

APPENDIX A

Clause 4.6 – Exceptions to development standards

Clause 4.4 Floor Space Ratio

Clause 4.6 of Canterbury-Bankstown Bay Environment Plan (CBLEP) 2023 is intended to provide an appropriate level of flexibility in applying development standards to development to achieve a better outcome in certain circumstances.

Subclause (2) states:

"Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument."

This allows a variation to be sought to development standards under Clause 4.6. In accordance with Subclauses (3), (4) and (5) the following written request seeks to:

- Justify contravention of the maximum floor space ratio requirements as per Clause 4.4 by demonstrating that compliance is unreasonable or unnecessary in the circumstances and that there are sufficient environmental planning grounds particular to the circumstances of the proposed development and the subject site to justify the contravention;
- Demonstrate that the proposed development will be in the public interest and maintains the objectives of Clause 4.4;
- Demonstrate that the contravention of the maximum floor space ratio development standard does not raise any matter of significance for State or regional environmental planning; and
- Consider the public benefit of maintaining the floor space ratio development standard.

NSW Land and Environment Case Law

In order to clarify the extent of the matters required to be addressed within a request for a variation under Clause 4.6, consideration has been given to the following case law:

Wehbe v Pittwater [2007] NSWLEC827

Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC90

Randwick City Council v Micaul Holdings Pty LTD [2016] NSWLEC7

Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSW LEC118

Review of these cases indicates that a request for a variation under the provisions of Clause 4.6 is more onerous than previously required under SEPP 1. The case of *Randwick v Micaul* indicates that Council, as the consent authority, maintains a high level of discretion with regard to the level of justification required in order to support a variation request.

The following request provides an assessment of the proposed variation to the maximum floor space ratio with respect to the test methodology and requirements outlined within the relevant Case Law and requirements of NSW Councils.

Introduction and Description of the development standard to be varied

The Environmental Planning Instrument that applies to the land is Canterbury-Bankstown Local Environmental Plan 2013. The subject site is zoned R2 Low Density Residential and a variation is sought to 'Clause 4.4 Floor space ratio', specifically subclause (2B)(b) which states:

'(b) for a building used for the purposes of dwelling houses or semi-attached dwellings on land identified as "Area 2" on the [Clause Application Map](#)—

(i) for a site area less than 200m²—0.65:1, and

(ii) for a site area greater than 200m² but less than 600m²—0.55:1, and

(iii) for a site area of 600m² or more—0.5:1,'

The subject site is mapped as being within 'Area 2' of the Clause Application Map and has a site area of 235.5sqm, resulting in a maximum FSR of 0.55:1. The proposed additions and alterations has a total floor space ratio of 0.57:1 or 133.5m², resulting in a variation to Councils control of 3.63% or 3.975m².

The variation is sought to enable a suitable dwelling design and internal amenity for the lot size and existing dwelling. The FSR is considered to be in keeping with the streetscape and other surrounding dwellings have similar footprints and scale to ensure the minor increase to FSR is not highly noticeable. The variation to the FSR is not likely to have any detrimental impact and will continue to meet the objectives of the control and R2 Zone.

What are the objectives of the development standard to be varied?

4.4 Floor space ratio

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

- (a) to establish the bulk and maximum density of development consistent with the character, amenity and capacity of the area in which the development will be located,*
- (b) to ensure the bulk of non-residential development in or adjoining a residential zone is compatible with the prevailing suburban character and amenity of the residential zone,*
- (c) to encourage lot consolidations in commercial centres to facilitate higher quality built form and urban design outcomes,*
- (d) to establish the maximum floor space available for development, taking into account the availability of infrastructure and the generation of vehicular and pedestrian traffic,*
- (e) to provide a suitable balance between landscaping and built form in residential areas.*

Compliance with the objectives of the development standard

- (a) to establish the bulk and maximum density of development consistent with the character, amenity and capacity of the area in which the development will be located,*

The proposed developments bulk and scale is in keeping and compatible with the context of the locality. The minor increase to FSR will not add to any excessive bulk and scale of the development given the minor increase. Suitable spatial separation is maintained and the landscaped areas of the site is capable of being maintained.

The increase to FSR will not intensify the use of the site and will not result in any detrimental impact to the character of the locality. No adverse impacts to the amenity of the adjoining properties is anticipated. Suitable window placement ensures privacy of the adjoining dwellings is maintained. The subject dwelling is a suitable design for the site, ensuring shadows cast over adjoining properties are minimised, with a favourable lot orientation.

Despite the minor increase to FSR, the bulk and density of the development is consistent with the streetscape character and maintains a suitable amenity of the area. The proposal is a suitable form of development for the area ensuring the capacity of the area is maintained.

