



**Application to vary the Floor Space Ratio under
Clause 4.6 of the Hurstville Local Environmental
Plan 2012**

2-8 Macpherson Street, Hurstville, NSW 2220
Lots 55, 56, 57 and 58 DP35124

August 2020

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EXECUTIVE SUMMARY

The NSW Land and Housing Corporation requests that the Georges River Council grant consent to the proposed development at 2-8 Macpherson Street, Hurstville, despite the proposed development contravening the Floor Space Ratio development standard within the Hurstville *Local Environmental Plan 2012* (HLEP 2012).

The request is considered to be reasonable and justified in that compliance with the standard is unnecessary on the grounds that:

- There are sufficient environmental planning grounds to justify the contravention of the development standard namely the provision of more social housing in an accessible location consistent with the NSW Government's Plan *Future Directions for Social Housing in NSW*, the *Greater Sydney Region Plan 2018*, the *Central City District Plan 2018*, and consistency with the relative objectives of the development standard and under (HLEP 2012);
- The proposed development is in the public interest, as the objectives of the land use zone and the standards are both achieved notwithstanding the non-compliance;
- The contravention achieves a better outcome for, and from, the development without significant environmental impact by providing more social housing, better utilisation of well-located land, efficient use of existing serviced urban land and is consistent with the emerging character of the locality ;
- The request satisfies the tests set by the Land and Environment Court for the justification and assessment of variations to development standards; and

The extent of variation sought is very minor, constituting only a 1.67% variation to the standard prescribed. In considering this request, it should be noted that in a recent decision of the NSW Land and Environment Court, it was held that a Clause 4.6 variation was not required to exceed height and floor space ratio standards in a Local Environmental Plan for seniors housing under the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004. Such a request is ousted through cl 5(3) of that SEPP. The decision can be found at *Eastern Suburbs Leagues Club Ltd v Waverley Council [2019] NSWLEC 130*. From case law, although not technically required, a Clause 4.6 request has been provided, should Council consider it warranted/necessary.

1 INTRODUCTION

1.1 Site Description

The site consists of four (4) Torrens title lots, legally described as Lots 55, 56, 57 & 58 in DP 35124, known as No's 2-8 Macpherson Street, Hurstville, located within the Georges River Local Government Area (LGA).

The development site has a total area of 2,381.1m². The development site is located on the eastern side of Macpherson Street, having a total frontage of 68.2m. It has a northern, southern and eastern boundary adjoining neighbouring residential developments of 37m, 36.9m and 60.6m respectively.

1.2 Proposed Development

The NSW Land and Housing Corporation (LAHC) proposes a two storey seniors housing development comprising 20 units (8 x 1 bedroom & 12 x 2 bedrooms) with a floor space ratio of 0.61:1, which exceeds the 0.6:1 FSR in Clause 4.4 *Floor space ratio* of the HLEP 2012 by 1.67%.

Clause 4.6 of the HLEP 2012 provides the Georges River Council with a degree of flexibility in applying the standards to the proposed development, subject to a written request by the applicant justifying any contraventions and demonstrating that compliance is unreasonable or unnecessary in the circumstance of the case. In addition, the Land and Environment Court, in *Wehbe v Pittwater Council (2007) NSW LEC 827*, *Winten Developments Pty Ltd v North Sydney Council (2001) NSW LEC 46* and *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* has articulated, principles and tests regarding the justification for, and assessment of, exceptions to development standards. The proposed development has been assessed against the established principles at **Section 4**.

This request therefore:

- Addresses the matters required to be considered by Council in exercising its discretion to the floor space ratio development standard under the HLEP 2012;
- Justifies the floor space ratio of the proposed development and demonstrates with that compliance with the development standard is unnecessary and unreasonable in this case in terms of the objectives of the standard and the zone, as well as the tests for assessment established by the Land and Environment Court; and
- Demonstrates why the Georges River Council should exercise its discretion by granting consent to the proposed development, despite a non-compliance with the HLEP 2012.

