

Clause 4.6 – Exceptions to Development Standards

Request to Vary Section 108(2)(c) of the State Environmental Planning Policy (Housing) 2021.

Address: 669-683 Old South Head Road, Vacluse

Proposal: The amended DA seeks consent to undertake the demolition of all structures on the site and construction of a seniors housing development involving 30 independent living units and ancillary facilities, including a ground floor retail/business premises, associated earthworks, lot consolidation, landscaping and tree removal works, located at No. 669-683 Old South Head Road, Vacluse ('the site').

Date: 26 September 2024

1. Introduction

This Statement has been prepared in accordance with the provisions of Clause 4.6 of the Waverly Local Environmental Plan 2012 (WLEP 2012). The statement sets out a request to vary the non-discretionary development standard for Floor Space Ratio (FSR) at Section 108(2)(c) of the State Environmental Planning Policy (Housing) 2021.

It is noted that this statement seeking to vary the non-discretionary standard has been prepared and submitted for abundant caution only, as it is considered that the provisions of the non-discretionary development standard for FSR at Section 108(2)(c) of the Housing SEPP are not relevant in the circumstances of the proposed development.

2. Site and Proposed Development

2.1. Site Description

The site is located at No. 669-683 Old South Head Road, Vacluse and is comprised of nine (9) allotments that are legally described as the following:

- Lot A, DP 324744;
- Lot B, DP 324744;
- Lot 2, DP 10314;
- Lot 1, DP 169310;
- Lot 4, DP 192614;
- Lot 1, DP 168877;
- Lot 1, DP 167942;
- Lot 1, DP 666626; and
- Lot 2, DP 316716.

The site has an area of 4,345.03m² and is irregular in shape. The site is located on the north-eastern corner of Old South Head Road and Oceanview Avenue, with a splayed frontage to Old South Head Road of 105.17m in length. The site has a secondary frontage to Oceanview Avenue of 33.53m.

The site has a significant fall (of approximately 5m) from the south-east to the north-west towards Old South Head Road. The northern part of the site drains to the rear of the existing properties on the site from west to east.

Vehicle access to the site is currently achieved via multiple separate driveways located along Old South Head Road and Oceanview Avenue.

The development site has a split zoning in accordance with the provisions of the Waverley Local Environmental Plan 2012 (WLEP 2012), such that the southern end (being Lots A and B in DP 324744) is zoned E1 Local Centre and the remainder of the site (the northern portion) is zoned R3 Medium Density Residential.

2.2. *Development Description*

The amended DA seeks consent to undertake the demolition of all structures on the site and construction of a seniors housing development involving 30 independent living units and ancillary facilities, including a ground floor retail/business premises (on the E1 zoned land), associated earthworks, lot consolidation, landscaping and tree removal works, located at No. 669-683 Old South Head Road, Vaucluse ('the site').

3. Description of the Environmental Planning Instrument, development standard and proposed variation

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

The Waverley Local Environmental Plan 2012 (WLEP 2012) and the State Environmental Planning Policy (Housing) 2021 (the 'Housing SEPP').

3.2. *What is the zoning of the land?*

The site is partly located within both the R3 Medium Density Residential zone and the E1 Local Centre zone under WLEP 2012 as illustrated in the extract of the Land Zoning Map in Figure 1.

