance, however the following points are made in relation to this clause:

- a) The contravention of the maximum floor space control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal and unique site attributes associated with the subject site; and
- b) There is no public benefit in maintaining the development standard as it relates to the current proposal as the proposal is consistent with the underlying objectives of the control and the fact that the minor non-compliance does not lead to excessive bulk and scale and it will not set an undesirable precedent for future development within the locality based on the observed building form in the locality.

Strict compliance with the prescriptive floorspace requirements is unreasonable and unnecessary in the context of the proposal and its particular circumstances.

The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The proposal will not have any adverse effect on the surrounding locality, and is consistent with the future characterised envisioned for the subject area.

## Conclusion

The proposal promotes the economic use and development of the land consistent with its zone and purpose. The consent authority is requested to invoke its powers under Clause 4.6 to permit the variation proposed.

The objection is well founded and taking into account the absence of adverse environmental, social or economic impacts, it is requested that the consent authority support the development proposal.