2 JUSTIFICATION FOR EXCEPTION TO THE STANDARDS

Clause 4.6 *Exceptions to development standards* of the HLEP 2012 provides Council with a degree of flexibility in applying the floor space ratio development standard to the subject development application (Clause 4.6(1)). This is provided that: the standards are not excluded from this discretion (Clause 4.6(2)); particular planning outcomes are achieved (Clause 4.6(3)); and that certain procedural requirements are met (Clauses 4.6(4)).

Each of these matters is addressed below.

2.1 Consistency with Objectives of the Clause

Clause 4.6 (1) states:

“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.”*

The non-compliance with the HLEP 2012 floor space ratio development standard is driven by the goal of achieving better outcomes for and from the development. The proposed development aims to achieve the objects of the EP&A Act, including:

- object of the Act to promote the delivery and maintenance of affordable housing;
- Achieving the orderly and economic use and development of the land given it's access to services and transport;
- Delivering more social (affordable) housing, consistent with the NSW Government's *Future Directions for Social Housing in NSW*;
- Achieving the objectives of the *Greater Sydney Region Plan 2018* and the *Central City District Plan 2018* regarding the provision of social (affordable) housing and high-density development in key transport nodes and corridors.

Despite the non-compliance with the standard, the proposed development will have a minimal impact on the amenity of the surrounding development with respect to overshadowing, views, visual impact and privacy.

2.2 Matters for consideration

In deciding whether or not to grant consent, Council is required to satisfy itself that the request for the variation demonstrates that:

- There are sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6(3)(b)); and
- The proposed development is in the public interest and consistent with the objectives of the standard and the zone in which the development is proposed to be carried out (Clause 4.6(4)(a)(ii)).

These clauses are addressed below.

Clause 4.6(3)(b) – Environmental planning grounds

It is considered that there are sufficient environmental planning grounds to justify contravening the floor space ratio development standard under the HLEP 2012. The development is considered to be consistent with:

- The objectives of *Clause 4.4 Floor space ratio*;
- Relevant plans and strategies.

These matters are addressed below.

Objectives of Clause 4.4 Floor space ratio

Table 1 Compliance with Clause 4.4 of the HLEP 2012

Objectives of Clause 4.4	Compliance	Comment
(a) <i>to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality</i>	Yes	The degree of variation is negligible, being only 1.67% above the prescribed floor space ratio of 0.6:1. This equates to an additional 23.4m², and is considered necessary in order to provide greater circulation spaces for seniors with mobility issues, without resulting in an adverse impact on the environment and/or adjoining neighbours. The additional floor area does not cause the building to be incompatible with the desired and future character of the locality. The development complies with the Council's prescribed height limit of 9m, for the location. The setbacks of the dwellings comply with, and a number of locations exceed, the Hurstville Development Control Plan No.1 minimum setback requirements. The buildings have been designed to minimize bulk and scale. This includes provided landscaping, changes in roof profiles and staggering and modulation of elevation alignments which have minimized the impact of the bulk and scale of the buildings on the streetscape and adjoining properties. The proposed development is compatible with the bulk and scale of the existing and desired future character of the locality.
(b) <i>to establish the maximum development density and intensity of land use, accounting for the availability of infrastructure and generation of vehicular and pedestrian traffic to achieve the desired future character of the locality,</i>	Yes	The proposed 1.67% variation to the prescribed floor space ratio (23.4m²) would not create unreasonable demands on the existing services or require the augmentation existing infrastructure, and will not result in the excessive generation of vehicular or pedestrian traffic, that would change the character of the locality.
(c) <i>to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,</i>	Yes	The expected impacts of the proposed development will not be noticeably different when compared to a development scheme complying with the prescribed FSR Due to the orientation of the site and the proposed layout, the proposed development will not result in any unreasonable adverse overshadowing, or overlooking impacts onto the adjoining properties. The proposed development has been designed to ensure that loss of privacy, loss of solar access and visual impacts are minimised.