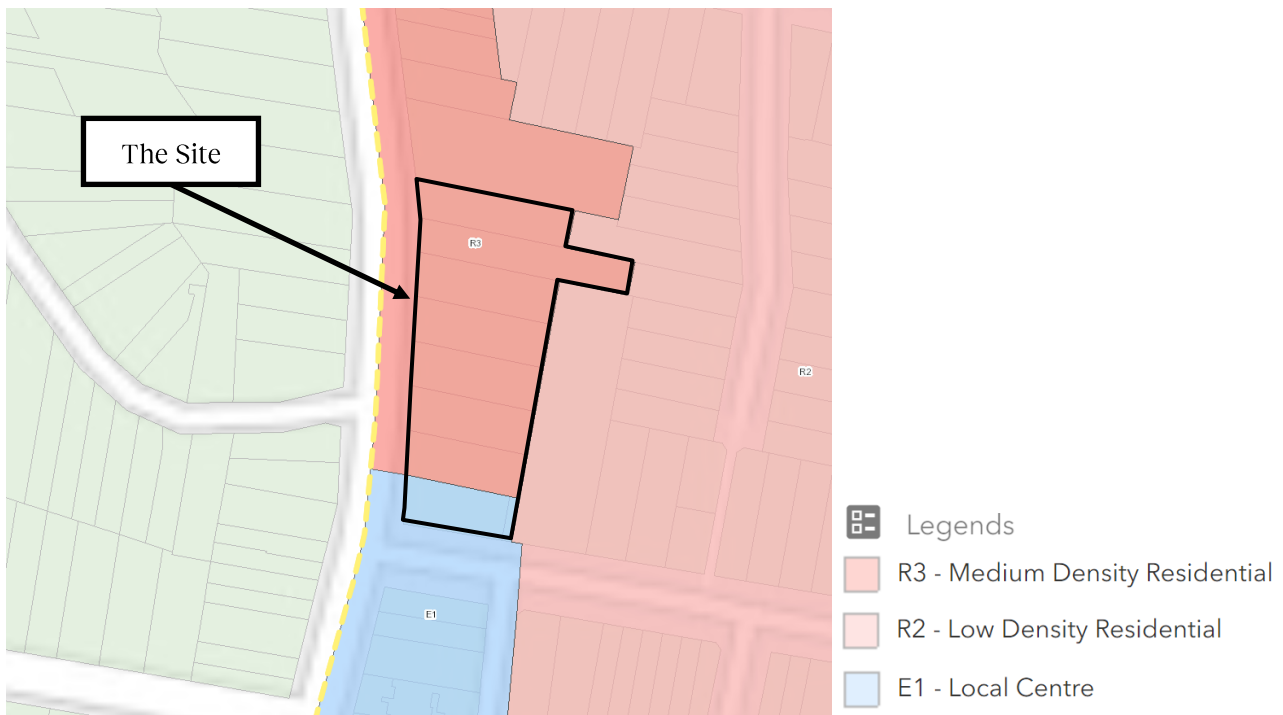


Figure 1: Extract of WLEP 2012 Zoning Map (Source: NSW Planning Portal Digital EPI Viewer)

The objectives of the R3 Medium Density zone are:

- To provide for the housing needs of the community within a medium density residential environment
- To provide a variety of housing types within a medium density residential environment
- To enable other land uses that provide facilities or services to meet the day to day needs of residents
- To maximise public transport patronage and encourage walking and cycling
- To increase or preserve residential dwelling density
- To encourage the supply of housing, including affordable housing, that meets the needs of the population, particularly housing for older people and people with disability
- To provide development that is compatible with the desired future character and amenity of the surrounding neighbourhood
- To promote development that incorporates planning and design measures that reduce the urban heat island effect
- To improve the urban tree canopy by providing high levels of deep soil planting and additional landscaping

The objectives of the E1 Local Centre zone are:

- To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area
- To encourage investment in local commercial development that generates employment opportunities and economic growth
- To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area
- To encourage business, retail, community and other non-residential land uses on the ground floor of buildings

- To strengthen the viability of Waverley’s existing business centres as places of vitality for investment, employment and cultural activity
- To maximise public transport patronage and encourage walking and cycling
- To encourage the provision of affordable housing
- To provide for a range of other uses, including light industrial, that serve the surrounding neighbourhood without impacting on the amenity of the adjoining uses
- To ensure development is of a height and scale that achieves the desired future character of the neighbourhood
- To promote employment growth by giving preference to commercial development over residential development
- To provide active ground floor uses to create vibrant centres

3.3. What is the development standard being varied?

Section 108(2)(c) of the Housing SEPP reads as follows:

“(2) The following are non-discretionary development standards in relation to development for the purposes of independent living units—
 (a)

 (c) the density and scale of the buildings when expressed as a floor space ratio is 0.5:1 or less,”

It is noted that in addition to the above non-discretionary development standard, the FSR development standards set out under Clause 4.4 of WLEP 2012, and Section 87(2)(b)(i) apply to the development and these standards combine to allow for a considerably greater FSR for development at the site than provided for under the Section 108 of the Housing SEPP.

