

61-75 Forest Road and 126 Durham Street, Hurstville

## Clause 4.6 – FSR Development Standard

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**61-75 FOREST ROAD AND 126 DURHAM STREET,  
HURSTVILLE**

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1.0	CLAUSE 4.6 REQUEST – FSR	4
1.1	Introduction	4
1.2	Clause 4.6 Exceptions to development standards	4
1.3	Development Standard to be varied	4
1.4	Extent of Variation to the Development Standard	6
1.5	Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?	6
1.6	Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?	9
1.7	Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)	10
1.8	Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives	10
1.9	Clause 4.6(5) Secretary Considerations	11
1.10	Objectives of Clause 4.6	12
1.11	Conclusion	12

## 1.0 CLAUSE 4.6 REQUEST – FSR

### 1.1 Introduction

This request for an exception to a development standard is submitted in respect of the FSR development standard contained within Clause 4.4 of the Hurstville Local Environmental Plan 2012 (HLEP). The request relates to an application for the demolition of all existing structures and construction of a mixed use development containing 4,274 square metres of commercial floor space, a hotel with 42 suites and 76 keys, and 260 apartments, within 4 buildings ranging in height from 3 to 20 storeys above a 4 basement levels containing 476 car parking spaces, and stratum subdivision at 61-75 Forest Road and 126 Durham Street, Hurstville.

### 1.2 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the HLEP provides that development consent may be granted for development even though the development would contravene a development standard imposed by the HLEP, or any other environmental planning instrument.

However, clause 4.6(3) states that development consent must not be grant 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) the applicant requests that the FSR development standard be varied.

### 1.3 Development Standard to be varied

Clause 4.4 states:

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

(a) to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality,

(b) 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,

(c) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,

(d) 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,

(e) to minimise the adverse impact of the development on heritage items,

(f) 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.

(2) The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.

There are two FSR zones which apply to the site being a 2:1 FSR along the Roberts Lane frontage of the site, and a 3.5:1 FSR for the remainder of the site, as illustrated in Figure 1 below.

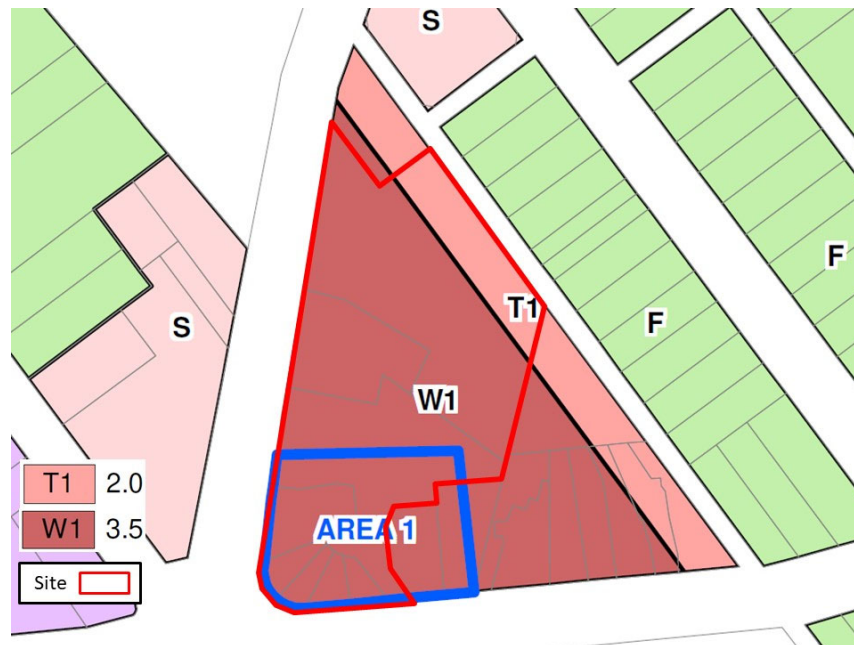


Figure 1:

Extract from  
the HLEP FSR  
Map

In addition to the FSR controls, Clause 4.4(2A) of the HLEP provides that

Despite subclause (2), development consent may be granted for a building if the consent authority is satisfied that—

(a) the gross floor area of the building will exceed the maximum gross floor area that would otherwise be permitted under this clause by an amount of no more than 7,023 square metres (the bonus floor allowance), and

(b) part of the building, with a floor area of not less than the bonus floor allowance, will be—

- (i) used for the purpose of hotel or motel accommodation, and
- (ii) situated on land identified as "Area 1" on the Floor Space Ratio Map.