(d) <i>to facilitate an appropriate transition between the existing character of areas or localities that are not undergoing and are not likely to undergo a substantial transformation,</i>	Yes	The locality is undergoing transformation. The bulk and scale of the proposed development reflects the emerging character of the area.
(e) <i>to minimise the adverse impact of the development on heritage items,</i>	Yes	The development will not impact any heritage items, with the closet item (I59) located approximately 100m to the north-east. The site does not contain any Commonwealth, State or Local Listed Heritage Items nor is it located within a heritage conservation area.
(f) <i>to establish maximum floor space ratios that ensure the bulk and scale of development is compatible with the major centre status of the Hurstville City Centre.</i>	Yes	The site is not located within the commercial centre of Hurstville City, located approximately 1.7km to the north.

Relevant plans and strategies

The development provides for social housing and is therefore consistent with the NSW Government's *Plan Future Directions for Social Housing in NSW*, the *Greater Sydney Region Plan 2018*, and the *Central City District Plan 2018*.

As at June 2019, there were over 46,000 households on the waiting list for social housing in NSW. The waiting list for the St George allocation zone (CS09) is approximately 1,750, with a wait time for one and two bedroom units/houses greater than 10 years.

Clause 4.6(4)(a)(ii) – the public interest

The proposed development will provide housing to meet the needs of the community, assisting LAHC in meeting its significant, long-standing and continually growing demand for social housing in the Georges River local government and surrounding areas. The development will also assist in allowing LAHC to grow its social housing portfolio in line with the NSW Government's *Future Directions for Social Housing in NSW*.

The development will assist LAHC to improve the amenity of accommodation for its tenants, by providing new, more appropriate housing aligning with demand for seniors housing. The development will also improve the environmental sustainability of housing on the site, particularly through improved thermal performance, solar access, natural ventilation, energy and water efficiency.

Objectives of Clause 4.4 Floor space ratio

The objectives of the development standard, are addressed in Table 1 above. As noted in the table, the extent of variation is negligible, being only a 1.67% increase above the allowable floor space ratio of 0.6:1 (proposing 0.61:1). Given the minor variation, it is considered that the building will still be compatible with the bulk and scale of the existing and desired future character of the locality, including accounting for the availability of infrastructure and generation of vehicular and pedestrian traffic. The development provides for an appropriate transition between the existing character, evident by the developments compliance with the 9m height control, and setback controls found in the DCP. Furthermore, any adverse environmental impacts on the use or enjoyment of adjoining properties and

the public domain are minimised.

Objectives of the R2 Low Density Residential zone

The site is identified within the R2 Low Density Residential zoning under the HLEP 2012. The objectives of the R2 zone are addressed below:

1) Objectives of zone

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To encourage development of sites for a range of housing types, where such development does not compromise the amenity of the surrounding area, or the natural or cultural heritage of the area.*
- *To ensure that a high level of residential amenity is achieved and maintained.*
- *To encourage greater visual amenity through maintaining and enhancing landscaping as a major element in the residential environment.*
- *To provide for a range of home business activities where such activities are not likely to adversely affect the surrounding residential amenity.*

The proposed development's floor space ratio non-compliance raises no inconsistencies with the objectives of the R2 zone. The development will provide for the housing needs of the community within a low density residential environment; will assist in addressing the communities immediate need for social housing; encourages a range of housing types through the provision of one (1) and two (2) bedroom apartments designed for seniors housing that does not compromise the amenity of the surrounding area, or natural or cultural heritage of the area. The development also ensures a high level of residential amenity to proposed units and existing adjoining residences.

2.3 Procedural Requirements

The procedural requirements of Clause 4.6 of HLEP 2012 are addressed below.

Clause 4.6(2)

Clause 4.6(2) states that *"this clause does not apply to a development standard that is expressly excluded from the operation of this clause"*.

Clause 4.4 Floor space ratio of the HLEP 2012 is not expressly excluded from the operation of Clause 4.6, and therefore, variation to the maximum floor space ratio can be considered under this clause.

Clause 4.6(3)

Clause 4.6 (3) requires a *"written request from the applicant that seeks to justify the contravention of the development standard"* that justifies *"compliance with the development standard is unreasonable or unnecessary in the circumstances of the case"*.