This Clause 4.6 Statement which seeks to vary the FSR non-discretionary development standard under s108(2)(c) of the Housing SEPP has been prepared and submitted for an abundance of caution.

3.4. Type of development standard.

Section 108(2)(c) is a numerical non-discretionary development standard.

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

In accordance with Section 108(2)(c) of the Housing SEPP provides a non-discretionary development standard of 0.5:1 FSR for development for the purpose of independent living units at the site. The FSR of 0.5:1 equates to a GFA of 2,172.52m².

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

The application proposes a total GFA of 6222m², which equates to a FSR of 1.43:1 across the site, equating to a variation of 4,049.48m² GFA if the FSR is applied pro rata across the entire site.

The proposed GFA over the southern part of the site (zoned E1) is 935m² equating to a FSR of 1.96:1.

The proposed GFA over the northern part of the site (zoned R3), is 5,287m² equating to a FSR of 1.37:1.

3.7. What is the percentage variation (between the proposal and the environmental planning instrument)?

The application achieves a FSR of 1.43:1 across the site, equating to a variation of 186.3% to the 0.5:1 non-discretionary development standard.

It is again noted that the request to vary the non-discretionary development standard has been provided for an abundance of caution.

4. Justification of the Proposed Variation

4.1. Clause 4.6 Exceptions to Development Standards

Clause 4.6 of WLEP 2012 establishes the framework for varying development standards in an Environmental Planning Instrument. Clause 4.6(3) outlines that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

- (a) *compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
- (b) *there are sufficient environmental planning grounds to justify the contravention of the development standard.*

This written request has been prepared in accordance with the *Guide to Varying Development Standards*, published by the NSW Department of Planning and Environment in November 2023 and has regard to the following judgements:

- *Winten Property v North Sydney Council (2001) NSW LEC 46;*
- *Wehbe v Pittwater Council (2007) NSW LEC 827;*
- *Four2Five Pty Ltd v Ashfield Council (2015) NSW LEC 90;*
- *Randwick City Council v Micaul Holdings Pty Ltd (2016) NSW LEC 7;*
- *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSW LEC 118;*
- *Initial Action Ltd v Woollahra Municipal Council (2019) NSW LEC 1097;*
- *RebelMH Neutral Bay Pty Limited v North Sydney Council (2019) NSWCA 130;*

4.2. How is compliance with the development standard unreasonable or unnecessary in the circumstances of this particular case?

The five common ways to establish whether compliance with the development standard is unreasonable or unnecessary have been summarised in *Wehbe v Pittwater Council [2007] NSWLEC 827* and are outlined as follows:

Compliance with the development standard is unreasonable or unnecessary if the:

1. Objectives of the development standard are achieved notwithstanding the non-compliance
2. Underlying objective or purpose is not relevant to the development
3. Underlying objective or purpose would be defeated or thwarted if compliance was required
4. Development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard
5. Zoning of the land on which the development is proposed was unreasonable or inappropriate.

This written request relies on the first and second test described in *Wehbe*.

Compliance with the non-discretionary FSR development standard at s108(2)(c) of the Housing SEPP is unreasonable and unnecessary as the objective of the development standard is achieved notwithstanding

the non-compliance. Specifically, the object of the non-discretionary standard is at s108(1) and states the following:

- “(1) *The object of this section is to identify development standards for particular matters relating to development for the purposes of independent living units that, if complied with, prevent the consent authority from requiring more onerous standards for the matters.*”

Noting that other EPIs (the WLEP and section 87 of the Housing SEPP) set less (not more) onerous maximum FSR standards for the proposed development, it can be said that the object of the standard is achieved.

Further, it could also be said that the purpose of the non-discretionary development standard at s108(2)(c) is not relevant to the development because of the fact that WLEP 2012 and s87 of the Housing SEPP prescribe considerably less onerous FSR standards which apply to the subject development.