The proposal seeks to take up part of the 'bonus floor allowance' provided by Clause 4.4(2A)(a) of the HLEP and includes a hotel of 4,741 square metres in Gross Floor Area as part of Building D, which is situated on land identified as "Area 1" on the Floor Space Ratio Map. The proposal is compliant in relation to this clause.

#### 1.4 Extent of Variation to the Development Standard

In relation to the calculation of FSR for the two FSR zones, in *Mulpha Norwest Pty Ltd v The Hills Shire Council (No 2)* [2020] NSWLEC 74, the Land and Environment Court has decided that the FSR must be evaluated separately in the two different FSR areas.

The table below provides a breakdown of the site area of each FSR zone, the compliant Gross Floor Area (GFA) within each FSR zone, the total available Gross Floor Area on a combined basis, and the variation to the FSR control in the 3.5:1 zone. (These figures are exclusive of the 'bonus floor allowance')

FSR zone	Site Area	Compliant GFA	Proposed GFA/FSR	FSR	FSR Variation
2:1	1,018.38 sqm	2,036.76sqm	1,014sqm	0.99:1	N/A
3.5:1	7,526.62 sqm	26,343.17sqm	27,363sqm	3.635:1	1,019.83sqm or 3.87%
TOTAL	8,545.63sqm	28,379.93sqm	28,377sqm	N/A	N/A

Whilst the total proposed Gross Floor Area (excluding the 'bonus floor allowance') does not exceed the total density that can be achieved across the entire site, the proposal exceeds the maximum gross floor area in the 3.5:1 area by 1,019.83 square metres or 3.87%.

#### 1.5 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In addition, in the matter of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Justice held that "establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary".

This request addresses the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

##### 1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

The specific objectives of Clause 4.4 of the HLEP are identified below. A comment on the proposal's consistency with each objective is also provided.

(a) to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality,

The overall density across the site does not exceed the maximum density which is achievable with the application of the two FSR controls and the variation arises as a result of a minor increase to the density on the western part of the site which is compensated by a significant reduction in density on the eastern part of the site. In particular, Building A is half the 6 storey height anticipated by the planning controls.

The proposed bulk and scale of the remaining buildings is exactly as anticipated by the planning controls which reflects the existing and desired future character of the locality.

(b) 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,

The overall density across the site does not exceed the maximum density which is achievable with the application of the two FSR controls and the variation arises as a result of a minor increase to the density on the western part of the site which is compensated by a significant reduction in density on the eastern part of the site. Accordingly, the intensity of land use is exactly as anticipated by the FSR controls which apply to the site notwithstanding the variation to FSR in the 3.5:1 zone which means that the density is acceptable having regard to the availability of infrastructure and also likely traffic generation arising from the development of the site.

(c) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,

The overall density across the site does not exceed the maximum density which is achievable with the application of the two FSR controls and the variation arises as a result of a minor increase to the density on the western part of the site which is compensated by a reduction in density on the eastern part of the site. The variation to the 3.5:1 FSR zone does not manifest itself in any difference in scale of development compared to that which is envisaged for the site under the recently adopted new planning controls for the site, and therefore there is no adverse environmental effects on the use or enjoyment of adjoining properties and the public domain as a result of the proposed variation.

(d) 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,

The variation to the 3.5:1 FSR zone does not manifest itself in any difference in scale of development compared to that which is envisaged for the site under the recently adopted new planning controls for the site, and therefore the development still provides appropriately for a transition in scale from west to east across the site. In fact, the proposal provides for a reduced density on the eastern part of the site where there is a more sensitive interface to the lower scale residential development across Roberts Lane to the east.

(e) to minimise the adverse impact of the development on heritage items,

The variation to the 3.5:1 FSR zone does not manifest itself in any difference in scale of development compared to that which is envisaged for the site under the recently adopted new planning controls for the site, and therefore there is no adverse impact to the nearby heritage listed Hurstville Scout Hall as a consequence of the proposed FSR variation.

(f) 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.

The overall density across the site does not exceed the maximum density which is achievable with the application of the two FSR controls and the variation arises as a result of a minor increase to the density

on the western part of the site which is compensated by a reduction in density on the eastern part of the site. The variation to the 3.5:1 FSR zone does not manifest itself in any difference in scale of development compared to that which is envisaged for the site under the recently adopted new planning controls for the site, and therefore the bulk and scale of the proposed development remains compatible with the major centre status of the Hurstville City Centre.