(b) to ensure the bulk of non-residential development in or adjoining a residential zone is compatible with the prevailing suburban character and amenity of the residential zone,

The subject development is for residential development and therefore this objective does not relate to the use of the site. The character and bulk of the dwelling remains in keeping with the prevailing suburban character.

(c) to encourage lot consolidations in commercial centres to facilitate higher quality built form and urban design outcomes,

The subject development is not located within a commercial centre and the built form will continue to provide for a high quality built form and urban streetscape design.

(d) to establish the maximum floor space available for development, taking into account the availability of infrastructure and the generation of vehicular and pedestrian traffic,

The FSR of the proposal is in keeping and compatible with the context of the locality. The minor increase to FSR will not add to any excessive bulk and scale of the development and will not generate an increase to vehicular or pedestrian traffic as the minor increase of approximately 4sqm provides for better internal living areas and better bedroom designs. The additional FSR allows for a suitable designed dwelling on the allotment size and does not increase reliance on infrastructure, nor will it account for the generation of vehicular or pedestrian traffic.

(e) to provide a suitable balance between landscaping and built form in residential areas.

The subject site more than meets with the minimum landscaped area requirements, with the proposed FSR not limiting the provision of front or rear landscaping. The subject site provides 22% landscaping which more than meets with the DCP requirements (20%). The design of the additions and alterations ensures the dwelling provides a better outcome for the residents and the minor increase to FSR does not intensify the development.

Compliance with the objectives of the zone

The objectives of the R2 Zone are provide below along with a comment in respect to the proposed dwelling meeting with the objective:

- *To provide for the housing needs of the community within a low density residential environment.*

The dwelling provides for a suitable housing choice within the low density zone that provides for the housing needs of the changing population and community. The additions and alterations are reasonably designed to accommodate contemporary family situations and the minor increase to FSR is considered to provide for a suitable housing choice for the future residents to accommodate appropriate living areas upon the smaller size allotment.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The proposed dwelling will not limit the provision of other land uses that provide facilities or services to meet with the needs of residents.

- *To allow for certain non-residential uses that are compatible with residential uses and do not adversely affect the living environment or amenity of the area.*

The subject dwelling does not propose a non-residential use, however, will not limit the provision of other non-residential land uses within the vicinity.

- *To ensure suitable landscaping in the low density residential environment.*

The increase to the proposed FSR does not limit the provision of landscaping, with 38% of the site to be landscaped which more than meets with the areas 20% requirement. This will ensure there is more than suitable landscaping on the site to contribute to the wider area.

- *To minimise and manage traffic and parking impacts.*

The FSR increase will not result in any detrimental impact to parking or traffic requirements. The additions and alterations include a new garage to the rear to accommodate a single parking space on the site, with street parking also available and a bus station directly across the site. The minor increase to FSR provides for the contemporary family needs without increasing traffic or parking beyond existing levels.

- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*

The additions and alterations are unlikely to result in any conflict between land uses as the proposal is permissible within the zone. The surrounding area is largely residential and therefore the subject development will remain compatible with the land use.

- *To promote a high standard of urban design and local amenity.*

The proposed development will not have any detrimental impact upon surrounding dwellings or the streetscape. The FSR increase will not impact upon the bulk and scale of the design given reasonable setbacks and landscaping and will therefore maintain the amenity of the adjoining properties and maintains a suitable urban design.

The design of the proposal will ensure a high degree of internal and external amenity to suit the needs of the residents whilst maintaining views from adjoining properties. The FSR is not anticipated to have any detrimental impact upon views or amenity from surrounding properties. Residents will still be able to carry out a range of activities, without affecting adjoining properties.

The landscape areas are able to be maintained to ensure the landscaped character of the area is maintained and the dwelling fits within the natural environment.

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As the dwelling remains able to meet the requirements for low density environmental living without any detrimental impact on the amenity of the surrounding sites, the development is found to achieve the objectives of the R2 Low Density Residential zone.

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

The requested variation to the maximum floor space ratio provision is considered to be a reasonable and appropriate design outcome for the following reasons:

- The increase to the FSR is the result of reasonable internal design of the dwelling to accommodate changing family situations and provide reasonable internal proportions of the dwelling.
- The development standard objectives and zone objectives are able to be maintained despite contravention to the numerical requirement.
- The building remains a high quality design, with suitable materials and finishes to ensure the dwelling will remain well articulated and will ensure the variation to the floor space ratio will not result in any adverse environmental impacts to the adjoining properties or public domain.
- The floor space ratio is unlikely to cause any increased impact upon the adjoining properties by way of visual bulk or overshadowing. With the minor increase to the

FSR not impacting upon landscaped areas and ensuring the dwelling provides for suitable landscaping.