4.3. *Are there sufficient environmental planning grounds to justify contravening the development standards?*

It is considered that there are sufficient environmental planning grounds to justify contravening the development standards which are detailed as follows:

The standard is not relevant

The non-discretionary development standard at s108(2)(c) is not relevant to the proposed development as the provisions of the Clause 4.4 of WLEP 2012 and s87 of the Housing SEPP provide less onerous FSR development standards that are applicable to the subject development.

Disconnect between height and FSR standard

The proposed development remains consistent with other relevant provisions of the Housing SEPP which provide for greater building height at the site i.e. the proposed building height is well below the building height allowable under the provisions of s87(2)(c) of the Housing SEPP.

Further, the proposed development is generally consistent with the WLEP maximum building height development standard albeit that there is a minor non-compliance with that standard for the purpose of lift overruns and a small component of the northern end of the building. This is addressed in a separate Clause 4.6 Statement.

The fact that the proposed FSR effectively ‘fits’ within the applicable building height demonstrates that there is an appropriate correlation between the proposed FSR and the applicable WLEP building heights for the site.

Further, if the FSR were reduced to match the FSR allowed under Clause 4.4 of the WLEP and s87(2) of the Housing SEPP, then the building height would be significantly below both the LEP height and the bonus height allowed under the Housing SEPP. This would be an inappropriate correlation and would not meet the objective of the FSR development standard.

As such there is an apparent disconnect between the non-discretionary development standard and the building height development standards and requiring compliance with the non-discretionary FSR standard would not be consistent with the orderly and economic use of the land and Objective (c) of the EP&A Act.

Avoidance of impacts

The variation to the FSR standard does not result in a development that will give rise to significant adverse overshadowing, privacy impacts, or view loss.

The non-compliance does not result in non-compliance with relevant solar access controls and do not result in adverse impacts to the amenity of existing adjacent residential development at 2 Oceanview Avenue and 687 Old South Head Road. Specifically, the proposal:

- The proposal complies with the provisions of Part 4A of the ADG and the Solar Access controls in the Waverley DCP for residential development; and
- The non-compliance does not result in any additional overshadowing upon any openings of adjacent development including openings in the western elevation of the existing residential flat building to the east of the site at 2 Oceanview Avenue from 9am to 3pm in mid-winter.
- The non-compliance with the FSR does not affect the sunlight to the living rooms or the primary private open spaces of the apartments at the residential flat building at 2 Oceanview Avenue in any way.
- The proposal will not result in overshadowing of any public park, reserve or the like.

The non-compliance does not result in non-compliance with relevant privacy controls and does not result in adverse impacts to the amenity of existing adjacent residential development at 2 Oceanview Avenue and 687 Old South Head Road with regard to privacy.

Contextual fit

The proposal is consistent with the density, height and scale of the adjacent development and the desired future character of the locality as envisaged with the WDCP 2022.

The non-compliant building does not result in a scale that is out of context with adjacent development and development with the North Rose Bay Village, such that the proposed density results in a four storey building, consistent with adjacent development to the immediate north and east of the site and with the scale of development to the south in the commercial area of the Rose Bay Village.

The development is consistent with the desired future character of the Rose Bay North Village Centre controls (at 3.1.11 of the WDCP 2022) and the “Building Design and Streetscape” and the “Site, Scale and Frontage” controls under C2 of the WDCP 2022, despite the non-compliance with the FSR standard.

Notwithstanding the breach of FSR, the proposed buildings achieve an appropriate scale and transition of height relative to surrounding contemporary and older buildings in the immediate vicinity of the site including the four storey developments at 2, 4 and 6 Oceanview Avenue and 687 Old South Head Road.

Notwithstanding the breach in FSR, the proposal satisfies other relevant controls and requirements including the Design Principles under Chapter 3, Part 5, Division 6 of the Housing SEPP, the Design Requirements under Chapter 3, Part 5, Division 5 of the Housing SEPP, the “Standards Concerning Accessibility and Usability for Hostels and Independent Living Units” under Schedule 4 of the Housing SEPP, and the relevant provisions of the WDCP 2022 and the Apartment Design Guide (ADG).