**2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;**

The underlying objectives and purpose of the FSR control are relevant to the proposed development. However, the proposed development is consistent with those objectives on the basis that the overall density on the site is as anticipated by the application of the two FSR zones.

**3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;**

The underlying objectives and purpose of the standard relates to density and intensity of use as well and to control bulk and scale. The underlying objective and purpose would be diminished by a compliant proposal in the 3.5:1 FSR zone as the development would fail to realise the identified environmental capacity of the site.

**4. the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;**

The development standard has not been virtually abandoned.

**5. 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.**

Key facts that support the above reasons why strict compliance with the floor space ratio development standard is unreasonable and unnecessary in the circumstances of the case are as follows:

- Whilst there is a minor exceedance in the 3.5:1 zone, this is balanced by the equivalent minor reduction in the 2:1 zone, such that the overall density of the proposed development is exactly as anticipated for the site when the two FSR zones are combined. Accordingly, the variation arises from the distribution of Gross Floor Area across the site and not as a result of any proposed increase in overall density for the site beyond that which is intended by the FSR controls.
- Notwithstanding that the distribution of Gross Floor Area across the site is not precisely as intended by the boundary between the two FSR zones, the proposed development nonetheless provides a distribution of mass and scale across the site generally as anticipated by the DCP as well as the previous masterplanning process.
- Despite the proposed FSR variation, the Applicant's proposed approach towards the distribution of density on the site is entirely aligned with the objective of the split FSR zones with a lower density and scale along the Roberts Road frontage of the site and higher density and scale for the remaining majority of the site. In particular, Building A is actually half of the 6 storey height anticipated by the DCP which provides for an even more sensitive interface to Roberts Lane.



- The proposed variation to the 3.5:1 FSR control is minor and does not result in any unreasonable impacts, noting that this does not compromise the achievement of all of the necessary metrics in relation to setbacks, number of storeys, common open space and the provision of through site links.
- If the variation is not permitted, the overall site will not achieve its planned level of density.

#### 1.6 Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?

The Land & Environment Court matter of Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 2018, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and
- there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development

The variation to the development standard in this instance is for FSR and unlike a variation to a height control for example, where there is a specific area of encroachment, there is not necessarily one specific area responsible for the FSR control. Notwithstanding, the proposed variation to the FSR control in the 3.5:1 FSR zone of 1,019.83 square metres could correlate with the GFA on the top floors of both Buildings C and D

The environmental planning grounds that justify the component of the development which results in the FSR variation are:

- The above identification of areas within the building which are equivalent to the additional 1,019.83 square metres is particularly useful in considering the environmental planning grounds associated with the proposed variation. The proposed development is predominantly compliant in relation to height, setbacks and arrangement of buildings as anticipated by the DCP. The removal of floor space by taking the top floor of both building C and D to simply achieve numerical compliance would result in a built form which is less than that which was anticipated for the site by the concept master plan and would be inconsistent with the built form outcome which is intended by the planning controls. Furthermore, strict compliance in the 3.5:1 FSR zone would force this area to be redeployed into Building A in the 2:1 zone, which could result in an anomalous outcome which would be inconsistent with the intention of the DCP to reduce scale at the eastern edge of the site. The proposed buildings in the 3.5:1 FSR zone have a scale and proportions as anticipated by the planning controls such that the proposed variation does not result in any detrimental impact or a built form outcome which differs from that which is expected on the site. Therefore, the appropriate contextual fit of the proposed development provides an environmental planning ground to support the proposed variation.
- It is noted that Preston J provides that the development is not required to demonstrate a beneficial effect relative to a compliant development, however, in this instance it is considered that strict compliance would not achieve any improved outcome for the development and would in fact result in a diminished outcome as a result of needing to redeploy the floor space into the 2:1 FSR zone, or simply result in less housing and employment floor space than that which is capable of being provided within the demonstrated environmental capacity of the site.