This Clause 4.6 variation provides a written request to contravene the HLEP 2012 floor space ratio development standard. In this instance, compliance with the maximum floor space ratio standard is considered unnecessary as the proposal allows the development to respond to design requirements for seniors developments and site constraints, without resulting in a major departure from the controls or the desired development outcome envisaged by the planning controls.

Clause 4.6(4)(b)

Clause 4.6(4)(b) stipulates that *Council must not grant consent to any variation unless the concurrence of the Secretary has been obtained.*

Planning Circular no PS18-003 Variations to development standards (dated 21 February 2018) provides that the concurrence of the Secretary can be assumed where Councils have adopted Clause 4.6 of the Standard Instrument, subject to certain conditions.

In accordance with the Planning Circular, concurrence may be assumed in this instance, by a delegate of Council, as the development contravenes a numerical development standard by less than 10% (1.67%).

3 JUSTIFICATION FOR FLOOR SPACE RATIO VARIATION

The proposed floor space ratio of 0.61:1 represents a very minor variation to the development standard prescribed in the HELP 2012 (0.6:1), constituting a 1.67% increase, equating to an additional 23.4m² floor area. The negligible increase in the floor space ratio allows LAHC to deliver greater housing choices to those in need, each requiring greater accessibility areas for users with mobility issues such as those in wheelchairs, or walking assisted devices, typical with seniors housing development.

The development complies with Council's prescribed height limit of 9m, for the location. The setbacks of the dwellings comply with, and in many instances exceed, the Hurstville Development Control Plan No.1 minimum setback requirements. Owing to the minor nature of the variation, the design, scale and materiality of the proposed development is consistent with the character of the locality, and for these reasons justifies the very minor departure from Council's floor space ratio.

4 THE LAND AND ENVIRONMENT COURT PRINCIPLES/TESTS

Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118 is discussed below at **Section 4.1** and addresses the correct approach to consider Clause 4.6 requests.

Two landmark cases articulate the Court's view on reasonable arguments for, and assessment of, requests for exceptions to development standards. These are discussed further below at **Section 4.2** and **Section 4.3**.

4.1 Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118

In his decision in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118*, Chief Justice Preston clarified the correct interpretation of Clause 4.6 requests with regard to Cl 4.6 (4)(a)(i) and (ii). A Cl 4.6 requests must:

- Adequately address the matters required by subclause (3) – that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Cl 4.6(3)(a)), and that there are sufficient environmental planning grounds to justify contravening the development standard (Cl 4.6(3)(b)); and
- Demonstrate that the proposed development will be in the public interest because it is consistent with the objectives of the development standard (in this case, Cl. 4.4 Floor space ratio) and land use zone objectives (in this case, R2 Low Residential zone) (Cl 4.6 (4)(a)(ii)).

These matters are addressed below.

With respect to the subject site, compliance with the 0.6:1 floor space ratio development standard is considered unnecessary in this case because the proposed development complies with the objectives of the subject development standard (*Clause 4.4 Floor space ratio*). The objectives of the development standards are addressed at **Section 2.2** above. Refer also to the five tests under *Wehbe v Pittwater Council* at **Section 4.2** below.

The development is considered to have sufficient environmental planning grounds given the development allows LAHC to deliver greater housing choices to those in need, through the provision of units with greater accessibility areas/ circulation spaces needed by seniors with mobility issues.

The development will be in the public interest because it raises no inconsistencies with the objectives of the R2 zone and complies with the objectives of the development standard. The proposed development has been designed to minimise any conflict with the adjoining properties such as overshadowing, privacy, sunlight impacts and view impacts. Refer to **Section 2.2** above.

The case also identifies that the outcome of the breach to a development standard does not necessarily need to be a *neutral* or *better* outcome, if the relevant environmental planning grounds to assess it

against do not require such. With regard to overshadowing, visual impact and privacy the objective of the development standard is to *minimise* disruption to adjoining properties and the public domain (CI 4.4(1)(c)). The proposed development has been designed to ensure that such impact to neighbours are minimised, and therefore complies with the objective.