Contextually, the proposal is of a density and overall bulk and scale that fits with immediately adjacent development, and development in the wider North Rose Bay Village setting.

Existing approvals

The proposed density, height, scale and building envelope is consistent with the density, height and building envelope of existing approvals for the site.

Specifically, notwithstanding the breach in FSR, the proposal achieves a FSR that is commensurate with the combined FSR of DA-455/2021 and DA-374/2020, i.e. 1.43:1.

Further, the proposed building height that is commensurate with the building height approved under the two previous recent approvals for the site (i.e. DA-455/2021 and DA-374/2020).

Importantly, and notwithstanding the non-compliance to the development standards, it can be demonstrated that the proposed development will result in a better planning outcome compared to the previous approvals at the site for the following reasons:

- The development proposes an overall scale and density commensurate with previous approvals for the site, however it replaces an approved residential flat building component at the corner of Old South Head Road and Oceanview Avenue, with seniors housing. This is considered to be a benefit to the local and broader community in providing a land use that is in demand in the area.
- The proposal delivers greater amenity and benefit to residents and the public through the synergies that will be achieved by delivering seniors housing across both sites (i.e. car parking, storage, use of open space and other facilities are able to be consolidated across the wider site). The synergies and improvements achieved through the consolidated approach include:
 - A more cohesive and higher quality urban design and architectural response to the prominent site. The proposal allows for a two-building solution to the site (similar to the previous approvals) albeit with the separation of the buildings in a more favourable and appropriate location along Old South Head Road compared to the two approved buildings,
 - This results in a superior streetscape character through a reduction in the visual massing of the buildings along the Old South Head Road elevation. It also results in reduced overshadowing of the residential flat building to the east of the site at 2 Oceanview Avenue, because of the more northern placement of the building separation.
 - A reduction in on-site car parking from 64 to 49 spaces and thereby reduction in traffic generation.
 - An increase in deep soil area.
 - An increase in basement storage volume for residents.
 - Reduction in overshadowing to the residential flat building at 2 Oceanview Avenue to a point that no openings in the western elevation of that building will be in shadow between 9am and 3pm in mid-winter.

Therefore, and notwithstanding the breach in FSR, in planning terms, the scale and density of the proposal is entirely consistent with the approved scale of two recent development approvals for the site but will result in a better planning outcome compared to those approvals.

Provision of affordable housing

The proposal will result in public benefit as it seeks to provide for seniors housing at the site within a development that is commensurate in terms of density and building height with previous approvals for the site, but that will be superior in a public benefit and planning sense in that it will reduce impacts for adjacent development, improve the streetscape and urban design outcomes and improve amenity for future residents in comparison to the previous approvals.

Additionally, the proposal is accompanied by a VPA which involves a monetary contribution that would allow for the realisation of affordable housing by Waverley Council.

The VPA is to the value of the affordable housing (i.e. 4 dwellings) that would otherwise have been realised at No. 671-683 Old South Head Road in accordance with Development Consent 455/2021. Further, the VPA provides for additional monetary contributions relating to the additional GFA (and based upon Council's VPA Policy) that is in excess of the GFA envisaged by the development standard relevant to the southern part of the site, being 669 Old South Head Road.

In providing affordable housing through the proposed VPA the proposal achieves consistency with Objective (d) of the EP&A Objective (d) under Section 1.3 which states:

"The objects of this Act are as follows—

.....

(d) to promote the delivery and maintenance of affordable housing,"

5. Conclusion

The proposed variation is based on the reasons contained within this formal request the non-discretionary FSR development standard at section 108(2)(c) of the Housing SEPP.

It is noted that the request for an exception to the non-discretionary standard has been provided for an abundance of caution.

As demonstrated in this submission, it would be unreasonable and is unnecessary for strict compliance with the non-discretionary FSR standard at s108(2)(c) of the Housing SEPP to be enforced as the standard is not relevant to the proposal and that in any event, the Object of the non-discretionary standard at s108 is nonetheless achieved.

For the reasons set out in detail under section 4.3 of this Statement, it has also been demonstrated that there sufficient environmental planning grounds to justify contravening the non-discretionary development standard.

It is concluded that the variation is well founded.