- The overall density of the proposal does not exceed the total density which could be achieved across the site. Furthermore, the proposed distribution of density across the site, where more floor space is located in the western part of the site rather than the more sensitive eastern part, is entirely consistent with the core objective of the split FSR zones which instead aims to shift the majority of built form to the western part of the site and away from the sensitive interface across Roberts Lane. In particular, Building A is actually half of the 6 storey height anticipated by the DCP which provides for an even more sensitive interface to Roberts Lane. The Applicant's proposed approach towards the distribution of density on the site is entirely aligned with the objective of the split FSR zones by moving density towards the western part of the site.
- The proposed variation to the 3.5:1 FSR control does not result in any unreasonable impacts.
- If the variation is not permitted, the proposal would need to relocate density to Building A which is counter intuitive as it more merely diminish the achievement of a more sensitive interface to Roberts Lane.
- The proposed FSR variation will provide for additional housing and employment floor space which is an environmental benefit particularly in this location where Council is trying to encourage additional housing and employment closer to centres due to the better access to public transport and the various facilities and amenities offered by the centres.

On the basis of the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed FSR non-compliance in this instance

#### 1.7 [Clause 4.6\(4\)\(a\)\(i\) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6\(3\)](#)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

#### 1.8 [Clause 4.6\(4\)\(a\)\(ii\) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives](#)

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

##### **Objective of the Development Standard**

The proposal's consistency with the objectives of the development standard have been addressed in detail in this clause 4.6 request.

##### **Objectives of the Zone**

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the B4 Mixed Use zone.

The objectives of the B4 Mixed Use 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.
- To allow for residential development in the Hurstville City Centre while maintaining active retail, business or other non-residential uses at street level.

The proposal provides a mixture of compatible uses comprising speciality retail, supermarket, food and drink premises, a hotel, and residential apartments and will contribute to the vibrancy of the area. The site is also particularly well located in relation to public transport being only 450 metres from Allawah train station and 750 metres from Hurstville train station and town centre and therefore provides a transit-oriented development that intensifies and diversifies activity around public transport infrastructure allowing for multiple activities and services, local employment and diverse housing options. The proposal is also in very close proximity to a range of recreational opportunities and services and facilities including Kemp Field which is directly opposite the site to the south.

The architecture of the development with buildings addressing the street frontages and the internal common landscaped open space, combined with a high quality public domain outcome will result in activated and vibrant places that are used both during the day and evening, increasing safety.

For the reasons given the proposal is considered to be consistent with the objectives of the B4 Mixed Use zone.

The above discussion demonstrates that the proposal development will be in the public interest notwithstanding the proposed variation to the FSR development standard, 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. Furthermore, there is no material public benefit in maintaining the standard generally or in relation to the site specifically as a variation as proposed has been demonstrated to be based on sufficient environmental planning grounds in this instance. Accordingly, there is no material impact or public benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard for this particular component.

#### 1.9 Clause 4.6(5) Secretary Considerations

The matters for consideration under Clause 4.6(5) are addressed below:

(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,

The contravention of the standard does not raise any matters of significance for state or regional environmental planning. The development does not impact upon or have implications for any state policies in the locality or impacts which would be considered to be of state or regional significance.

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

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

This Clause 4.6 request has demonstrated there are environmental planning benefits associated with the contravention of the standard. There is no material impact or benefit associated with strict adherence to the development standard and in my view, there is no compelling reason or public benefit derived from maintenance of the standard.

#### 1.10 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

(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.

As demonstrated above the proposal is consistent with the objectives of the zone and the objectives of Clause 4.4 notwithstanding the proposed variation to the FSR development standard.

Requiring strict compliance with the FSR development standard in the 3.5:1 zone on the subject site would result in an inferior built form because it would require density to be relocated to Building A which would diminish the achievement of a more sensitive interface with Roberts Lane. Strict compliance would force this floor space to be redeployed to the 2:1 zone which is a less desirable outcome due to the objective to reduce density in that part of the site.

Allowing the flexible application of the FSR development standard in this instance is not only reasonable but also desirable given the objective to increase density in the western part of the site.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the 3.5:1 FSR standard, and where the overall site density is not exceeded, will achieve a better urban design outcome in this instance in accordance with objective 1(b).

#### 1.11 Conclusion

Strict compliance with the FSR development standard contained within clause 4.4 of Hurstville Local Environmental Plan 2012 has been found to be unreasonable and unnecessary in the circumstances of the case. In addition there are sufficient environmental planning grounds to justify the variation. Finally, the proposed development and overall site density is in the public interest because it is consistent with the objectives of the standard and the zone. In this regard it is reasonable and appropriate to vary the FSR development standard to the extent proposed.