4.2 **Wehbe v Pittwater Council (2007) NSW LEC 827**

In his decision in *Wehbe v Pittwater Council (2007) NSW LEC 827*, Chief Justice Preston expressed the view that there are five different ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary. The five tests are considered in the table below.

i. <i>The objectives of the standards are achieved notwithstanding non-compliance with the standard</i>	The proposed development complies with the objectives of <i>Clause 4.4 Floor space ratio</i> . The objectives of the standard are addressed at Section 2.2 above.
ii. <i>The underlying objectives or purposes of the standard are not relevant to the development and therefore compliance is unnecessary</i>	The underlying objectives of the standard are relevant to the development. However, as provided in this request, compliance with the standard is considered unnecessary in this case.
iii. <i>The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable</i>	The underlying object or purpose of the standards would not be defeated or thwarted if compliance was required.
iv. <i>The development standards have been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standards and hence compliance with the standard is unnecessary and unreasonable; and</i>	This exception to development standards request does not rely on this reason.
v. <i>The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.</i>	This exception to development standards request does not rely on this reason.

4.3 **Winten Developments Pty Ltd v North Sydney Council (2001) NSWLEC 46**

The exception to development standard request is assessed below against the accepted test for the assessment of development standard variation established by *Winten Developments Pty Ltd v North Sydney Council (2001) NSWLEC 46*.

a) Are the planning controls in question a development standard?	Yes, Clause 4.4 of the HLEP 2012 is a development standard.
b) What is the underlying object or purpose of the standards?	The objectives of the standard are addressed at Section 2.2 above.
c) Is compliance with the development standards unnecessary or unreasonable in the circumstances of the case?	Sections 2 and 3 demonstrate that compliance is unnecessary and unreasonable.

d) Is compliance with the development standards consistent with the aims of the Policy (to provide flexibility in the application of development standards); and, in particular, does compliance with the development standards tend to hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Environmental Planning and Assessment Act 1979?	As demonstrated in Section 2, compliance with the standards would be inconsistent with the objectives of Clause 4.6 and would hinder the attainment of the objects of the Act as discussed in Sections 2, 3 and 4 of this request.
e) Is the objection well founded?	The objection is well founded on the grounds that the non-compliance: – Enables the delivery of greater housing choices to those in need, by providing units with better circulation space for seniors with mobility issues. – Allows for the delivery of an additional unit, therefore providing critical infrastructure, needed to address the long waiting list for social housing. – Has been demonstrated not to raise any issues of State or regional planning significance; – Achieves the objects of the EP&A Act and will provide positive social impacts to the Georges River Local Government Area; – Enables a development that reflects the changing character of the locality without significant environmental impacts on the use and enjoyment of adjoining land uses, such as overshadowing, privacy, sunlight impacts and view impacts.

5 CONCLUSION

The development proposes to vary the maximum HLEP 2012 floor space ratio standard of 0.6:1 by 0.01:1 (1.67%) resulting in a maximum floor space ratio of 0.6:1:1.

In considering this request, it should be noted that the Land and Environment Court of NSW in a recent decision in *Eastern Suburbs Leagues Club Ltd v Waverley Council [2019] NSWLEC 130* found that a Clause 4.6 variation is not required to exceed height and floor space ratio standards in a Local Environmental Plan for seniors housing under the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004. Although not technically required, the Clause 4.6 request has been provided, should Council consider it warranted/necessary.

The proposed development, with the floor space ratio non-compliance, will not result in a built form that will be out of character with surrounding residential development and will be consistent with the emerging character of the area. Additionally, any potential impacts of the proposed development on surrounding dwellings will not be noticeably different when compared to the impacts of a scheme achieving the 0.6:1 floor space ratio control.

The proposed floor space ratio is supported on environmental planning grounds and is in the public interest, as outlined in this report.

It is therefore considered that the minor variation to the floor space ratio development standard at 2-8 Macpherson Street, Hurstville, does not undermine the objectives of both the development standard and the zone. The noncompliance results in a development that improves the amenity of future tenants without any discernible internal and external impacts. Council is therefore requested to exercise its flexibility under Clause 4.6 by granting development consent to the proposed development.