- The floor space ratio will not have an excessive impact upon the streetscape or adjoining properties and is considered to result in an appropriate outcome for the residents needs.
- The building remains as a high quality design solution that sensitively responds to the site context and character and scale of the surrounding built form to ensure the privacy, view sharing and solar access of the subject site and surrounding properties is maintained.

Sufficient environmental planning grounds that are particular to the circumstances of the proposed development

There are sufficient environmental planning grounds in these circumstances to justify contravening the floor space ratio development standard. The development is not considered to be overdevelopment of the site and sufficient grounds for the variation are provided below:

- The proposed dwelling is able to maintain the objectives of the R2 Low Density Residential Zone, as well as the objectives of development standard Clause 4.4 Floor space ratio of dwellings.
- The increase to the floor space ratio does not result in any adverse amenity impacts upon adjoining properties.
- The variation is unlikely to be highly noticeable from the streetscape or surrounding properties. The suitable side setbacks and large landscaped areas will offset the larger floor space ratio.
- The floor space ratio provides suitable space for a dwelling, with suitable living spaces to accommodate a contemporary family situation.

In determining if there are sufficient environmental planning grounds the *Initial Action* judgment considers that it is appropriate to apply the Objectives of Section 1.3 of the EP&A Act in order to demonstrate that the grounds exist to warrant a variation.

The objectives of 1.3 are listed along with a comment with respect to compliance in the table below.

<i>Objective</i>	<i>Comment</i>
<i>(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources.</i>	This object is not relevant to this development.
<i>(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about</i>	The proposal will facilitate an ecologically sustained development given that no negative impact on environmental and social considerations are present. This in

<i>environmental planning and assessment.</i>	turn will serve to offer the ongoing sustainment of the economic health of the area.
<i>(c) to promote the orderly and economic use and development of land.</i>	The proposed development will maintain the orderly and economic use of the land by providing a development and land use that is consistent with that envisaged by Council through zoning.
<i>(d) to promote the delivery and maintenance of affordable housing.</i>	This object is not relevant to this development.
<i>(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats.</i>	There is no anticipated impact upon any threatened species of ecological communities given the development is proposed within the footprint of the existing dwelling.
<i>(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage).</i>	This object is not relevant to this development.
<i>(g) to promote good design and amenity of the built environment.</i>	The proposed development is a high quality design that remains within a suitable built form and scale to be aesthetically appropriate. The proposed development is considered to appropriately respond to the established and changing character of the development identified within both the immediate and broader context. The development maintains the amenity of the area through a suitable design.
<i>(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.</i>	The proposed development will comply with all relevant BCA codes and will promote the health and safety of occupants.
<i>(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State.</i>	This object is not relevant to this development.
<i>(j) to provide increased opportunity for</i>	The proposed development has been

<i>community participation in environmental planning and assessment.</i>	publicly notified to meet with this objective.
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Based on the above, the consent authority can be satisfied that the proposed development remains consistent with the Objects of the Act despite the variation to the minor height breach.

Does the development remain within the public interest?

There is overall public benefit in maintaining the development standards, however, there is also benefit to providing flexibility in specific circumstances. Strict compliance with the development standards would waive the opportunity to provide a superior design outcome within an development that is already existing and will remain in keeping with the height, scale and character of the surrounding built form.

The proposed additions and alterations will result in a minor increase to the existing FSR provisions and Council is requested to consider that during assessment. On balance, the proposed variation to the floor space ratio development standard is considered to be an appropriate use of the provisions of Clause 4.6 and existing use rights.

Conclusion

The contravention of the development standard in this case will not raise any issues of State or regional planning significance as it relates to local and contextual site conditions. The proposed works will provide for the housing needs of the residents by improving the functionality and amenity of the existing dwelling while retaining the character of the built form which will in turn assist in meeting local housing demand.

Variations under the provisions of Clause 4.6 are understood to be permitted in circumstances where the non-compliant development is found to be able to meet with the objectives of the zone, but does not expressly need to result in a better outcome than a compliant proposal. In this case, the proposed floor space ratio is considered to meet with the objectives of the zone and strict compliance would not necessarily result in a development that was significantly improved.

Numerical provisions such as floor space ratio are considered to be in force as a guide to achieve the objectives of the control. In this instance the objectives of the floor space ratio control are achieved despite the variation. The variation is not anticipated to result in any detrimental impact to surrounding properties and despite the minor variation and remains complaint with Councils controls being within a development relying on existing use rights within a changed zone.

It is requested that Council consider this variation due to the minimal impact upon the surrounding properties and the public places. The proposed floor space ratio will not have any detrimental impact.